MEMORANDUM

EXHIBIT F-1
LU 16-0030

TO: Jessica Sarver, Planning Manager

CC: Scot Siegel, Director of Planning and Building Services

FROM: Evan Boone, Deputy City Attorney

SUBJECT: "Similar Use Determination" / Affected Area of Determination and Procedure

DATE: November 2, 2016

Questions Presented and Answer:

Is a "similar use determination" pursuant to LOC 50.03.002.1.f currently binding on properties other than the lot that is the subject of the request for determination? No.

If the noticing requirement for a similar use determination was modified to be city-wide, would the determination then be binding citywide? Not likely. Similar Use Determinations are currently classified by LUBA as a "permit" under ORS 227.160, which relates to a specific site.

Recommendations:

I recommend the minor development notice procedure for similar use determinations berevised so that it does not require a preliminary staff decision before the notice of opportunity to comment is given.

Discussion:

Lake Oswego CDC – Similar Use Determination

The Code authorizes the City Manager to make a "similar use determination" per LOC 50.03.002.1.f, based upon criteria in the section. The section also classifies the appeal procedure as being pursuant to the appeal of a minor development decision, except that the body appealed to is the Planning Commission, rather than the Development Review Commission:

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LOC 50.03.002.1.f Authorization for Similar Uses

The City Manager may authorize that a use not specifically named in the permitted, conditional or prohibited uses of a district be included among the allowed uses, if the use 1) is similar to and of the same general type as the uses specifically allowed; 2) is consistent with the Comprehensive Plan; and 3) has similar intensity, density, off-site impacts and impacts on community facilities as uses permitted in the zone. However, the City Manager may not authorize a use already specifically permitted in any other zoning district. A person disagreeing with the City Manager's decision may appeal that decision to the Planning Commission pursuant to LOC 50.07.003.7.b, Appeal of Minor Development Decision.[1]

The CDC classifies a similar use determination as a minor development under LOC 50.07.003.14.a.ii(3), because it "[r]equires a more discretionary level of review than a ministerial decision":

LOC 50.07.003.14 Minor Development Decisions

a. Minor Development Classification

i. A minor development is **a development which requires a permit** from the City that:

(1) **Requires a more discretionary level of review than a ministerial decision.** "Minor development" is intended to include decisions defined as "limited land use decisions" pursuant to ORS 197.015(12); or

(2) ****

ii. "Minor development" **under subsection 14.a.i(1)** of this section includes:

****

(3) Involves a determination by the City Manager that a use not expressly permitted in the zone may be allowed pursuant to the considerations contained in LOC 50.03.002.1.f, **Authorization for Similar Uses.** In such case, the required notice shall include a description of the proposed use and the reasons for the City Manager's determination.

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[1] There are other "similar use" decisions that staff must make, usually as part of a "permit" decision, although not as a part of the Similar Use Determination procedure. In some cases, an express use contains a "such as" or "similar use" component. For example:

- "[2] **Such as** open space, recreational sites, view points, community centers, swimming pools, tennis courts, **and similar uses associated** with a planned development, designed and intended for use by residents of the development. Table 50.03.002-1, fn. 2.
- "An application for a conditional use permit to locate a nonprofit social, recreational, educational, or cultural facility or use **such as** recreational sites, community centers, swimming pools, tennis courts and **similar uses**, in the R-0, R-3 or R-5 zone shall comply with the following standards ***" LOC 50.003.03.4.c.
- "Temporary structures and uses are permitted only as follows:
  ***
  d. Upon property for which the primary existing use is other than residential, temporary uses and nonsubstantial structures* for public or nonprofit education, fund-raising, weekend fair, athletic events or jamborees/tournaments, artistic, musical/concert performances, or **other similar uses**, ****"

Notice of a minor development application requires a 300 ft. notice area [LOC 50.07.003.14.c; 50.07.003.3].

Classification of Similar Use Determination – Quasi-Judicial "Permit" or Legislative Decision?

Similar Use Determinations are subject to specific criteria and are initiated by an application that compels a decision be issued, similar to all other quasi-judicial development applications under the CDC. If a determination is made that it is similar to an outright permitted use in a zone, the determination itself authorizes development akin to the granting of a development permit. (Granted, a building permit is also required for development, but in terms of the land use process, the effect of a similar use determination is the same as the approval of a conditional use permit – the land use approval results in the later application and issuance of a building permit.)

