

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

3
4 OAKLEIGH-MCCLURE NEIGHBORS,
5 BRYN THOMS, SANDY THOMS, TAMMY CRAFTON,
6 KAREN FLEENER-GOULD, SCOTT FLEENER-GOULD,
7 CECELIA BAXTER-HEINTZ and PAUL BAXTER-HEINTZ,
8 *Petitioners,*

9
10 and

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12 PAUL CONTE and SIMON TRAUTMAN,
13 *Intervenors-Petitioners,*

14
15 vs.

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17 CITY OF EUGENE,
18 *Respondent,*

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20 and

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22 OAKLEIGH MEADOWS CO-HOUSING, LLC,
23 *Intervenor-Respondent.*

24
25 LUBA No. 2014-001

26
27 FINAL OPINION
28 AND ORDER

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30 Appeal on remand from the Court of Appeals.

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32 Lauren C. Regan, Eugene, represented petitioners.

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34 William K. Kabeiseman, Portland, represented intervenors-petitioners
35 Paul Conte and Simon Trautman.

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37 Anne C. Davies, Eugene, represented respondent.

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39 Zack P. Mittge, Eugene, represented intervenor-respondent.

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RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 05/15/2015

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

In *Oakleigh-McClure Neighbors v. City of Eugene*, __ Or LUBA __ (LUBA No. 2014-001, August 21, 2014) (*Oakleigh I*), we remanded a decision by the city approving a tentative planned unit development application for the reasons set forth in our opinion. As relevant here, after intervenor-petitioner Simon Trautman (Trautman) filed his petition for review, we denied Trautman’s motion to intervene because we determined that he had failed to file his motion within the deadline set out in ORS 197.830(7). Trautman appealed our decision to the Court of Appeals, and the Court of Appeals reversed our decision, concluding that Trautman’s motion to intervene was timely filed under ORS 197.830(7). *Oakleigh-McClure Neighbors et al. v. City of Eugene*, 269 Or App 176, 188, 344 P3d 503 (2015) (*Oakleigh II*). Trautman’s motion to intervene is therefore allowed.

After the Court of Appeals issued the appellate judgment on April 15, 2015, Trautman and intervenor-petitioner Conte moved to allow additional briefing on the assignment of error raised in Trautman’s petition for review that was filed on June 7, 2014, in order “to address the scope of the remanded decision before the [city] * * * ” and “to address the appropriate remedy for the city’s failure to adequately provide notices of the hearings and notices to persons within the notice area.” Motion to Allow Briefing on Remand Issue 1, 2. We issued an order allowing petitioners, the city, and intervenor-respondent Oakleigh Meadows Co-Housing, LLC (Meadows) to respond to the motion. Petitioners support the motion for the same reasons that are set forth in the motion. Meadows objects to the motion, pointing out that ORS 197.850(11) requires LUBA to “respond to the court’s appellate judgment within 30 days.”

1 Meadows argues that additional briefing would cause further delay in
2 contravention of ORS 197.850(11).

3 We conclude that we have already received adequate briefing from the
4 parties on the issue presented in Trautman’s petition for review and that
5 additional briefing is not warranted. We now resolve the assignment of error in
6 Trautman’s petition for review.

7 **TRAUTMAN ASSIGNMENT OF ERROR**

8 **A. Motion to Take Evidence Not in the Record and Reply Brief**

9 In its response brief, Meadows moves to take evidence not in the record
10 which, as we understand it, seeks to establish that Trautman was living in Idaho
11 at the time his letter to the hearings officer found at Record 1308 was submitted
12 into the record. In *Oakleigh II*, the Court of Appeals questioned the relevance
13 of a similar argument by Meadows regarding whether Trautman was living in
14 Idaho at the time his letter was submitted into the record. *Oakleigh II*, 269 Or
15 App at 178 n 2. We also fail to see the relevance of Meadows’ argument to
16 Trautman’s assignment of error. The motion to take evidence is denied.

17 Trautman filed a reply brief to respond to Meadows’ response brief.
18 The reply brief is allowed.

19 **B. Assignment of Error**

20 As we explained in *Oakleigh I*, the hearings officer’s decision approved
21 the application for a tentative planned unit development, and some of the
22 petitioners appealed the hearings officer’s decision to the planning
23 commission. Prior to the initial hearings officer’s decision, Trautman, along
24 with his wife and mother-in-law, submitted a letter into the record opposing the
25 application. Record 1308. The city did not provide notice of the hearings
26 officer’s decision to Trautman as required by Eugene Code (EC) 9.7335(1)(d),

1 which requires the city to provide notice of the hearings officer’s decision to
2 “[a]ny group or individual who provided written or oral testimony prior to the
3 close of the public comment period[.]”¹ The city also did not provide notice of
4 the planning commission appeal hearing to Trautman as required by EC
5 9.7665(1)(e), which requires the city to provide written notice of the appeal
6 hearing to “[a]ny person who submitted written comments in regards to the
7 original application.”

8 In his assignment of error, Trautman argues that the city’s procedural
9 errors in failing to provide the required notice of the hearings officer’s decision
10 and notice of the appeal hearing “meant that Trautman was not able to review
11 the Hearings Official’s decision and present contrary argument in the local
12 appeal proceedings.” Trautman Petition for Review 6. Citing *Johnson v.*
13 *Jackson County*, 59 Or LUBA 94 (2009), we understand Trautman to argue
14 that failure on the city’s part deprived Trautman of his substantial rights to
15 participate in the appeal hearing before the planning commission.

16 Meadows responds that Trautman failed to provide the city with a
17 correct address for purposes of mailing notice of the decision and notice of the
18 appeal hearing, and that Trautman lived in Idaho when both notices were sent,
19 and for those reasons he has failed to establish that the city’s failure to provide
20 the required notices prejudiced his substantial rights. Meadows also contends
21 that the city provided notices of the decision and appeal hearing to the attorney
22 who is representing petitioners at LUBA and therefore satisfied its obligation
23 to provide notice to Trautman.

¹ ORS 227.173(4) requires “[w]ritten notice of the approval or denial shall be given to all parties to the proceeding.”

1 In his reply brief, Trautman responds that his residency in Idaho is
2 irrelevant in determining whether the city was obligated to provide him with
3 notices of the decision and the appeal hearing. Trautman also responds that
4 petitioners' attorney never represented him during the proceedings below.

5 As we explained above, like the Court of Appeals we fail to see the
6 relevancy of Trautman's actual state of residence to whether the city committed
7 a procedural error. In addition, we see no evidence in the record that
8 petitioners' attorney represented Trautman during the proceedings before the
9 city.

10 ORS 197.835(9)(a)(B) authorizes LUBA to remand for procedural errors
11 that prejudice the substantial rights of the petitioner. We agree with Trautman
12 that the city's failure to provide Trautman with notice of the hearings officer's
13 decision and with notice of the appeal hearing prejudiced his right to
14 participate in the planning commission hearing on the appeal of that hearings
15 officer's decision. *See Muller v. Polk County*, 16 Or LUBA 771, 775 (1988)
16 (“[u]nder ORS 197.835[(9) (a)(B)] the ‘substantial rights’ of parties that may
17 be prejudiced by failure to observe applicable procedures are the rights to an
18 adequate opportunity to prepare and submit their case and a full and fair
19 hearing.”) Accordingly, remand is required.

20 The city's decision is remanded.