

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

3
4 CRAIG REALTY GROUP-WOODBURN LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WOODBURN,
10 *Respondent.*

11
12 LUBA No. 99-131

13
14 OREGON DEPARTMENT OF TRANSPORTATION and
15 DEPARTMENT OF LAND CONSERVATION AND
16 DEVELOPMENT,
17 *Petitioners,*

18
19 vs.

20
21 CITY OF WOODBURN,
22 *Respondent.*

23
24 LUBA No. 99-135

25 ORDER ON MOTIONS TO DISMISS

26 In LUBA No. 99-135, petitioners Oregon Department of Transportation (ODOT) and
27 Oregon Department of Land Conservation and Development (DLCD) jointly filed a notice of
28 intent to appeal a post-acknowledgement land use decision on August 19, 1999. Respondent
29 and petitioner Craig Realty Group move to dismiss that appeal on the grounds that
30 petitioners' notice of intent to appeal was not timely filed.¹ Movants contend that the notice
31 of intent to appeal was untimely under ORS 197.830(8), which provides in part:

32 "A notice of intent to appeal a land use decision or limited land use decision
33 shall be filed not later than 21 days after the date the decision sought to be
34 reviewed becomes final. A notice of intent to appeal plan and land use
35 regulation amendments processed pursuant to ORS 197.610 to 197.625 shall
36 be filed not later than 21 days after the decision sought to be reviewed is

¹In these consolidated cases, we hereafter refer to respondent and petitioner Craig Realty Group collectively as movants, or individually as "the city" and "Craig Realty."

1 mailed to parties entitled to notice under ORS 197.615. * * * The notice shall
2 be served and filed in the form and manner prescribed by rule of the board
3 * * *²

4 The Court of Appeals has held that “for amendments to land use regulations under the
5 post-acknowledgment statutes, ORS 197.610 to ORS 197.625,” the 21-day appeal period
6 “runs from the time that the notice specified in those statutes is given to persons entitled to
7 notice under them.” *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 431, 899
8 P2d 720 (1995). In this case, a notice of intent to appeal had to have been filed within 21
9 days after the city mailed the decision and findings to DLCD or notice of the decision to
10 parties entitled to notice as required by ORS 197.615.³ *ODOT v. City of Oregon City*, 153 Or

²LUBA prescribes the form and manner by which the notice must be served and filed in OAR 661-010-0015, which provides in part:

“(1) Filing of Notice:

“(a) * * * A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. A Notice filed thereafter shall not be deemed timely filed, and the appeal shall be dismissed.”

³ ORS 197.615 provides in part:

“(1) A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the Director of the Department of Land Conservation and Development a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. If the proposed amendment or new regulation that the director received under ORS 197.610 has been substantially amended, the local government shall specify the changes that have been made in the notice provided to the director.

“(2)(a) Not later than five working days after the final decision, the local government also shall mail or otherwise submit notice to persons who:

“(A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation or the new land use regulation; and

“(B) Requested of the local government in writing that they be given such notice.”

1 App 705, 959 P2d 615 (1998); *Barton v. City of Lincoln City*, 29 Or LUBA 612, 614-15
2 (1995). Failure to comply with the notice provisions of ORS 197.615(1) is not only a
3 procedural error, but may also be a substantive matter. *Oregon City Leasing, Inc. v.*
4 *Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993).

5 On July 28, 1999, the city mailed the full text of the challenged decision, all findings
6 adopted by the city, and appeal information required by ORS 197.615 to, *inter alia*, DLCD.⁴
7 The city subsequently mailed a second notice to DLCD on July 30, 1999. The notice mailed
8 July 30, 1999, included the “Notice of Adoption” form required by DLCD. The prior notice
9 to DLCD did not include the form. Petitioners ODOT and DLCD filed their notice of intent
10 to appeal within 21 days of the July 30, 1999 mailing, but not within 21 days of the July 28,
11 1999 mailing.

12 Petitioners ODOT and DLCD have the burden of establishing this Board’s
13 jurisdiction, including that petitioners’ notice of intent to appeal was timely filed. *Bowen v.*
14 *City of Dunes City*, 28 Or LUBA 324, 330 (1994). Movants argue separate bases for
15 dismissing petitioners DLCD and ODOT. We address the motion to dismiss DLCD first.