In 1991 LUBA expressly held in *Citizens Concerned with Medical Waste Burning in Sherwood v. City of Sherwood,* 21 Or. LUBA 515 (1991)("*Citizens Concerned")*, that a similar use determination was a "permit" under state law and was subject to quasi-judicial notice requirements under ORS 197.763. The property owner applied for a similar use determination to allow expansion of its site for incineration operations but no public notice of the application or planning commission hearing was given. The planning commission considered and approved the application in 1988. The petitioners first learned of the decision in 1990, and then filed an appeal of the decision to LUBA. The issues before LUBA were:

1. Was the similar use determination a ministerial decision (and thus not subject to LUBA jurisdiction) or a "permit" under ORS 227.160 - .185 (and therefore subject to LUBA jurisdiction)?; and
2. If it was a permit under ORS 227.160, was the required notice given?

The Sherwood criteria for a similar use determination was non-existent:

> "Under ZCDC 4.603 the planning commission may approve, approve with conditions or deny a request for approval of a use as one that **is similar to uses permissible** in the applicable zone."

LUBA held the criteria resulted in the application of "significant legal and factual judgment," was therefore not a ministerial decision but rather was a "permit" under ORS 227.160(2)[2]:

[2] ORS 227.160(2) "Permit" means **discretionary approval** of a **proposed development of land**, under ORS 227.215 or city legislation or regulation. "Permit" does not include:

(a) A limited land use decision as defined in ORS 197.015;

(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;

> "The city's determination that the incinerator is similar to uses permitted under ZCDC 2.111.02, and is not a prohibited commercial use under ZCDC 2.111.04, is a permit because it involves significant legal and factual judgment. See Flowers v. Klamath County, supra; Kirpal Light Satsang v. Douglas County, supra. Although the code language that was at issue in Flowers is not the same as the above quoted ZCDC language, the kind of reasoning and analysis required in that case to determine whether a medical waste incinerator could be classified as a scrap operation, is similar to the analysis and reasoning required of the city in this case. In Flowers, as in this case, the *applicable code language was relatively openended and subjective and, therefore, required the exercise of significant discretion in determining its proper application.* **The city's similar use determination is, therefore, a permit.** See also Kunkel v. Washington County, 16 Or LUBA 407, 411-13 (1988) (decision whether an emergency disposal site for up to 27,000 dead animals is a "farm use" entails the exercise of discretion).
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> Id., at 522-523 (emphasis added in *italics* and **bold**)[3]

Although Lake Oswego's criteria stated in LOC 50.03.002.1.f above are more descriptive than Sherwood's, the criteria does require the application of a discretionary level of review, which is acknowledged by its classification as a minor development. LOC 50.07.003.14.a.ii, above), the threshold for a "permit."

There is a later LUBA case that has given rise to speculation that LUBA might reverse itself and hold that a similar use determination is not a "permit." In *South v. City of Portland*, 53 Or LUBA 362, aff'd without opinion, 213 Or.App. 240 (2007), LUBA held that a property line adjustment was not a "permit," even if the decision involved "significant legal and factual judgment,"[4] because the lot line adjustment did not itself authorize development:

(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or

(d) An expedited land division, as described in ORS 197.360.

[3] LUBA completed its analysis in *Citizens Concerned* by noting that ORS 197.175(3) required notice per ORS 197.763 Conduct of local quasi-judicial land use hearings; notice requirements; hearing procedures.

> "(5) Hearings under this section may be held only after notice to the applicant and other interested persons and shall otherwise be conducted in conformance with the provisions of ORS 197.763."
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> (Current version of ORS 197.175 shown)

ORS 197.763(2)(a) requires a minimum notice area of 100 ft. when the subject property is within an urban growth boundary. Because Sherwood did not give notice to persons other than the applicant, LUBA remanded the application for a hearing following notice.

