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

MITCHELL JONES and HAROLD K. LONSDALE,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

WILLAMETTE UNITED FOOTBALL CLUB,
Intervenor-Respondent.

LUBA No. 2019-063

ORDER

The challenged decision is a December 2017 planning director interpretation of the Clackamas County Zoning Ordinance.

FACTS

On August 25, 2017, intervenor-respondent Willamette United Football Club (intervenor) filed an application seeking a county determination of whether certain uses are similar to the Recreational Uses as described in and conditionally allowed in the county's Rural Residential Farm Forest 5-acre (RRFF-5) zone under Clackamas County Zoning Ordinance (CCZO) Table 316-1. As described in intervenor's application, the sports facility uses to be evaluated for similarity with the RRFF-5 Recreational Uses included artificial turf sports fields, basketball and volleyball courts, an indoor training facility for futsal, team rooms,

concessions, jogging/walking paths, a playground, a picnic area with a barbeque pit, storage, an operational building for indoor athletic training, classroom space, related offices and an amphitheater. Notice of Intent to Appeal (NITA), Ex-A 1.

Under the CCZO, zoning district regulations identify the uses permitted in those districts. In some districts, including RRFF-5, a use that is not specifically identified as permitted may be approved as a use that is similar to a permitted use, *i.e.*, a "similar use." CCZO Section 106 provides the standards and procedures for authorization of a similar use. If a similar use is approved, then that use is subject to the approval criteria and development standards that govern the use to which it is found to be most similar. CCZO 106.01(C).

> "An authorization of a similar use is not a site-specific application, but rather it is a use-specific application. The decision on an application for authorization of a similar use is applicable to all land in the zoning district for which the request was made and is applicable only to the use described in the application." CCZO 106.01(B).

An authorization of a similar use requires review as an interpretation pursuant to CCZO Section 1308. CCZO 106.02.

On December 13, 2017, the county issued its Notice of Type II Land Use Decision that certain of the uses identified by intervenor were similar to one or more Recreational Uses and therefore conditionally allowed on any property zoned RRFF-5 (the Similar Use Decision). The county determined that (1) concessions, storage facilities and playgrounds are listed in the CCZO as allowed Recreational Uses and therefore conditionally allowed in the RRFF-5 zone, (2)

operational buildings and offices, team rooms and parking are similar uses to Recreational Uses and conditionally allowed only to the extent they are ancillary to other allowed Recreational Uses, and (3) an operational building for classroom space is not a similar use to Recreational Uses. NITA, Ex-A 4–5. The remaining uses identified by intervenor, including artificial turf sports fields, basketball and volleyball courts, indoor training facility for futsal, jogging/walking path, picnic area with barbeque pit, and amphitheater were deemed similar uses to Recreational Uses and therefore, conditionally allowed on any property zoned RRFF-5. NITA, Ex-A 4.

On June 20, 2019, petitioners filed their NITA of the Similar Use Decision. On July 3, 2019, the parties filed a stipulated motion to suspend the proceedings to allow the parties time to resolve an unidentified proceeding the parties described as related. The motion requested that the suspension remain in place until one of the parties notified LUBA to reactivate the appeal. On July 9, 2019, we issued an order suspending the appeal.

On August 30, 2019, the county and intervenor (collectively respondents) filed a motion to dismiss and alternative motion for an evidentiary hearing. On September 12, 2019, petitioners filed a response to the motion to dismiss and alternative motion for evidentiary hearing. On September 26, 2019, intervenor filed a reply and on September 27, 2019, filed an amended reply to petitioners' response. On September 30, 2019, the county joined in intervenor's reply. On October 4, 2019, petitioners filed a sur-reply. On October 8, 2019, we issued an

order advising the parties that we would resolve the pending motions based on the filings and that additional briefing would not be accepted without prior permission.

We resolve the pending motions below.

MOTION TO DISMISS

Respondents move to dismiss the appeal based upon their assertion that (1) petitioners are not "adversely affected" by the decision and, in the alternative, that (2) even if petitioners are adversely affected, they did not file their appeal within the time allowed by law. In their response to the motion to dismiss, petitioners concede that petitioner Ek did not timely appeal the decision and is properly dismissed from the appeal.[1] For the reasons discussed below, we agree with petitioners that Ek is properly dismissed from this appeal. We further conclude that the appeal is properly brought by petitioners Jones and Lonsdale.

