

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                   ALLEN WILLIS, KIM WILLIS, MIKE MOORE,  
5                   RICHARD JOHNSON, JEFFREY WALTER,  
6                   JOHN JOHNSON, CHRIS HERGERT,  
7           EDWARD RASMUSSEN, KIMBERLY RASMUSSEN  
8                   JEFF PLYMATE, JEFFREY CAMERON,  
9                   ALISSA CAMERON and STEVE COPHER,  
10                                   *Petitioners,*

11  
12                                   vs.

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14                   CLACKAMAS COUNTY,  
15                                   *Respondent,*

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17                                   and

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19                   TOAL PROPERTIES, LLC,  
20                                   *Intervenor-Respondent.*

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22                                   LUBA No. 2017-021

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24                   ORAL HULL FOUNDATION FOR  
25                   THE BLIND, INC.,  
26                                   *Petitioner,*

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28                                   vs.

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30                   CLACKAMAS COUNTY,  
31                                   *Respondent,*

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33                                   and

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35                   TOAL PROPERTIES, LLC,  
36                                   *Intervenor-Respondent.*

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38                                   LUBA No. 2017-022

1 ORDER

2 **JURISDICTION**

3 LUBA Nos. 2017-021 and 2017-022 appeal the same decision by the  
4 county approving a conditional use permit for a home occupation for events in  
5 a pole barn. In a previous order, we consolidated LUBA Nos. 2017-021 and  
6 2017-22.<sup>1</sup>

7 **A. Appearance**

8 Intervenor-respondent Toal Properties, LLC (intervenor) moves to  
9 dismiss LUBA No. 2017-022, arguing that petitioner Oral Hull Foundation for  
10 the Blind, Inc. (Oral Hull) failed appear in the proceedings below, as required  
11 by ORS 197.830(2)(b). ORS 197.830(2) provides in relevant part:

12 “Except as provided in ORS 197.620, a person may petition the  
13 board for review of a land use decision or limited land use  
14 decision if the person:

15 “(a) Filed a notice of intent to appeal the decision as provided in  
16 subsection (1) of this section; and

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<sup>1</sup> OAR 661-010-0055 provides:

“The Board, at the request of any party or on its own motion, may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s). Consolidation of appeals does not affect the status of the parties to each appeal. See OAR 661-010-0050(3).”

1           “(b) Appeared before the local government, special district or  
2           state agency orally or in writing.”

3           Oral Hull does not respond that it appeared during the proceedings  
4 below. Rather, Oral Hull cites ORS 197.830(3), which provides:

5           “If a local government makes a land use decision without  
6 providing a hearing, except as provided under ORS 215.416 (11)  
7 or 227.175 (10), *or the local government makes a land use*  
8 *decision that is different from the proposal described in the notice*  
9 *of hearing to such a degree that the notice of the proposed action*  
10 *did not reasonably describe the local government’s final actions,* a  
11 person adversely affected by the decision may appeal the decision  
12 to the board under this section:

13           “(a) Within 21 days of actual notice where notice is required; or

14           “(b) Within 21 days of the date a person knew or should have  
15 known of the decision where no notice is required.”  
16           (Emphasis added).

17 Oral Hull argues that it is allowed to appeal the decision under ORS  
18 197.830(3)(b) because the county “ma[de] a land use decision that is different  
19 from the proposal described in the notice of hearing to such a degree that the  
20 notice of the proposed action did not reasonably describe the local  
21 government’s final actions.” According to Oral Hull, the notice of hearing  
22 listed Clackamas County Zoning and Development Ordinance (CCZDO) 806,  
23 which provides the standards for “home occupations to host events,” but failed  
24 to list CCZDO 822, which defines “home occupations.” Petitioners’ Response  
25 to Intervenor-Respondent’s Motion to Dismiss and Motion to Strike and  
26 Supplemental Motion 5. That failure, according to Oral Hull, means that the  
27 proposal described in the notice of hearing differed to such a degree from the