[4] In Lake Oswego, lot line adjustments are classified as either ministerial [LOC 50.07.003.13.a.ii(4)] or minor [LOC 50.07.003.14.a.ii(7)] development. Except if the site involves a historic landmark or is located in a historic district, the criteria are functionally the same in either case; the distinction is whether the result of the lot line adjustment would result in an increase in density. (I say "functionally the same" criteria because although additional development standards are applied to minor developments, the additional development standards rarely, if ever, will apply, due to either the statement of applicability of the standard or through the nonconforming use provisions.) Thus, we believe the zoning and development standards that are applied to a lot line adjustment are

> We assume without deciding that the challenged property line adjustment decision involved the kind of discretion that characterizes an ORS 227.160(2) permit decision. However, we agree with the city that **because the challenged decision approves only a property line adjustment, it does not involve the "proposed development of land" and is therefore not a "permit" decision as defined by ORS 227.160(2).**
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> ***
>
> Consequently, we agree with the city that a proposed property line adjustment is not a "proposed development of land," and therefore the challenged decision approving a property line adjustment is not a "permit" as defined by ORS 227.160(2).

This decision led the authors of OSB, §14.5 Administrative Law Aspects of Local Proceedings, Land Use (2010 edition)(reproduced in full, attached), to suggest that this reasoning applies to similar use determinations, legal lot determinations, and the like, and that presumably LUBA would hold that a similar use determination was a not a "permit" under ORS 227.160 et seq.

> Recently, LUBA determined that lot-line adjustment decisions are not permit decisions because they do not involve the development of land. *South v. City of Portland,* [citation omitted]. **The holding of *South* should apply to other status determinations such as legal lot of record determinations, similar use rulings,** and declaratory rulings. LUBA found that the hearing rights provided by ORS 227.175 ["permits" requires 100 ft. notice] do not apply to lot-line adjustments. *South,* 53 Or LUBA at 370.
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> > *Practice Tip:* **Lot-line adjustments and other status determinations are often land use decisions**. When this is true and a hearing is not provided by a local government (it is not required by ORS 227.175), ORS 197.830(3) creates a right of appeal to LUBA. Those appeal rights can be exercised long after a local decision is issued. **The appeal rights, however, expire 21 days after actual notice or after when a person knew or should have known of the decision.** ORS 197.830(3)(a)–(b). *Goddard v. Jackson County,* LUBA Nos. 97-147, 97-148, 97-164, 34 Or LUBA 402, 409–410 (1998); *Thompson v. City of St. Helens,* LUBA No. 97-075, 30 Or LUBA 339 (1996) (lot-line adjustment decision is a land use decision[5]; notice required). As a result, a prudent attorney will ask the local government to either (1) process these applications with notice and an opportunity for a hearing, or (2) provide written notice of the decision to all affected persons. "

clear and do not involve "significant legal and factual judgment." The issue for this analysis is LUBA's implicit finding that it would meet the criteria for a "permit" because the decision would involve "proposed development of land."

[5] The local code did not identify the criteria for a lot line adjustment. "Determining which criteria, if any, within the city's land use regulations apply to lot line adjustments requires an interpretation of those regulations and the exercise of legal judgment. LUBA therefore has jurisdiction over this appeal." Thompson v. City of St. Helens, *Id*.

I do not think the *South* holding regarding a lot line adjustment is clear enough to conclude that LUBA would reverse its prior *Citizens Concerned* holding that a similar use determination is a "permit" under ORS 227.160 et seq. A lot line adjustment is usually the application of clear zoning criteria to a change in a lot boundary. The decision does not affect the uses permitted in the zone. Because the result of the similar use determination can result in an unlisted use being found to be similar to a listed, outright permitted use, which only needs a building permit to proceed with development, a similar use determination is more directly "involved with development" and is more akin to a permit decision, such as a DR or conditional use permit, than a lot line adjustment.[6]]

2. *If it is a "permit," does the notice area affect the area bound by the decision?*

As a "permit," the next question is whether expanding notice of the opportunity to comment / planning commission's hearing, so that more persons would be aware of the application and could comment or testify on the request for similar use determination, would bind a larger area than the subject property to the interpretation?

