BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CASEY JONES WELL DRILLING, INC. and CASEY JONES, JR., Petitioners, vs. CITY OF LOWELL, Respondent.	LUBA Nos. 97-072 and 97-073
	FINAL OPINION AND ORDER

Appeal from City of Lowell.

Meg E. Kieran, Springfield, filed the petition for review and argued on behalf of petitioners. With her on the brief was Harold & Leahy.

Wendie L. Kellington, Portland, filed the reply brief and argued on behalf of petitioners. With her on the brief was Schwabe, Williamson & Wyatt.

Jerome Lidz and Emily K. Newton, Eugene, filed the response brief and argued on behalf of respondent. With them on the brief was Harrang, Long, Gary, Rudnick P.C.

HANNA, Board Member; GUSTAFSON, Board Chair, participated in the decision.

REMANDED 03/27/98

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

Opinion by Hanna.

NATURE OF THE DECISION

Petitioners in these consolidated appeals challenge two decisions of the city council amending its ordinance regulating mobile home parks.

MOTION TO FILE REPLY BRIEF

Petitioners submitted a motion to file a reply brief to respond to allegations raised by the city in its response brief challenging petitioners' standing and LUBA's jurisdiction. A reply brief accompanied the motion. Petitioners rely on Boom v. Columbia County, 31 Or LUBA 318 (1996), where we held that a reply brief was appropriate to respond to challenges to standing and jurisdiction that were raised for the first time in respondent's brief.

The city argues that a reply brief is not justified here because the issues discussed in the reply brief regarding standing and jurisdiction were already raised and thoroughly discussed by petitioners in their petition for review. We agree. Essential to our holding in Boom was the fact that the petition for review included only the facts establishing petitioners' standing and why the challenged decision was a land use decision, as required by OAR 661-10-030(4)(a) and (c). In Boom we noted that "such statements do not customarily include arguments intended to withstand challenges on those grounds." Id. at 319. The Boom rationale does not apply where, as here, the petition for review sets forth

twenty pages of argument related to anticipated challenges to standing and jurisdiction. The reply brief simply embellishes those arguments, and is therefore not allowed under OAR 661-10-039. Wissusik v. Yamhill County, 20 Or LUBA 246, 250 (1990).

The motion to file a reply brief is denied.

FACTS

The two decisions that are the subject of these consolidated appeals were adopted by the city on October 17, 1995 (1995 Ordinance) (LUBA No. 97-072) and August 6, 1996 (1996 Ordinance) (LUBA No. 97-073). Both decisions involve the city's adoption of standards and procedures for the development of manufactured home parks. Petitioners are the owners of a 15.88-acre undeveloped parcel that is zoned Mobile Home Park (MHP).

A. 1995 Ordinance

On September 24, 1995, the city provided notice, through publication in a local newspaper, of a public hearing to be held on October 3, 1995. The notice stated that the purpose of the public hearing was to hold a "first reading" of proposed revisions to the city's mobile home park ordinance. 97-072 Record 26. The city did not provide 45 days' prior notice to DLCD of the proposed amendment as required by ORS 197.610.

At the October 3, 1995 public hearing, the Mayor read the proposed ordinance, Article 29, by title only. 97-072 Record

23. Because there were no comments regarding the proposed adoption of Article 29, the hearing was closed. Id. Petitioners did not attend that hearing. On October 17, 1995, the city conducted a second reading of the ordinance. Again, petitioners did not attend and no public testimony was received. The ordinance was adopted by the city council at that meeting. 97-072 Record 21.

The city did not provide notice of adoption of the October 17, 1995 decision to the Department of Land Conservation and Development (DLCD) as required by ORS 197.615 until March 28, 1997.[1] 97-072 Record 28-30. After receiving the notice of adopted amendment from the city, DLCD mailed notice of the city's adopted amendments on April 3, 1997, identifying the appeal deadline for the 1995 decision as April 18, 1997. 97-072 Record 27. Petitioners filed their notice of intent to appeal to LUBA on April 18, 1997.

B. 1996 Ordinance

On December 14, 1995, attorneys for petitioners sent a letter to the city requesting "notice to our office of any council limited land use decision, whether legislative or quasi-judicial, that affects [petitioners'] property in

[1]The city originally provided notice to DLCD of the October 17, 1995 decision on February 21, 1997; however, the notice of adoption provided to DLCD on that date stated an adoption date of August 6, 1996. On March 28, 1997, the city sent DLCD a letter informing the agency that the notice of adoption erroneously stated the ordinance had been adopted on August 6, 1996 when, in fact, the ordinance was adopted on October 17, 1995. 97-072 Record 28. Attached to that letter, the city submitted a revised notice of adoption with a corrected adoption date of October 17, 1995 hand written in next to the incorrect date. 97-072 Record Record 29.

Lowell." 97-073 Record 74. On February 29, 1996, the city published notice in the local newspaper of a "public hearing meeting" to be held on March 5, 1996. 97-073 Record 73. The notice provided that the purpose of the meeting was to

> "discuss broad changes in Ordinance 38, Articles 10 and 29 to eliminate the Mobile Home Subdivision District, eliminate conflicts and redundancies, and enact new standards for mobile home parks." 97-073 Record 73.