A. ORS 197.830(3)

ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175(10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not

[1] Petitioners state in their response, "As Respondents point out, Petitioner Pauline Rose Ek did receive actual or inquiry notice of the interpretation request in 2017 and therefore, LUBA may properly dismiss Petitioner Ek for lack of standing." Response 9.

reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Recreational Uses conditionally allowed in the RRFF-5 zone include "boat moorages, community gardens, country clubs, equine facilities, gymnastics facilities, golf courses, horse trails, pack stations, parks, playgrounds, sports courts, swimming pools, ski areas, and walking trails" as well as "concessions, restrooms, maintenance facilities, and similar support uses." CCZO 106.01, Table 316-1, n 18.[2] Uses that the county determines are similar to Recreational Uses are also conditionally allowed in the RRFF-5 zone. CCZO Table 316-1, n 11. The county's determination that some elements of the sports facility are similar to Recreational Uses conditionally allowed in the RRFF-5 zone was made through the county's Type II process, without providing a hearing.[3] CCZO

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[2] References to the notes in Table 316-1 refer to the version of the table reproduced in the final decision. NITA Ex A 7.

[3] CCZO 1307.04(A)(2) provides:

> "Type II permits are administrative in nature and involve land use actions governed by standards and approval criteria that generally require the exercise of limited discretion. Impacts associated with the land use action may require imposition of conditions of approval to minimize those impacts and to ensure compliance with this

1307.09, 1307.13, Table 1307-1. Accordingly, ORS 197.830(3) governs appeals of the decision to LUBA and petitioners must establish that they are adversely affected by the decision and their appeal timely filed.

1. Adversely Affected

Intervenor's similar use application explains that it is a "[r]equest for authorization of similar use pursuant to [CCZO] Section 106 to establish that a proposed use at 1521 Borland Rd. may be permitted as a recreational use in the RRFF-5 zone." Response, Ex-A 1. The first page of the application narrative includes a vicinity map for the 1521 Borland Road site (Borland site). The narrative explains that:

> "This application requests that the Planning Director authorize, as a use similar to those listed under 'Recreational Uses' in Table 316-1, a proposed development by Willamette United Football Club on property located at 1521 Borland Road, West Linn, Oregon. The subject property includes Tax Lots 300, 400, 500, 600 and 700 on Clackamas County Assessor's Map 21E28D. The site is zoned [RRFF-5] and is approximately 21 acres in area." Response, Ex-A 3.

Despite repeatedly referencing the Borland site, however, the application narrative acknowledges that a similar use decision will not authorize any development of the Borland site, noting that the preliminary site plan shown is

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> Ordinance. The Type II procedure is an administrative review process, where the review authority reviews the application for conformance with the applicable standards and approval criteria and issues a decision."

"[s]ubject to change upon submittal of an application for a site specific [conditional use permit]." Response Ex-A 6. Respondents maintain that Lonsdale and Jones are not adversely affected because the Similar Use Decision does not authorize any activity on any property. Respondents argue that the impact on petitioners is no different than the impact on all county residents generally and is not the type of impact that may be deemed to adversely affect a party.

The Court of Appeals has held that "[a] person is adversely affected by a decision that authorizes a land use * * * when the operation of the allowed use impinges upon that person's property or personal interest." *Devin Oil Co., Inc. v. Morrow County*, 275 Or App 799, 807, 365 P3d 1084 (2015). The Court of Appeals has also held that persons who own property within sight or sound of property that is the subject of the appeal may be adversely affected by an appealed decision concerning the property. *Wilbur Residents for a Clean Neighborhood v. Douglas County*, 151 Or App 523, 526-27, 950 P2d 368 (1997). The Similar Use Decision applies to all properties zoned RRFF-5 and accordingly, no single specific property is the subject of this appeal. The court has, however, held that "when the decision under review is not a land use authorization, but instead is a decision made without a public hearing under ORS 197.830(3), a person is adversely affected by the decision when the decision either applies to the person or directly affects the person's interests in an adverse way." *Devin Oil*, 275 Or App at 807.

Jones and Lonsdale own property within 500 feet and within sight and sound of the RRFF-5-zoned Borland site referenced by intervenor in its similar use application. Jones and Lonsdale each state in their affidavits that noise from the similar use will interfere with quiet enjoyment of their property, that increases in traffic will be significant and will interfere with access to their property, and that they will have to spend time and money opposing the conditional use permit (CUP) intervenors will seek because of the Similar Use Decision. Response, Ex-B (Jones Affidavit) 1-2; Response, Ex-C (Lonsdale Affidavit) 1-2. Respondents argue that the adverse effects identified by petitioners will not result directly from the Similar Use Decision because an additional land use decision (approval of a CUP) will be required to authorize development on the property. For the reasons explained below, we conclude that Lonsdale and Jones are adversely affected.