16 **1. DLCD**

17 Petitioner DLCD contends that it timely filed its notice of intent to appeal because the
18 city did not provide DLCD with the notice required by ORS 197.615(1) and OAR 660-018-
19 0040 until July 30, 1999. DLCD argues that the Land Conservation and Development
20 Commission (LCDC) has adopted administrative rules to implement ORS 197.610 to
21 197.625 pursuant to ORS 197.040(1)(b)⁵. Among those implementing rules is OAR 660-

⁴There is no contention that the city failed to send notice to all persons who participated in the proceedings leading to the challenged decision and who submitted a written request for notice of the land use decision, as required by ORS 197.615(2)(a).

⁵ORS 197.040(1) provides in part:

“The Land Conservation and Development Commission shall:

“* * * * *

1 018-0040(1), which provides, in relevant part:

2 “Amendments to acknowledged comprehensive plans or land use regulations,
3 new land use regulations adopted by local government, and findings to
4 support the adoption shall be mailed or otherwise submitted to the Director
5 within five working days after the final decision by the governing body and
6 *shall be accompanied by appropriate forms provided by the Department.*”
7 (Emphasis added.)

8 DLCD contends that because the provisions of OAR 660-018-0040 are validly promulgated,
9 they have the full force and effect of law, citing *Haskins v. Employment Dept.*, 156 Or App
10 285, 965 P2d 422 (1998). DLCD also relies on *Bronson v. Moonen*, 270 Or 469, 476, 528
11 P2d 82 (1974), for the proposition that “[a]dministrative rules and regulations are to be
12 regarded as legislative enactments having the same effect as if enacted by the legislature as
13 part of the original statute.” DLCD concludes that failure to comply with the OAR 660-018-
14 0040 requirement to submit post-acknowledgement amendments to DLCD “accompanied by
15 appropriate forms provided by the Department” amounts to a failure to comply with ORS
16 197.615(1). Thus, DLCD argues, the city did not provide notice in compliance with ORS
17 197.615(1) until July 30, 1999. Therefore, DLCD argues, its notice of intent to appeal was
18 timely filed.

19 In ORS 197.615(1), the legislature requires a local government that makes a post-
20 acknowledgement plan amendment to mail DLCD “a copy of the adopted text of the
21 comprehensive plan provision or land use regulation together with the findings adopted by
22 the local government.” LCDC adopted OAR 660-018-0040 to implement ORS 197.610 to
23 197.625. OAR 660-018-0040(1) requires that, in addition to amendments to acknowledged
24 comprehensive plans or land use regulations adopted by a local government and findings to
25 support the adoption required to be submitted to DLCD, the local government shall submit

“(b) In accordance with the provisions of ORS 183.310 to 183.550, adopt rules that it
considers necessary to carry out ORS chapters 195, 196 and 197. * * *”

1 “appropriate forms provided by the Department.”⁶ There is no dispute that DLCD’s “Notice
2 of Adoption” form is one of the “appropriate forms” referred to in OAR 660-018-0040.

3 The city’s motion to dismiss presents essentially two issues. The first is whether the
4 administrative rule is inconsistent with ORS 197.615, and therefore was not validly
5 promulgated. The second is whether the rule, if it is a valid rule, has the effect of tolling the
6 21-day appeal period to LUBA.

7 The city cites generally the Oregon Supreme Court’s decision in *Lane County v.*
8 *LCDC*, 325 Or 569, 942 P2d 278 (1997), for the principle that “[w]hile LCDC has broad
9 authority to adopt administrative rules, this does not include the power to adopt rules that are
10 inconsistent with statutes.” Respondent’s Reply 2. In *Lane County v. LCDC*, the court held
11 that LCDC did not exceed the scope of its authority when it promulgated regulations
12 imposing additional restrictions on lands classified as high value farmland, even if those
13 regulations have the effect of prohibiting uses otherwise permissible under the applicable
14 statute. 325 Or at 583.

15 We agree with the city’s analysis of *Lane County v. LCDC*. However, the problem
16 with the city’s argument in the present case is that it has shown no inconsistency between
17 OAR 660-018-0040(1) and ORS 197.615(1).⁷ Nothing in ORS 197.615(1) indicates a
18 legislative intent to provide an exclusive list of items to be submitted to DLCD to constitute
19 notice of a post-acknowledgement plan amendment. Given the broad authority granted
20 LCDC by ORS 197.040(1)(b) to adopt rules that it considers necessary to carry out ORS

⁶OAR 660-018-0010(5) defines “department” as DLCD for purposes of OAR chapter 660, division 18.