Lake Oswego Similar Use Determination

Regardless of the notice area, a minor development decision results, if granted, in a permit that authorizes the requested *development* upon the property for which the permit was sought*:*

> "Development Permit: Written authorization for a development to proceed as described in an application, such authorization having been given in accordance with this Code."
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> LOC 50.10.003.2 Definitions

Based upon the existing classification of a similar use determination as a "minor development," and LUBA's *Citizens Concerned* holding that a similar use determination is a "permit" under ORS 227.160 et seq., a similar use determination is applicable only to the applicant /permit holder or to the permit holder's successors in interest for the subject site; it does not bind other parcels or other persons. Just as a property owner who wants to do a partition approved for one parcel cannot use that partition approval to authorize a partition on a different parcel – the owner must file a separate partition application -- so too must a separate application be filed for a similar use determination for a new site even if the proposed similar use is the same (or nearly the same) as considered before at a different parcel.

If all facts are the same as for a prior similar use determination, then the same conclusions should result for the new similar use determination, absent a statement explaining the reason for different conclusion. However, the corollary rule may also be true: no two unlisted uses

[6] Lake Oswego classifies a lot line adjustment that could result in an increase in density as requiring a minor development permit or involves a historic landmark, subject to notice and opportunity for hearing.

likely have identical "similar intensity, density, off-site impacts and impacts on community facilities," so it may be unlikely that a prior similar use determination will be useable for a use that is similar, but not an "identical twin" to a prior use where a similar use determination was made.

With a 300 ft. notice area for a similar use determination, the conclusion that the determination applies only to the specific subject site is understandable because it is the same notice area applied to all minor development applications to develop a specific parcel. But if the notice were expanded to city-wide, would all minor development permits be binding city-wide? No, regardless of the notice area, a minor development permit is binding only upon the subject site.

The notice area is not what determines the land area that is bound to the decision. State law requires permits to be noticed for 100 ft. from the subject site. A larger (300 ft.) notice area, as required by Lake Oswego Code, does not expand the land area that is bound to the decision. The notice area is a procedural requirement for the decision to comply with the applicable requirements for a decision.

The underlying question is the nature of the land use decision.

> "The second step [after determining if the decision is or is not a 'land use decision"] is to **ask whether an application is a request for a permit** as defined by ORS 215.402 (counties) or ORS 227.160 (cities), **or if the application is another type of action**. A matter is a permit if it involves the discretionary approval of a proposed development of land under land use regulations.
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> //
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> **The following categories may apply:**
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> **(1) A decision on a permit as defined by ORS 215.402(4), for counties, and ORS 227.160(2), for cities; or**
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> **(2) A discretionary land use decision that is not a permit; and**
>
> (3) A decision that is listed as an exception to a permit in ORS 215.402(4) or 227.160(2). Limited land use decisions, expedited land use decisions, certain transportation system decisions, and decisions that determine the appropriate zoning classification for a use based on criteria or performance standards are currently listed as exceptions to the permit-review process.

As noted, LUBA has held that a similar use determination is, at its core, a "permit" under ORS 227.160, and I am not convinced that LUBA will reverse its decision based on the *South* decision. Accordingly, I conclude that a similar use determination is binding only upon the subject property, regardless of the notice area. *If* a similar use determination were not a "permit," then the answer would be different, as a land use decision could be binding upon all persons (and successors in interest) that either had actual knowledge of the application and

opportunity to comment/attend hearing or should have known. See *South* and attached OSB Land Use section discussion, last "practice tip."

The City has an annual procedure to codify staff (or DRC/PC) interpretations that have been made, to give them city-wide effect – the annual CDC Update. If a similar use determination is made, finding a new use is "similar to and of the same general type as the uses specifically allowed," the similar use could be codified as an express use within the Code.[7]

Unique Procedural Elements of Similar Use Determinations per CDC Minor Development Process

The similar use determination process is a procedurally unique minor development permit under the Code because:

> (1) The City Manager must make at least a preliminary decision initially, before notice is given of the opportunity to comment.

LOC 50.07.003.14.a.ii(3), in classifying a similar use determination as a minor development, states:

> "In such case (making a similar use determination), the <u>required notice</u> (of the opportunity to comment prior to the City Manager's determination) shall include a description of the proposed use <u>and the reasons for the City Manager's determination</u>.

Since the "required notice" under LOC 50.07.003.a requires a 14-day notice of the opportunity to comment prior to the City Manager (staff) making a minor development decision, it appears that the City Manager must make a preliminary decision and include that preliminary decision and tentative reasons in the notice of opportunity to comment.