Borton v. Coos County, 51 Or LUBA 478, 484 (2006) involved a challenge to a property line adjustment. The petitioner's appeal, filed almost a year after approval of the property line adjustment, asserted that the property line adjustment process had been improperly used to approve a land division. Unlike the decision here, the property line adjustment was specific to one piece of property within sight and sound of petitioner's property. We note, however, that we held that the property line adjustment had an adverse effect on the petitioner's property even though the property line adjustment did not directly result in a development on the property but rather facilitated a subsequent development application.

In *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150 (2006), we concluded that the City of Damascus was adversely affected where both it and the City of Happy Valley had annexed the same three tax lots. The annexation ordinance did not authorize development, but we concluded that "[b]oth cities cannot annex those tax lots, and Happy Valley's attempt to do so in [its ordinance] adversely affects the interest of Damascus." *Id.* at 155.

In *Sievers v. Hood River County*, 46 Or LUBA 635, 636 (2004), in the context of a voter approved initiative requiring "voter approval of certain residential development on certain forest lands," the petitioner argued that he was adversely affected because he owned land zoned for forest use and the initiative placed an additional impediment on his ability to site a major housing development on his property. We held that the initiative's addition of an impediment to the petitioner's development of his property which was outside the existing land use regulations was sufficient to render the petitioner adversely affected.

We conclude that a property owner is similarly adversely affected when an impediment to development of property within sight and sound of his or her property is removed by an interpretation that applies county-wide and that interpretation potentially allows uses in addition to or beyond those listed in the adopted and acknowledged zoning code. That is so even in the circumstances presented here, where the CCZO allows for such an interpretation without notice to any property owners or any persons if the interpretation does not relate to a

specific property. CCZO 1308.02(D). If we accept respondents' reasoning that petitioners are not adversely affected because the interpretation applies to all RRFF-5 zoned property in the county, then the Similar Use Decision is essentially unreviewable because, under respondents' reasoning, all county residents are equally affected by the Similar Use Decision and therefore none are adversely affected.[4] We do not think that the legislature in enacting ORS 197.830(3) intended such a result. Finally, we cannot at this point ascertain any preclusive effect that the Similar Use Decision may have in a later proceeding to authorize a determined similar use, but we observe that under the doctrine of collateral attack, it is possible that no person may be able to challenge the director's interpretation regarding the similarity of the proposed use to recreational uses allowed on RRFF-5 zoned land, due to the finality of the Similar Use Decision.

Intervenor argues that the Similar Use Decision did not remove an impediment to development but rather acknowledged that intervenor's proposed use was, effectively, always allowed by the zoning code. That argument is

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[4] The Similar Use Decision could also result in a *de facto* amendment of the CCZO without providing notice and a hearing to any person and without complying with the requirements for post-acknowledgement plan amendments in ORS 197.610 to 197.625. *See Loud v. City of Cottage Grove*, 26 Or LUBA 152, 157 (1993) (observing that the "the line between proper application of 'similar use' provisions and improper addition of unlisted uses to the zoning ordinance may be hazy in particular cases").

unpersuasive. A similar use decision under CCZO 106 *authorizes* a use that is not expressly allowed in the zone, if that use is found to be similar to a permitted use. The Similar Use Decision authorized the proposed uses and did not simply acknowledge that they are allowed in the zone. Intervenor sought the Similar Use Decision in order to ascertain whether to invest in seeking a CUP. As petitioners point out, a prior conditional use application to site sports fields on a specific site in the RRFF-5 zone was denied on October 27, 2016.[5] We conclude that both Jones and Lonsdale are adversely affected by the Similar Use Decision.

B. Timeliness of Appeal

Jones and Lonsdale are required to establish that their appeals were timely filed. As explained above, appeals filed pursuant to ORS 197.830(3) must be filed:

> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Petitioners argue that actual notice was required under the local code. Petitioners' position is that:

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[5] The 2016 application was for a CUP for artificial turf ball fields, associated buildings, amenities and concessions and the RRFF-5 zoned, 26.18-acre site was located at 21605 SW Stafford Road. Sur-Reply Ex-A 1. The hearings officer opined that had a determination of similarity with Recreational Uses been sought, it likely would have been denied. In his view, the proposed uses were most similar to "Recreational Sports Facilities," a use not allowed in the RRFF-5 zone. Sur-Reply, Ex-A 6.