1 final decision that the notice of hearing “did not reasonably describe the local  
2 government’s final actions.” ORS 197.830(3) is not concerned with the  
3 applicable approval criteria that are also listed in the notice of hearing. ORS  
4 197.830(3) asks whether the use that is approved by a land use decision differs  
5 to such a degree from the proposal described in the notice of hearing that a  
6 person could have been misled by the notice regarding the nature of the  
7 proposal, and failed to appear or participate at the hearing and thus become  
8 entitled to notice of the decision, or failed to timely appeal the local  
9 government’s final decision. *See Bigley v. City of Portland*, 168 Or App 508, 4  
10 P3d 741 (2000) (“ORS 197.830(3) provides a remedy, in the form of the tolling  
11 of the appeal period, to adversely affected persons who are misled by the  
12 deviation between the notice of the proposal and the substance of the  
13 decision.”). We understand Oral Hull to argue that the failure to list the  
14 CCZDO definition of “home occupation” as an approval criterion misled Oral  
15 Hull regarding the proposal and caused it to fail to appear.

16 The notice of hearing described the proposal as:

17 “A request for a conditional [u]se permit to operate a home  
18 occupation to host events out of the applicant's 9,600 square foot  
19 pole barn in the RRFF-5 zone. The owners will operate the  
20 business; with a total of 30 events per year: approximately two per  
21 month with up to 300 attendees for 15 of the annual events and up  
22 to 250 people for the other 15 annual events. Hours of operation  
23 will be 10 am to 10 pm for each event (excluding set-up and clean-  
24 up). Events may be held outdoors depending on weather and the  
25 event contractee’s preference. After construction of the pole barn,  
26 the events will be held in or around the pole barn. The facility will  
27 also have site circulation, use of a party tent, temporary brides

1           dressing tent, pole barn dressing rooms (when built), port-a-potties  
2           for outdoor events, and parking for up to 300 guests. The site takes  
3           access off Oral Hull Road.” Record 55.

4   The decision approves “a conditional use permit to operate a home occupation  
5   to host events out of a pole barn.” Record 1. The notice of hearing described a  
6   proposal for a conditional use permit for a home occupation to host events in a  
7   pole barn, and the county’s decision approved a conditional use permit for a  
8   home occupation to host events in a pole barn. There is no difference at all  
9   between the proposal described in the notice of hearing and the county’s land  
10   use decision. Accordingly, Oral Hull may not rely on ORS 197.830(3) to file its  
11   appeal, and was required to demonstrate, pursuant to ORS 197.830(2)(b), that it  
12   appeared during the proceedings before the local government.

13           Having failed to appear as required by ORS 197.830(2)(b), Oral Hull  
14   does not have standing to appeal the decision.<sup>2</sup>

15           **B.    The Petitions for Review**

16           On June 11, 2017, one of the thirteen petitioners in LUBA No. 2017-  
17   021, Allen Willis (Willis), filed a petition for review (Willis Petition). That  
18   petition for review was signed by Willis, but was not signed by any of the other  
19   thirteen petitioners in LUBA No. 2017-021 or by Oral Hull. On June 12, 2017,  
20   Oral Hull filed a “Joint Petition for Review” in LUBA Nos. 2017-021 and  
21   2017-022 (Joint Petition). Willis also signed the Joint Petition.

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<sup>2</sup> By separate final opinion and order issued this date, we dismiss LUBA No. 2017-022.

1           Intervenor moves to strike the Joint Petition. Intervenor argues that  
2 Willis is not a party to LUBA No. 2017-022, the appeal filed by Oral Hull, and  
3 therefore may not participate in that appeal. Intervenor also argues that  
4 LUBA’s rules allow a petitioner to file a single petition for review, and Willis,  
5 having filed a petition for review in the appeal in which he is one of the  
6 petitioners, may not file a second petition for review, in an appeal to which he  
7 is not a party.