(Although the "required notice" could also be read to refer to notice of the Planning Commission's public hearing, per LOC 50.07.003.3.a, I conclude that the notice of public hearing need not contain staff's initial determination – which would thereby require a staff decision, resulting in an appeal to the Planning Commission – and therefore referral to the Planning Commission may occur. The Planning Commission staff report may contain a staff recommendation regarding the similar use request, for consideration in the public hearing.)

[7] The broader a use definition, the more uses will be found to be within the express use listing, rather than needing a similar use determination. One of the effects of the Commercial Use Streamlining code amendments (LU 15-0035) eliminating specific commercial uses, such as "accounting, auditing and bookkeeping" as being distinct from "Adjustment and collection agencies," in favor of having a more inclusive use of "office, business or professional" use means that the different permutations of accounting services will not require a similar use determination, they will be classified within the broader "office, business or professional" use, and these use types are defined.

2) The hearing body is the Planning Commission, rather than the DRC.

As stated with the Similar Use criteria, the code provides:

> **A person disagreeing with the City Manager's decision may appeal that decision to the Planning Commission** pursuant to LOC 50.07.003.7.b, Appeal of Minor Development Decision.
>
> LOC 50.03.002.1.f

Conclusions:

Per current code, a minor development decision is binding upon the specific application, and a similar use determination is binding upon the specific application for the specific site. Changing the notice requirement would not expand the determination to a larger area because the basic nature of the determination is a quasi-judicial "permit".

I recommend the minor development notice procedure for similar use determinations be revised, so that it does not require a preliminary staff decision before the notice of opportunity to comment is given.

Attachment 1

Reproduced from OSB, §14.5 Administrative Law Aspects of Local Proceedings, Land Use (2010 edition)

B. (§14.5) Types of Decisions and Review Processes

As explained in §14.4, local government decisions can be legislative or quasi-judicial. The process for adopting legislation is discussed in §§14.65–14.71.

State law imposes procedural requirements for land use and other related decisions. It also imposes limits on local government decisions. These procedures and limits are dictated based on the type of decision. In many cases, procedures apply to multiple types of decisions. Knowing which type of decision is being made, however, is essential to knowing which state law procedures apply to a local government decision. A two-step review will enable the attorney to determine what state rules apply for a typical land use application.

> Practice Tip: In some cases additional or special rules may apply based on the type of use proposed. The attorney should be familiar with these exceptions or search for exceptions when preparing a land use or limited land use application. For instance, state statutes provide special rules for the siting and development of speedways, destination resorts, farmworker housing, manufactured homes, and other specific types of applications. ORS 197.431–197.434, 197.435–197.467, 197.312–197.313, 197.314. See below for a more complete listing.

Step One

Step one is to determine whether a decision is an ORS 197.015(10) land use decision or a type of decision that is excepted from the definition of a land use decision by ORS 197.015(10). The term land use decision is broadly defined as any decision regarding the adoption, amendment, and application of land use goals, plans, and regulations. ORS 197.015(10)(a). Any quasi-judicial land use matter that requires a hearing must comply with the notice, hearing, and posthearing procedures set forth in ORS 197.763.

The exceptions to a "land use decision" are listed in ORS 197.015(10). Different review processes apply to the review of decisions that fit the exceptions. The exceptions include but are not limited to the following:

(1) A limited land use decision, ORS 197.015(10)(b)(C) and 197.015(12);
(2) Ministerial decision, ORS 197.015(10)(b)(A);
(3) Issuance of a building permit under clear and objective criteria, ORS 197.015(10)(b)(B);
(4) Certain decisions related to transportation facilities, ORS 197.015(10)(b)(D);
(5) Approval of certain outdoor mass gatherings, ORS 197.015(10)(d); and
(6) An expedited land division, ORS 197.015(10)(b)(E) and 197.360–197.380.

A writ-of-mandamus decision issued under the authority of ORS 215.429 or 227.179 and a local decision issued after a writ of mandamus has been filed are not land use decisions. ORS 197.015(10)(e).