> "[Intervenor] asked the County to consider how the [CCZO] applied 'to specific properties' and went so far as to identify them by street address, by legal description including map and tax lot number, and to identify them graphically on an area map as the "SITE." * * * The [CCZO] Section 1308 governing interpretations not only provides that property-specific requests are to be processed through a Type II procedure but more specifically states that where 'an interpretation related to the applicability of * * * this Ordinance to a specific property,' mailed notice shall 'include property owners of record pursuant to Subsection 1307.09(A)(1)(b)." Response 9–10.

Because "[intervenor's] application clearly and unambiguously set forth a site specific interpretation request," petitioners maintain "[CCZO] 1308.02(D) required that the County mail notice of the application and the decision to property owners within 500 feet." Response 4.

The application for the similar use determination was processed as an interpretation under CCZO 106.02(C) and according to the procedures in CCZO 1308. CCZO 106.02 provides:

> "106.02 APPROVAL CRITERIA An authorization of a similar use requires review as an interpretation pursuant to Section 1308, *Interpretation*, and shall be subject to the following standards and criteria:
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> "A. In the following zoning districts, the proposed use must be similar to one or more of the listed permitted uses in that same zoning district: BP, C-2, C-3, CC, CI, GI, LI, NC, OA, OC, PMD, PMU, RC, RCC, RCO, RI, RTC, RTL, SCMU, and VCS Districts.
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> "B. In the following zoning districts, the proposed use must be similar to one or more of the listed permitted limited uses in that same zoning district: HDR, MRR, RCHDR, and SHD Districts.

"C. In zoning districts regulated by Table 315-1, *Permitted Uses in the Urban Residential Zoning Districts,* 316-1, *Permitted Uses in the Rural Residential and Future Urban Residential Zoning Districts,* or 317-1, *Permitted Uses in the MRR and HR Districts*, the proposed use must be similar to one or more uses that are:

"1. Listed permitted conditional uses in that same zoning district; and

"2. Identified by the applicable table as eligible to be the basis of an authorization of similar use.

"D. In the Historic Landmark, Historic District, and Historic Corridor overlay zoning district, the proposed use must be similar to one or more of the listed permitted conditional uses in that overlay zoning district.

"E. A use may not be authorized as a similar use if it is specifically listed as prohibited in the applicable zoning district.

"F. A use may not be authorized as a similar use if it is a special use regulated by Section 800, *Special Use Requirements.*" (Emphasis in original.)

CCZO 1308.02(D) explains that "[o]nly if an interpretation relates to the applicability of the Comprehensive Plan or this Ordinance to a specific property, shall mailing of notices, applications, *and decisions* required by Section 1307 include property owners of record pursuant to Subsection 1307.09(A)(1)(b) or 1307.10(A)(3)(b)." (Emphasis added.) When a Type II decision is site specific, CCZO 1307.09(A)(1)(b) and 1307.09(C) require that notice of the application *and decision* be sent to property owners of record within "500 feet of the subject property, and contiguous properties under the same ownership * * *." CCZO

1307.09(A)(1)(b)(ii). However, CCZO 106.01(B) expressly provides that requests for a similar use determination are not site specific:

> "An authorization of a similar use is not a site-specific application, but rather it is a use-specific application. The decision on an application for authorization of a similar use is applicable to all land in the zoning district for which the request was made and is applicable only to the use described in the application."

Given that the CCZO provisions governing similar use determinations state expressly that such a decision is not site specific, we agree with respondents that pursuant to CCZO 106.01(B) and 1308.02(D), actual notice of the decision was not required to be provided to petitioners. Accordingly, we evaluate the timeliness of petitioners' appeal under ORS 197.830(3)(b).[6]

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[6] Petitioners ask that we not address whether their time to appeal ran from the date they obtained actual notice of the Similar Use Decision until after briefing on the merits, explaining:

> "Petitioners[']] challenge on the merits will be that, if this decision was intended to apply county-wide, as Respondents maintain, the Planning Director's decision was *ultra vires*, failed to comply with state and local procedural requirements, and prejudiced Petitioners[']] substantial rights. In other words, the scope of the notice requirements will be determined by what procedures applied to this decision. Rather than be forced to determine what notice procedures were required, as necessary to determine whether the 'actual' or 'knew or should have known' standard applies, Petitioners urge LUBA to defer this question until all of the briefing is completed and conclude that under either notice standard, the Petitioners' appeal was timely filed." Sur-Reply 6.

