

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

3
4 OLD TOWN CORNELIUS NEIGHBORHOOD
5 ASSOCIATION and BARBARA STOREY,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF CORNELIUS,
11 *Respondent.*

12 LUBA No. 2000-089

13
14 ORDER ON MOTION TO DISMISS

15 The city moves to dismiss this appeal, arguing that LUBA lacks jurisdiction because
16 petitioners cannot establish standing to appeal the city’s decision.

17 **BACKGROUND**

18 The challenged decision amends the city’s comprehensive plan text and map and the
19 zoning map to create a special “Main Street” planning district affecting 86 acres in and
20 around the city’s downtown. Petitioners allege that members of the Old Town Cornelius
21 Neighborhood Association (OTCNA) and individual petitioner Barbara Storey own
22 residential property within two or three blocks from the city’s downtown that was
23 redesignated and rezoned as part of the challenged decision.¹

24 The challenged amendments originated in a series of public workshops conducted by
25 a steering committee from October 1996 to June 1997. A description of the proposal before
26 the steering committee was distributed to every property owner in the city in an October
27 1996 insert in the local newspaper. The steering committee developed a final “Main Street”

¹For purposes of this order, we assume without deciding that petitioner OTCNA has standing to assert the interests of its members in this appeal. *See Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991) (setting forth the requirements for representational standing). We also assume, because the parties do not contend otherwise, that the statutes and rules applicable to our review of the challenged decision are those in effect when the challenged decision was adopted. Accordingly, we quote and address below the 1997 statutes and rules.

1 plan by June 1997, and forwarded that plan to the city planning commission. On June 27,
2 1997, the city provided a Notice of Proposed Amendment to the Department of Land
3 Conservation and Development (DLCD), pursuant to ORS 197.610.² The city's notice states
4 that the date of final hearing would be August 4, 1997, 38 days from the date of the notice.

5 The city planning commission conducted public hearings on July 8, July 29, and
6 August 19, 1997, for which public notice was provided by publication in the local
7 newspaper. The planning commission approved the recommendations on September 9, 1997,
8 and forwarded them to the city council. The city council held public hearings on October 6,
9 1997, and February 2, 1998, for which notice was also provided by publication. Petitioners
10 did not participate in any of the proceedings before the planning commission or city council.

11 The city council adopted the proposed amendments at the February 2, 1998 hearing.
12 However, the city failed to provide notice of the adopted amendments to DLCD, as required
13 by ORS 197.615(1), until May 25, 2000.³ DLCD thereupon issued a Notice of Adopted

²ORS 197.610(1) and (2) (1997) provide:

- “(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of [DLCD] at least 45 days before the final hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The director shall notify persons who have requested notice that the proposal is pending.
- “(2) When a local government determines that the goals do not apply to a particular proposed amendment or new regulation, notice under subsection (1) of this section is not required. In addition, a local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:
 - “(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615 (1) and (2); and
 - “(b) Notwithstanding the requirements of ORS 197.830 (2), the director or any other person may appeal the decision to the board under ORS 197.830 to 197.845.”

³ORS 197.615 (1997) provides in relevant part:

1 Amendment on June 2, 2000, stating that the city’s Notice of Proposed Amendment was
2 submitted to DLCD with less than the 45-day notice required by ORS 197.610(1). DLCD’s
3 Notice of Adopted Amendment stated that the deadline to appeal the city’s decision to LUBA
4 was June 16, 2000. On June 16, 2000, petitioners filed a notice of intent to appeal with
5 LUBA.

6 **JURISDICTION**

7 The city argues that petitioners lack standing to appeal the city’s decision, because
8 neither OTCNA nor petitioner Barbara Storey appeared before the steering committee, the
9 planning commission, or the city council in any of the proceedings leading up to the
10 challenged decision. The city contends that both ORS 197.830(2) and ORS 197.620(1) limit
11 standing to appeal decisions such as the present one to persons who “participated either

“(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 [DLCD] 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. * * *

“(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.

“* * * * *

“(3) Not later than five working days after receipt of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation submitted under subsection (1) of this section, the director shall notify by mail or other submission any persons who have requested notification. The notice shall:

“(a) Explain the requirements for appealing the action of the local government under ORS 197.830 to 197.845; * * *”

1 orally or in writing” or appeared in the local government proceedings leading to the adoption
2 of the decision.⁴

3 The city concedes that if it failed to provide DLCD with notice of the proposed
4 amendment at least 45 days before the final hearing on adoption, as DLCD indicated in its
5 Notice of Adopted Amendment, then the appearance requirement is waived pursuant to
6 ORS 197.610(2)(b). However, we understand the city to argue that DLCD is not correct, and
7 that in fact the “final hearing on adoption” occurred much later than 45 days from the date
8 the city provided notice to DLCD.⁵ Consequently, the city argues, nothing in the relevant
9 statutes or administrative rules governing the proposal or adoption of post-acknowledgment
10 plan amendments provides an exception to the requirement for a local appearance.

11 Petitioners advance several theories for why the ORS 197.830(2) and 197.620(1)
12 appearance requirements are not applicable in the present case, but we need address only the
13 dispositive argument.⁶ For the following reasons, we agree with petitioners that the

⁴ORS 197.620(1) (1997) provides in relevant part:

“Notwithstanding the requirements of ORS 197.830 (2), persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. * * *”

ORS 197.830(2) (1997) provides:

“Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

- “(a) Filed a notice of intent to appeal the decision as provided in [ORS 197.830(1)]; and
- “(b) Appeared before the local government, special district or state agency orally or in writing.”