The limited land use decision and expedited land use decision apply only to land located inside an urban growth boundary. ORS 197.015(12)(a), 197.360(1)(a)(A). Limited land use decisions include tentative plan (land division) decisions and review of uses permitted outright based on discretionary standards. ORS 197.015(12). If a decision is a limited land use decision, the local government may apply a more informal review process than applies to land use decisions. ORS 197.195. A hearing is not required, but—if provided and new evidence is accepted—the procedural rules of ORS 197.763 must be followed. Unless included in the land use regulations, comprehensive plan provisions do not apply to limited land use decisions. ORS 197.195(1). An expedited land division is a land division that applies to residential land only. An expedited land division occurs only if an applicant specifically requests it. ORS 197.365. Once requested, a very specific state-mandated review process applies that preempts local land use procedures. See ORS 197.360–197.380; §§14.117–14.126.

Step Two

The second step is to ask whether an application is a request for a permit as defined by ORS 215.402 (counties) or ORS 227.160 (cities), or if the application is another type of action. A matter is a permit if it involves the discretionary approval of a proposed development of land under land use regulations.

The following categories may apply:

(1) A decision on a permit as defined by ORS 215.402(4), for counties, and ORS 227.160(2), for cities; or
(2) A discretionary land use decision that is not a permit; and
(3) A decision that is listed as an exception to a permit in ORS 215.402(4) or 227.160(2). Limited land use decisions, expedited land use decisions, certain transportation system decisions, and decisions that determine the appropriate zoning classification for a use based on criteria or performance standards are currently listed as exceptions to the permit-review process.

The rules applicable to the review of permits are found in ORS 215.416 (counties) and ORS 227.173 and 227.175 (cities). These rules require local governments to provide notice to parties and affected persons and a hearing or an opportunity to request a hearing. ORS 215.416, 227.175.

Practice Tip: ORS 215.416 (counties) and ORS 227.175 (cities) require a de novo hearing on appeal of an administrative decision issued without a hearing. This right does not, however, apply to the review of limited land use decisions, even if the local land use review process allows an appeal hearing. If a hearing is provided for a limited land use

decision and new evidence or testimony is accepted, the procedural protections of ORS 197.763 that apply to land use decisions will apply. ORS 197.195(5).

Plan amendments and zone changes are discretionary land use decisions that are not permits. The Land Use Board of Appeals (LUBA) has determined that they are not permit decisions based on the language of ORS 215.050–215.060 and ORS 227.165–227.170. These statutory provisions imply that plan map amendments are treated differently. See 1000 Friends of Oregon v. Washington Co., LUBA No. 85-100, 14 Or LUBA 416, 427–430, aff'd, 80 Or App 34 (1986). Also, they imply that a zone change is not a permit. Constant v. Lake Oswego, LUBA No. 81-130, 5 Or LUBA 311, 315–317 (1982); Reeder v. Clackamas County, LUBA No. 90-107, 20 Or LUBA 238, 243 n 7 (1990); Leonard v. Union County, LUBA No. 91-202, 24 Or LUBA 362, 366 (1992). Recently, LUBA determined that lot-line adjustment decisions are not permit decisions because they do not involve the development of land. South v. City of Portland, LUBA No. 2006-184, 53 Or LUBA 362, 364–366, aff'd without opinion, 213 Or App 240 (2007). The holding of South should apply to other status determinations such as legal lot of record determinations, similar use rulings, and declaratory rulings. LUBA found that the hearing rights provided by ORS 227.175 do not apply to lot-line adjustments. South, 53 Or LUBA at 370.

Practice Tip: Lot-line adjustments and other status determinations are often land use decisions. When this is true and a hearing is not provided by a local government (it is not required by ORS 227.175), ORS 197.830(3) creates a right of appeal to LUBA. Those appeal rights can be exercised long after a local decision is issued. The appeal rights, however, expire 21 days after actual notice or after when a person knew or should have known of the decision. ORS 197.830(3)(a)–(b). Goddard v. Jackson County, LUBA Nos. 97-147, 97-148, 97-164, 34 Or LUBA 402, 409–410 (1998); Thompson v. City of St. Helens, LUBA No. 97-075, 30 Or LUBA 339 (1996) (lot-line adjustment decision is a land use decision; notice required). As a result, a prudent attorney will ask the local government to either (1) process these applications with notice and an opportunity for a hearing, or (2) provide written notice of the decision to all affected persons.