1. Appeal Within 21 Days of Date Petitioners Knew or Should Have Known of the Decision

If a petitioner knows of a land use decision, the time to file appeal under ORS 197.830(3)(b) at a minimum begins to run at the time knowledge of the decision was obtained. It may, however, begin to run earlier if the person should have known of the decision. As we held in *Eng v. Wallowa County*, 76 Or LUBA 432, 452 (2017):

> "LUBA has interpreted the 'should have known' language in ORS 197.830(3)(b) to apply 'where a petitioner does not have knowledge of the decision, but observes activity or otherwise obtains information reasonably suggesting that the local government has rendered a land use decision[.]' *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002); *see also Rogue Advocates v. Jackson County*, 282 Or App 381, 389, 385 P3d 1262 (2016) (assuming without deciding that *Rogers* correctly construes ORS 197.830(3)(b)). In that circumstance, the petitioner is placed on 'inquiry notice.' As we explained in *Rogers*, 'inquiry notice' means that:
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> > "'If the petitioner makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. Otherwise, the 21-day appeal period begins to run on the date the petitioner is placed on inquiry notice.' *Id*."

"In other words, timely inquiry 'tolls' the appeal deadline until the party discovers the challenged decision. *See Rogue Advocates*, 282 Or App at 389 (so stating.)" *Leyden* v. *City* of *Eugene*, ___Or LUBA ___ (LUBA No 2018-114, Feb 8, 2019) (slip op at 10).

As discussed below, respondents posit numerous ways petitioners either knew or should have known of the Similar Use Decision and contend that the

2019 appeal of the 2017 decision is untimely. Respondents included with their motion copies of newspaper website articles, published by the West Linn Tidings on June 15, 2017, and August 14, 2018, discussing intervenor's project goals. Respondents argue that the articles served to place upon petitioners an obligation to make inquiries concerning the proposal. We disagree. Although the articles include some discussion of the land use process, intervenor fails to establish that the mere existence of these articles supports the conclusion that petitioners should have known of the articles and their content. Jones and Lonsdale submitted responsive affidavits in which they state that they did not see the media coverage.

Respondents also argue that the petitioners knew or should have known of the Similar Use Decision based on the activities of a community planning organization (CPO), the Stafford CPO. Recognized CPOs were provided with notice of the application and with notice of the Similar Use Decision.[7] Jones and Lonsdale own property within the geographic boundaries of the Stafford CPO and the Stafford CPO had a meeting in 2017 at which the 2017 similar use request was discussed. Ek attended a June 10, 2017 preapplication meeting intervenor held with the Stafford CPO to discuss the planned similar use application. She was therefore on notice of the planned application and knew or should have

[7] CCZO 1307.09(A)(1)(d) provides that the county will provide notice of a Type II application to "[a]ny active community planning organization, hamlet or village that is recognized by the County, if the subject property lies wholly or partially inside the boundaries of such organization, hamlet, or village."

known of the Similar Use Decision. As noted above, the NITA was not filed within 21 days of the date Ek knew or should have known of the county's decision.

Lonsdale and Jones stated in their affidavits that they did not attend meetings of the Stafford CPO where the similar use request was discussed or receive emails from the Stafford CPO representatives concerning the 2017 similar use request.[8] Lonsdale stated that he did not attend Stafford CPO meetings or receive emails from the Stafford CPO and did not learn of the decision until June 19, 2019. Jones states that he learned of CPOs and their function on June 8, 2019. He first attended a Stafford CPO meeting on June 11, 2019. He did not receive emails from the Stafford CPO until on or after June 20, 2019. He first visited the Stafford CPO website on June 22, 2019. Respondents have not established that Jones and Lonsdale knew or should have known of the Similar Use Decision based on activities of the Stafford CPO.

At some point after the county's adoption of the Similar Use Decision on December 13, 2017, intervenor submitted an application for a CUP authorizing development of its proposed use on the Borland site. On May 13, 2019, the county provided petitioners with notice of a public hearing on the CUP

[8] Respondents have not established that owning property within the geographic boundaries of a CPO makes the owner a CPO member.

application.[9] Motion to Dismiss, Ex-9. The first public hearing was set for June 20, 2019. As noted, petitioners learned of the existence of the Similar Use Decision in early June 2019 and filed the NITA on June 20, 2019. Respondents argue that the May 13, 2019 notice of the June 20, 2019 CUP hearing placed petitioners on inquiry notice of the Similar Use Decision and that petitioners failed to make a timely inquiry into the proposed development, which would have revealed the existence of the Similar Use Decision. In respondents' view, petitioners' failure to *more* promptly investigate the proposed use after receiving notice of the CUP application and hearing resulted in an untimely appeal to LUBA. We disagree.