⁷The city also argues “OAR 660-018-0040 was promulgated by LCDC, not LUBA, and cannot legally define the notice and mailing requirement for LUBA appeals.” Respondent’s Reply 2. ORS 197.830(8) provides LUBA the authority to prescribe by rule “the form and manner” by which a notice of intent to appeal to this Board “shall be served and filed.” Pursuant to that authority, LUBA promulgated OAR 661-010-0015(1). As relevant here, that rule provides “[a] notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed with the Board on or before the 21st day after the date the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615.” Nothing in ORS 197.830(8) or OAR 661-010-0015(1) dictates the manner by which this Board is to determine when a local government has “mailed” a post-acknowledgement plan amendment to DLCD under ORS 197.615(1).

1 chapter 197 and a failure of the city to demonstrate how OAR 660-018-0040(1) is
2 inconsistent with ORS 197.615(1), we conclude that the rule is not inconsistent with ORS
3 197.615 in any manner argued to this Board. Having determined that LCDC's rule is not
4 inconsistent with ORS 197.615, we turn to the issue of whether the time period for appealing
5 a post-acknowledgement amendment to LUBA is tolled until the local government provides
6 DLCD the notice required by OAR 660-018-0040.

7 In *Haskins*, the court reviewed a final order of the Employment Appeals Board that
8 held that the claimant's failure to sign an application for unemployment benefits as required
9 by administrative rule was grounds for dismissal of the claim.⁸ Claimant argued that
10 although the hearing request was not signed as required by the rule, she had otherwise
11 complied with the requirements of the applicable statute, which did not contain the signature
12 requirement. The statute at issue in *Haskins* provides that a claimant denied benefits must
13 file a request for a hearing with the agency within a specified time. The statute does not
14 specify the contents of the request for a hearing. Such specification is provided by the
15 agency's administrative rules. The court rejected the argument that the claimant's failure to
16 comply with the administrative rule is of no consequence where the statute makes no mention
17 of a signature requirement. The court affirmed the dismissal on the basis that the
18 administrative rule requires a signature and that rule has the effect of law. 156 Or App at
19 288.

20 *Haskins* is instructive for the present case. OAR 660-018-0040(1) adds a requirement
21 for a local government notice of a post-acknowledgement plan amendment to DLCD.
22 Failure to comply with OAR 660-018-0040(1), even where the requirements of ORS
23 197.615(1) are otherwise satisfied, amounts to a failure to provide the notice to DLCD that is

⁸We recognize that the claimant in *Haskins* did not challenge the validity of the administrative rule. 156 Or App at 288. In the present case, movants do not develop a challenge to the validity of OAR 660-018-0040 beyond stating that LCDC does not have power to adopt rules inconsistent with statutes. We rejected the argument that LCDC lacked authority to adopt OAR 660-018-0040(1) and that OAR 660-018-0040(1) is inconsistent with ORS 197.615(1) in any manner argued to this Board, above.

1 required by ORS 197.615(1).

2 Movants' motions to dismiss as to petitioner DLCD are denied.

3 **2. ODOT**

4 We held above that the city did not mail notice to DLCD that satisfied the
5 requirements of OAR 660-018-0040(1) and ORS 197.615 until July 30, 1999. In *ODOT v.*
6 *City of Oregon City*, the Court of Appeals held that there is always a mailing requirement
7 under ORS 197.615. 153 Or App at 708. The court stated that under ORS 197.830(8), the
8 time for appealing post-acknowledgement plan and regulation amendments is measured from
9 the time of the required mailing under ORS 197.615. *Id.* The court then agreed with
10 ODOT's contention that "the time for appealing to LUBA applies to any person with
11 standing to appeal, and not only to the person or persons who are entitled to notice under
12 ORS 197.615." *Id.* Neither ORS 197.830(8) nor the court in *ODOT v. City of Oregon City*
13 make any distinction between the mailing to DLCD required by ORS 197.615(1), and the
14 mailing to other parties (such as ODOT here) required by ORS 197.615(2). Thus, based on
15 the holding in *ODOT v. City of Oregon City* deciding that when the time period for filing a
16 notice of intent to appeal is tolled for one party, it is tolled for all, and our foregoing
17 conclusion that the city did not comply with ORS 197.615(1) and OAR 660-018-0040(1)
18 until July 30, 1999, we conclude that petitioner ODOT timely appealed the challenged
19 decision, by filing a notice of intent to appeal within 21 days of July 30, 1999.

20 Movants' motions to dismiss petitioner ODOT are denied.

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22 Dated this 3rd day of March, 2000.

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29 _____
30 Anne Corcoran Briggs
Board Member