⁵OAR 660-018-0010(9) defines “Final Hearing on Adoption” in relevant part as “the last hearing where all interested persons are allowed to present evidence and rebut testimony on the proposal to adopt or amend a comprehensive plan or land use regulation. * * *”

⁶In addition to the argument discussed in the text, petitioners also argue that the appearance requirement is obviated by the city’s failure to provide adequate individual notice of the proposed amendments to those petitioners whose property was rezoned by the challenged decision, which, according to petitioners, allows them to appeal the city’s decision under ORS 197.830(3). *But see Orenco Neighborhood v. City of Hillsboro*,

1 appearance requirement is waived, pursuant to ORS 197.610(2)(b), and therefore petitioners’
2 failure to appear during the proceedings below does not affect LUBA’s jurisdiction.

3 ORS 197.610(1) and ORS 197.615(1) provide procedures for assuring that
4 amendments to acknowledged local land use legislation comply with the statewide planning
5 goals, and violation of those procedures can be a substantive, rather than a procedural,
6 matter. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495
7 (1993). Pursuant to its authority under ORS 197.040(1), the Land Conservation and
8 Development Commission (LCDC) has promulgated rules prescribing the form and content
9 of the required notice under ORS 197.610(1) and ORS 197.615(1). *See Craig Realty Group*
10 *v. City of Woodburn*, 37 Or LUBA 1041, 1047-48 (2000) (time for appealing a post-
11 acknowledgment amendment to LUBA under ORS 197.830(8) is tolled until the local
12 government provides the notice required by ORS 197.615(1) on the forms provided by
13 DLCD). OAR 660-018-0020(1) provides, in relevant part, that notice of proposed
14 amendments under ORS 197.610(1) “shall be accompanied by appropriate forms provided”
15 by DLCD and “shall indicate the date of the final hearing on adoption.” The second line of
16 the pertinent form provided by DLCD, entitled Notice of Proposed Amendment, requires the
17 local government to provide the date of final hearing. The evident purpose of that rule
18 requirement is to allow DLCD and other interested parties at least 45 days’ notice of the *last*
19 opportunity to participate in the proceedings before the local government. Because nothing
20 in the relevant statute or rules appears to compel local governments to notify DLCD of
21 subsequent changes that affect that opportunity, the notice of the date of final hearing

135 Or App 428, 432, 899 P2d 720 (1995) (failure to provide prehearing notice required under local code procedures does not suspend the statutory 21-day deadline for filing appeals of comprehensive plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625). Finally, petitioners argue that the city’s failure to provide a timely Notice of Adoption to DLCD as required by ORS 197.615(1) also waives any appearance requirement.

1 provided to DLCD has considerable significance in safeguarding that opportunity.⁷

2 In the present case, the Notice of Proposed Amendment provided by the city to
3 DLCD stated that the date of final hearing would be August 4, 1997, less than 45 days from
4 the date DLCD received the notice. The fact that the city failed to conduct a hearing on that
5 date, and may have conducted another evidentiary proceeding after that date that could be
6 characterized as the “final hearing on adoption,” is immaterial for present purposes. The
7 consequence of submitting notice of a proposed amendment less than 45 days before the
8 proposed final hearing on adoption is that DLCD or any other person may appeal the
9 decision to LUBA “notwithstanding the requirements of ORS 197.830(2).”
10 ORS 197.610(2)(b).⁸ If local governments wish to avoid that consequence, nothing of which
11 we are aware prevents them from sending additional notice to DLCD proposing a date for the
12 final hearing on adoption that complies with ORS 197.610(1).⁹

13 CONCLUSION

14 For the foregoing reasons, the city has not demonstrated that the ORS 197.830(2)(b)
15 and ORS 197.620(1) appearance requirements bar petitioners from proceeding with this
16 appeal.

17 The city’s motion to dismiss is denied.

⁷We note that OAR 660-018-0010(9) states that “[i]f a final hearing on adoption is continued or delayed, following proper procedures, the local government is not required to submit a new notice under OAR 660-018-0020.”

⁸As the city notes, both ORS 197.830(2)(b) and ORS 197.620(1) impose appearance requirements. However, ORS 197.610(2)(b) provides a waiver only to the requirements of ORS 197.830(2). While the relevant statutes are not models of clarity, read together we believe that circumstances waiving the requirements of ORS 197.830(2) also waive the requirements of ORS 197.620(1). ORS 197.830(2) and ORS 197.620(1) cross-reference each other, and purport to allow standing to appeal to persons who participate in the proceedings below, notwithstanding the requirement in the cross-referenced statute that also requires that such persons participate in the proceedings below. We cannot claim complete understanding of the logic or sense of that cross-reference, other than to discern an intent to link the two sets of requirements. It seems consistent with that intent to read the relevant statutes together such that, if the appearance requirement at ORS 197.830(2) is waived, so is the appearance requirement at ORS 197.620(1).

⁹Although it is not relevant to this appeal, 1999 amendments to ORS 197.610(1) now require that local governments provide notice of proposed amendments to DLCD at least 45 days before the “first evidentiary hearing on adoption.”

1 On August 8, 2000, the Board suspended review proceedings in this appeal, in order
2 to resolve the city's motion to dismiss. We now resume those proceedings. The petition for
3 review was filed July 31, 2000. Accordingly, the response brief is due 21 days from the date
4 of this order.

5 Dated this 30th day of August, 2000.

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Tod A. Bassham
Board Chair