In a 2018 appeal, *Leyden*, ___ Or LUBA ___ (LUBA No 2018-114, Feb 8, 2019), petitioner Leyden appealed a 2015 zone verification by a city planner confirming that an outdoor athletic field and neighborhood center were permitted uses of the property. The city's code provided that a zone verification provided a determination by the planning and development director of "whether uses not specifically identified on the allowed use list for that zone are permitted, permitted subject to an approved conditional use permit or other land use permit, or prohibited, or whether a land use review is required due to the characteristics

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[9] Jones states that although there was a mention of CPOs in the March 2019 notice of the CUP application, he did not notice the CPO reference. Even if he had noticed the reference to the CPO in the March notice, respondents have not explained why that observation would result in a requirement that recipients investigate past CPO activity or lose their right to appeal.

of the development site or the proposed site." *Leyden*, ___ Or LUBA at ___ (slip op at 3 n 1). The zone verification decision was linked to the specific site in the city permit tracking system, and notice of it was recorded in a city registry as required by ORS 227.175(11)(a).

In 2018, the city provided to Leyden notices related to a 2018 site review application for the outdoor athletic field and neighborhood center. *Leyden*, ___ Or LUBA ___ (LUBA No 2018-114, Feb 8, 2019). During the 2018 site review proceeding, a copy of the 2015 zone verification was placed into the record and discussed in staff reports and at a public hearing. Leyden did not participate in the site review proceeding. Leyden received a copy of the 2015 zone verification from a neighbor in September 2018, approximately two months after the city approved the site plan.[10] Four days after receiving a copy of the verification, Leyden filed her LUBA appeal.[11] We concluded that:

> "Reasonable inquiry includes such actions as inquiring with the local government's planning department and reviewing the public planning file for the subject property. That inquiry obligation does not demand general and constant vigilance, but instead requires

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[10] The city issued its decision approving the site plan in late June, 2018 and that decision was appealed to LUBA. *Richardi v. City of Eugene*, ___ Or LUBA ___ (LUBA Nos 2018-082/082, Oct 24, 2018), *aff'd*, 295 Or 840, 434 P3d 990 (2019).

[11] The appeal was brought under ORS 197.830(5)(b), but we held that the "should have known" language in (5)(b) is identical to the ORS 197.830(3)(b) language and that the standard is the same. *Leyden*, ___ Or LUBA at ___ (slip op at 8–9).

> diligent efforts to obtain a copy of the challenged decision, after sufficient triggering observations or information that would lead a reasonable person to suspect that the decision exits." *Leyden*, ___ Or LUBA at ___ (slip op at 9–10).

A February 16, 2018 notice of the proposed land use action invited Leyden to review the public planning documents at the planning office and online. The March 26, 2018 notice of the planning director decision also invited Leyden to review the public files. An April 11, 2018 and April 23, 2018 notice of public hearings on the site review application once again invited Leyden to review the public files. *Leyden*, ___ Or LUBA at ___ (slip op at 12). We concluded that Leyden failed to exercise reasonable diligence and that her appeal was untimely.

Neelund v. Josephine County, 52 Or LUBA 683, *aff'd*, 210 Or App 368, 150 P3d 1115 (2006) also addressed when a petitioner should have known of the existence of a land use decision. In *Neelund*, the notice of a height variance application invited the recipients of the notice to review the land use file. The request for a variance in and of itself suggested there was an approved dwelling that might obtain a height variance. Further, if the invitation to review the land use file had been accepted and the file reviewed, the reviewer would have found reference to approval of the underlying dwelling. We concluded that the petitioner had an obligation to inquire further in order to toll the time to file an appeal. The petitioner failed to do so and we dismissed the case.

In the present case, intervenor has provided us with a copy of the notice of conditional use public hearing but pointed to nothing in that document that put

petitioners on notice of the existence of a prior relevant land use decision or even invited the public to review an existing land use file. Motion to Dismiss, Ex 9.

Here, the Similar Use Decision was not site specific and we find *Borton*, 51 Or LUBA 478, discussed above, to be instructive. In *Borton*, in 2004, the county approved a property line adjustment without providing notice or a hearing. The intervenors subsequently filed an application for a CUP to construct two dwellings on the two lots reconfigured by the 2004 property line adjustment. At some point during or after the CUP proceeding, petitioner became aware of the 2004 property line adjustment and filed an appeal with LUBA challenging the county's approval of the property line adjustment. The petitioner maintained that she did not receive notice of a 2004 property line adjustment but filed her appeal with LUBA within 21 days of learning of the decision. Nothing in the notice of the CUP provided to the petitioner suggested a land division in 2004. In the CUP proceeding, the county repeatedly described the property as consisting of existing legal lots platted in 1907. "[A]t no time before, during or after the CUP proceedings did the county indicate to petitioner that the plat considered during the CUP proceedings was the result of a previous property line adjustment decision." *Id.* at 488. There is no reference in our *Borton* decision to the local government inviting petitioner to review the public file throughout the CUP process. We held that the petitioner's participation in the CUP proceeding did not indicate that she had knowledge of or should have made an inquiry to identify a property line adjustment obtained prior to the CUP proceeding.

