



1 subject property. Citing *Utsey v. Coos County*, 176 Or App 524, \_\_\_ P3d \_\_\_ (2001), *pet for*  
2 *rev pending*, intervenor argues that petitioner lacks a sufficient interest in this matter to bring  
3 the appeal.

4 The Court of Appeals’ decision in *Utsey* concerns “whether the constitution imposes  
5 limits on the authority of the legislature to confer a right to seek *judicial* review.” 176 Or  
6 App at 528 (emphasis added). More specifically, *Utsey* concerns the broad standing that  
7 ORS 197.850(1) grants parties at LUBA to seek judicial review of LUBA’s final opinions.<sup>3</sup>  
8 The majority decision concludes that as applied to the appeal in *Utsey*, ORS 197.850(1)  
9 violates Article III, section 1, and Article VII (Amended), section 1, of the Oregon  
10 Constitution.<sup>4</sup> Although it was undisputed that the appellant in *Utsey* met the ORS  
11 197.850(1) standing requirements to seek judicial review, the majority concluded that the  
12 appeal was not justiciable and, for that reason, must be dismissed.<sup>5</sup>

13 Even if we assume petitioner here would lack standing to seek judicial review of  
14 *LUBA’s final opinion* in this matter under *Utsey*, that does not mean he does not have  
15 standing to seek review by LUBA of the *county’s decision*. LUBA is not a court and does

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<sup>3</sup>ORS 197.850(1) provides:

“Any party to a proceeding before the Land Use Board of Appeals under ORS 197.830 to 197.845 may seek judicial review of a final order issued in those proceedings.”

<sup>4</sup>Article III, section 1, separates the powers of state government into three branches, “the Legislative, the Executive, including the administrative, and the Judicial[.]” Article VII (Amended), section 1, provides in relevant part that “[t]he judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law.”

<sup>5</sup>The majority opinion explains:

“To begin with, as we have observed, because the [appellant] is the sole party that has invoked the jurisdiction of this court, it is the [appellant’s] obligation to establish the justiciability of its claim. Moreover, to establish such justiciability, the [appellant] must demonstrate that a decision in this case will have a practical effect on its rights. The [appellant] must do so regardless of what the statutes provide by way of conditions—or lack of conditions—on obtaining judicial review. The case law concerning the ‘practical effects’ requirement clearly states that an abstract interest in the proper application of the law is not sufficient. In this case, the [appellant’s] only contention is that its disagreement with LUBA concerning the lawfulness of the approval of the Lillies’ application is sufficient. That is at odds with settled principles of justiciability.” 176 Or App 549-50 (citations omitted).

1 not exercise judicial power. Rather, LUBA is an agency of the executive branch. ORS  
2 197.810. ORS 197.830(2) does not implicate either of the articles of the Oregon Constitution  
3 that the majority in *Utsey* found to be violated in that case by ORS 197.850(1). Although the  
4 majority, concurring and dissenting opinions often refer to ORS 197.830(2), it is clear that  
5 those references are included only because ORS 197.850(1) simply confers standing on  
6 anyone who becomes a party at LUBA under ORS 197.830(2). It is true that the majority  
7 opinion never expressly states that its opinion is limited to standing to seek judicial review of  
8 LUBA opinions under ORS 197.850(1). However, it is clear from the majority’s reasoning  
9 and analysis that *Utsey* is so limited. The concurring opinion explicitly notes that it is limited  
10 to ORS 197.850(1).

11 “\* \* \* Under the constitution, the legislature is at liberty to make any  
12 individual or entity that it desires a party to an *executive* proceeding, including  
13 a party who represents only the public interest, rather than a personal interest.  
14 Consequently, there is nothing unconstitutional, insofar as Article III, section  
15 1, is concerned, about the provisions of ORS 197.830 that permit any person  
16 or organization who has appeared before the local government, special district  
17 or state agency to appear as a party before [LUBA]. Where the legislature  
18 potentially runs afoul of Article III, section 1, is in the conferral of judicial  
19 review of LUBA’s decisions on this court, without regard for the fact that  
20 executive proceedings may lack a justiciable controversy. \* \* \*” 176 Or App  
21 561, Edmonds, J., concurring.

22 As a final point, we note that ORS 197.805 includes a general directive that LUBA’s  
23 “decisions be made consistently with sound principles governing judicial review.” That  
24 general directive does not mean that LUBA is part of the judicial branch. Neither do we  
25 believe it provides any basis for believing the legislature intended to limit standing to appeal  
26 land use decisions to LUBA under ORS 197.830(2) in the same way that legislative power  
27 may be constitutionally limited in establishing standing to seek judicial review.

28 Because petitioner has standing to bring this appeal under ORS 197.830(2), and the  
29 limits on standing to seek judicial review that are articulated in *Utsey* do not apply in appeals  
30 of land use decisions to LUBA, the motion to dismiss is denied.

1           We cancelled oral argument and suspended this appeal on October 9, 2001, to allow  
2 time for petitioner to respond to the motion to dismiss and for LUBA to resolve the motion.  
3 The deadline for intervenor and respondent to file their briefs in this matter shall be extended  
4 to December 17, 2001.<sup>6</sup> The deadline for issuing our final opinion and order is extended to  
5 January 21, 2002. ORS 197.840(1)(b).

6           Dated this 26<sup>th</sup> day of November, 2001.  
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13 Michael A. Holstun  
14 Board Member

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<sup>6</sup>Although our October 9, 2001 order suspended the deadline for filing respondents' briefs, intervenor-respondent nevertheless filed a respondent's brief on November 19, 2001. Respondent has not filed a brief.