8           We have explained in previous cases that:

9           “Consolidation of separate appeals under LUBA’s rules is a matter  
10 of administrative convenience for the parties and the Board, and  
11 does not affect the legal relations of the parties to each other or the  
12 matters appealed. Consolidation of two appeals does not permit a  
13 person who is a petitioner in one appeal to file a response brief in  
14 the other appeal, absent filing a timely motion to intervene on the  
15 side of respondent in that other appeal. *DLCD v. Jackson County*,  
16 59 Or LUBA 101, 102 (2009) (citing *Leach v. Lane County*, 45 Or  
17 LUBA 733, 735 (2003)).

18 Consolidation of LUBA No. 2017-021 with LUBA No. 2017-022 does not  
19 permit Willis to file a petition for review in LUBA No. 2017-022, because he is  
20 not a party to LUBA No. 2017-022. Accordingly, Willis’ signature on the Joint  
21 Petition for Review does not make him a petitioner or other party entitled to  
22 file a petition for review in LUBA No. 2017-022.

23           Oral Hull and Willis also request that LUBA treat the Joint Petition and  
24 the Willis Petition for review as “a single petition for review in appeal 2017-  
25 021.” Petitioners’ Response to Intervenor-Respondent’s Motion to Dismiss and  
26 Motion to Strike and Supplemental Motion 2. According to Oral Hull and

1 Willis, “Willis filed a short, supplementary petition one day in advance of the  
2 filing of the Joint Petition [for Review] lacking awareness that doing so could  
3 affect his legal right to rely upon the Joint Petition.” *Id.*

4 We decline to do so. Treating the Willis Petition and the Joint Petition as  
5 a single petition filed by Willis in LUBA No. 2017-021 is inconsistent with a  
6 number of LUBA’s rules. OAR 660-010-0030 contemplates the filing of a  
7 single petition for review, rather than multiple petitions for review. OAR 661-  
8 010-0030(1) provides:

9 “Filing and Service of Petition: The petition for review together  
10 with four copies shall be filed with the Board within 21 days after  
11 the date the record is received or settled by the Board. See OAR  
12 661-010-0025(2) and 661-010-0026(6). The petition shall also be  
13 served on the governing body and any party who has filed a  
14 motion to intervene. Failure to file a petition for review within the  
15 time required by this section, and any extensions of that time  
16 under OAR 661-010-0045(9) or 661-010-0067(2), shall result in  
17 dismissal of the appeal and forfeiture of the filing fee and deposit  
18 for costs to the governing body. See OAR 661-010-0075(1)(c).  
19 Co-petitioners who file a single Notice of Intent to Appeal shall be  
20 limited to a single, joint petition for review.”

21 OAR 661-010-0030(1) uses the words “the” and “a,” words that commonly  
22 connote a single incidence or occurrence. Use of the words “the” and “a”  
23 clearly supports the interpretation that a petitioner is allowed to file *one*  
24 petition for review. The last sentence of OAR 661-010-0030 also limits co-  
25 petitioners who file a single Notice of Intent to Appeal to “a single, joint  
26 petition for review,” in other words, one petition for review. Petitioners do not  
27 point to any place in LUBA’s rules that allows multiple petitions for review to

1 be filed by the same party, particularly at different times.<sup>3</sup> We decline to treat  
2 the Willis Petition and the Joint Petition as Willis’ single petition for review.  
3 Intervenor’s motion to strike the Joint Petition is granted.

4 **BRIEFING SCHEDULE**

5 We previously suspended the deadline for filing the response briefs. The  
6 county and intervenor shall have 21 days from the date of this order to file the  
7 response briefs to the Willis Petition. The Board will schedule oral argument  
8 by separate letter.

9 Dated this 28<sup>th</sup> day of August, 2017.

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Melissa M. Ryan  
Board Chair

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<sup>3</sup> OAR 661-010-0030(2)(b) provides that a petition for review shall “[n]ot exceed 14,000 words[.]” If OAR 661-010-0030(1) were interpreted to permit multiple petitions for review, those petitions for review together could potentially exceed the OAR 661-010-0030(2)(b) word limit.