For a few reasons, we reach a similar conclusion here. First, nothing in the content of the single CUP notice for intervenor's project that was sent to petitioners would have placed a reasonable person on inquiry notice that a relevant land use decision had already been made. Second, the first CUP hearing was set for June 20, 2019. On June 8, 2019, Jones invited a neighbor to attend a June 13, 2019 neighborhood meeting to discuss the CUP. He states in his affidavit that he learned of the Similar Use Decision from the neighbor on June 8, 2019. His appeal was filed within 21 days of June 8, 2019 and is timely.

Lonsdale states in his affidavit that he learned of the Similar Use Decision on June 19, 2019 when he was asked by a neighbor if he wished to join in the appeal and received a copy of the Similar Use Decision on June 20, 2019, the date the NITA was filed. As discussed above, nothing in the CUP notice suggested that an earlier decision had been made or invited review of the land use file that would have revealed the Similar Use Decision. Lonsdale filed his appeal within 21 days of the date he learned of the decision, and his appeal is therefore timely.

For the reasons explained above, the motion to dismiss petitioner Ek is granted. The motion to dismiss petitioners Jones and Lonsdale is denied.

MOTION FOR EVIDENTIARY HEARING

Respondents filed an alternative motion for an evidentiary hearing, asking that in the event LUBA denies their motion to dismiss, LUBA hold an evidentiary hearing.

OAR 661-010-0045(1) provides that the board may, on written motion, take evidence to resolve issues of standing. A motion to take evidence must include "a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of the rule, and how the facts will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). An affidavit establishing need must accompany a request to obtain documents not available to the moving party. OAR 661-010-0045(2)(b)(B).

In its alternative motion, respondents identified the facts it sought to establish. Each request is discussed below.

A. Obtain Documents from the Stafford CPO

Respondents seek to obtain copies of all sign in sheets for the Stafford CPO and to require the Stafford CPO to identify all persons on its mailing list from July 2017 to May 2019. Although it is required by our rule, respondents did not provide with their motion for evidentiary hearing an affidavit establishing the need to obtain the requested CPO sign in sheets and mailing lists.[12] OAR 661-010-0045(2)(b)(B). Instead, intervenor provided an affidavit addressing the

[12] Affidavits filed with the original motion were focused on proving that one of the petitioners, Ek, had attended a Stafford CPO meeting discussing the planned similar use application. Petitioners now concede that Ek does not have standing.

required elements with its amended reply to petitioners' response to its motion.[13] The county later joined in the reply. The motion is denied because the request failed to include the required affidavit addressing need with the initial motion. We also deny the motion for the reasons set forth below.

Intervenor argues in its reply that it wishes to subpoena documents from the Stafford CPO and provides with its reply, an affidavit from one of its representatives addressing the need to obtain certain documents from the Stafford CPO. A subpoena for documents is an order directed to a person and directing the person to produce specified documents for inspection and copying. ORCP 55(A). OAR 661-010-0045(2)(d) provides in part that "the Board shall issue subpoenas *to any party* upon a showing that the witness or documents to be subpoenaed will produce evidence relevant and material to the grounds for the motion." (Emphasis added.) Intervenor has not established that our rules allow us to direct a subpoena to a nonparty. We need not reach that issue, however, because intervenor has not shown that the requested documents are "relevant and material to the grounds for the motion." OAR 661-010-0045(2)(d). The issue to be resolved is when Jones and Lonsdale knew or should have known of the Similar Use Decision. Both Jones and Lonsdale have submitted affidavits stating that they did not attend Stafford CPO meetings where the similar use application

[13] We observe that intervenor has not argued that any of the facts it asserts in the affidavit it submitted with its amended reply were unavailable at the time the original motion and affidavit were filed.

or decision was discussed, or receive CPO emails concerning the similar use.[14] Respondents have not submitted evidence that leads us to doubt those assertions; thus, we accept them. Accordingly, we concluded above that Jones and Lonsdale did not know and should not have known of the Similar Use Decision as a result of CPO activities.

In the affidavit submitted with its reply brief, intervenor explains that it distrusts information it has received from the Stafford CPO to date. Intervenor may be seeking the documents in an attempt to impeach the sworn testimony of petitioners Jones and Lonsdale. We conclude that respondents have not established a need to obtain a subpoena in order to obtain the CPO mailing list or sign in sheet as required. OAR 661-010-0045(2)(b)(B). Intervenor has not indicated that it has identified and followed any formal procedures for obtaining documents from the Stafford CPO and intervenor has not indicated that the county does not have or is unable to obtain the desired documents.

Accordingly, respondents' motion to obtain documents from the Stafford CPO is denied.

B. Obtain the Sworn Testimony from Petitioners

Respondents speculate that Jones and Lonsdale may have learned about the Similar Use Decision from neighbors or a CPO. Respondents seek to obtain

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[14] Respondents have not asserted that U.S. Mail was used by the Stafford CPO to communicate with potentially interested individuals.

sworn testimony from petitioners regarding whether they attended any of the Stafford or Beavercreek CPO meetings discussing the Similar Use Decision, whether they knew that the Stafford CPO distributed notices of county land use decisions, or that it maintained a website with information on county land use matters.

Petitioners Lonsdale and Jones have submitted responsive affidavits. Lonsdale submitted an affidavit stating that he did not attend any of the Stafford CPO meeting discussing the similar use determination. Lonsdale does not address in his affidavit the exact date when he learned the function of the Stafford CPO, but respondents do not establish that a general knowledge of the functions of a CPO would suffice to establish that Lonsdale knew or should have known of the Similar Use Decision. Jones submitted an affidavit in response to the alternative motion and a second affidavit in response to intervenor's amended reply to the response. Jones stated in his affidavits that he did not have knowledge of the Stafford CPO or its activities until June 2019. He states that he did not receive email from the Stafford CPO prior to June 2019.

After receiving petitioners' responsive affidavits, intervenor filed the required affidavit addressing need. The affidavit does not establish a need for testimony because Lonsdale and Jones have stated that they did not obtain notice of the decision from the Stafford CPO. We also note that intervenor's affidavit states that Jones attended a June 2019 CPO meeting and sat with a woman who participated in the Similar Use Decision process, lives approximately 750 feet

from Jones, and appeared to have a relationship as neighbors, "if not as friends", with Jones, leading the affiant to conclude that the woman likely told Jones about the Similar Use Decision before 2019, and the Jones appeal is untimely. Amended Reply, Ex-3 (Nelson Declaration) 1–2. This assertion is entirely speculative.

In *Wilbur Residents for a Clean Neighborhood v. Douglas County*, 33 Or LUBA 761 (1997), petitioners alleged that they were entitled to bring an appeal because they did not receive notice of local proceedings, to which they were entitled and brought the LUBA appeal within the statutory deadline based on the date they received actual notice of the decision. Intervenor submitted a motion for evidentiary hearing enabling him "to question individual petitioners regarding their standing to bring this appeal." *Id*. at 762. We concluded that there was no need for an evidentiary hearing where petitioners submitted affidavits that established the date of actual notice, as there were no disputed allegations of fact that would affect the outcome of the proceeding. *Id*. at 764–65. Similarly here, respondents have not established a need for an evidentiary hearing.

We also conclude that respondents have not established a need to question Jones or Lonsdale concerning activities of the Beavercreek Hamlet/CPO. Although the Beavercreek organization discussed the similar use application, respondents have provided no basis for concluding that either Jones or Lonsdale may have obtained earlier knowledge of the Similar Use Decision based upon those discussions.

Lonsdale and Jones provided affidavits stating when they learned of the Similar Use Decision. Jones states that he became aware of the Similar Use Decision on June 8, 2019. Response, Ex-B (Jones Affidavit) 3. Lonsdale states that he became aware of the Similar Use Decision on June 19, 2019. Response, Ex-C (Lonsdale Affidavit) 2. Respondents are not entitled to cross-examine them or inquire into matters such as when Jones' wife, who is not a party, learned of the Similar Use Decision. *Grimstad v. Deschutes County*, 74 Or LUBA 360, *aff'd*, 283 Or App 648, 389 P3d 1197, *rev den*, 361 Or 645 (2017) (knowledge of co-owner is not imputed to another owner for purposes of ORS 197.830(3)(b)).

The motion to obtain petitioners' sworn testimony is denied.

RECORD TRANSMITTAL

Our order suspending the appeal suspended all deadlines, including the deadline for transmitting the record. The appeal is reactivated. The next event in this appeal is transmittal of the record. The county shall transmit the record to the Board and the parties within 21 days of the date of this order.

Dated this 20th day of November 2019.

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Michelle Gates Rudd
Board Member