On March 5, 1996, the city held the meeting that was the subject of the February 29, 1996 notice. That meeting was scheduled as a work session, and not as a public hearing. Id. at 68. However, petitioners appeared at the meeting and participated in the discussion regarding the proposed amendments. Appendix to Petition for Review (App) 6-109. At the end of the March 5, 1996 meeting, the Mayor announced that the proceeding would be continued until March 12, 1996. App 108-09.

On March 12, 1996, petitioners' attorney sent a letter to the city raising objections regarding the city's failure to provide 45 days' notice to DLCD of the proposed adoption of land use regulation amendments as required by ORS 197.610. 97-073 Record 65. The first reading of proposed Ordinance 173 occurred at the March 12, 1996 city council meeting, and the city canceled the second reading that had been scheduled for the following day.

On March 13, 1996, petitioners' attorney sent a letter to the city stating that petitioners' manufactured home park site

plan, which had been submitted to the city for development approval on March 11, 1996, was placed before the city council members at the March 12, 1996 meeting. Petitioners argued that the city appeared to be adopting standards that were applicable only to petitioners' property, and that the proceedings leading to the adoption of the proposed amendments were quasi-judicial in nature, requiring enhanced notice and comment procedures. 97-073 Record 49. On March 18, 1996, petitioners submitted another letter to the city in which they set forth numerous substantive objections to the proposed ordinance. 97-073 Record 44. Substantive comments were also submitted to the city by the Oregon Manufactured Housing Association. 97-073 Record 42.

The city submitted notice of the proposed amendments to DLCD on June 5, 1996, and scheduled a final public hearing on Ordinance 173 for August 6, 1996. 97-073 Record 6, 26. On July 14, 1996, the city published notice in the local newspaper of a public hearing to be held on July 23, 1996 for a first reading of Ordinance 173. The city did not provide individual notice of this public hearing to petitioners. At the hearing on July 23, 1996, the Mayor read the proposed ordinance by title. Petitioners did not attend the hearing, and there was no discussion of the proposed amendments. 97-073 Record 23.

The second and final reading of the Ordinance 173 was held on August 6, 1996. The city did not provide notice to

petitioners of the public hearing, and did not publish notice in the local newspaper. At the August 6, 1996 meeting, Ordinance 173 was read by title only, no comments were received, and the ordinance was adopted. 97-073 Record 21.

The city provided notice of the adopted amendments to DLCD on February 21, 1997. 97-073 Record 6. On February 25, 1997, DLCD issued a notice of adopted amendment stating a deadline for appeal to LUBA of March 14, 1997. 97-073 Record 75. In a letter from DLCD to the city dated March 20, 1997, DLCD stated that no notice of intent to appeal had been filed with LUBA by the March 14, 1997 deadline, and "[b]ecause the adoption of Ordinance 173 was not appealed to LUBA, it is now acknowledged under the Statewide Goals." 97-073 Record 6. Petitioners filed their notice of intent to appeal to LUBA on April 18, 1997.

PRELIMINARY ISSUES

Petitioners make two preliminary assertions that bear directly on our disposition of this appeal. First, petitioners assert that, at least for purposes of determining pertinent issues regarding standing and jurisdiction, the two challenged decisions should be treated as a single decision. Second, petitioners contend that the challenged decisions are quasi-judicial in nature, rather than legislative.

A. Number of Decisions on Review

Petitioners argue that the city treated the two challenged decisions as a single decision in its dealings with

DLCD, and also point out that DLCD, in its treatment of the two ordinances, assigned a single file number to both decisions. Petitioners assert that the 1995 and 1996 Ordinances were actually part of a single land use decision process for purposes of DLCD and LUBA review.

Petitioners rely on the fact that the notice of adoption provided by the city on February 21, 1997 to DLCD regarding the 1995 Ordinance initially stated the date of adoption as August 6, 1996, which is actually the date of adoption of the 1996 Ordinance. 97-072 Record 29. However, the city subsequently corrected this error, and on March 28, 1997 resubmitted the notice of adoption with the corrected date of October 17, 1995 interlineated on the document. 97-072 Record 28-29.

The city responds, and we agree, that the discrepancies pointed out by petitioners are not sufficient to merge the two separate and independent decision-making proceedings into a single process for purposes of our review. The 1995 Ordinance was adopted by the city on October 17, 1995, and created certain standards and procedures for the development of mobile home parks. 97-072 Record 6. Seventeen months later, as the culmination of a separate proceeding, the city adopted the 1996 Ordinance, which by its terms repealed and replaced the 1995 Ordinance. 97-073 Record 7. While petitioners are correct that the city's belated attempts at compliance with ORS 197.610 and 197.615 do not present a model of procedural

clarity, it is sufficiently clear from the record that the notices ultimately provided to DLCD were for two different ordinances. The fact that DLCD assigned the same number to the two ordinances does not convert them into a single decision for purposes of our review.

B. Nature of Challenged Decisions

Petitioner next contends that the processes leading to the adoption of the 1995 and 1996 Ordinances were quasi-judicial in nature, and therefore the city was required to apply the procedural standards set forth in ORS 197.763 in the course of the proceedings below. Our consideration of this issue is based upon the factors identified by the Oregon Supreme Court in Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), and addressed by the following three questions:

1. Is "the process bound to result in a decision?"

2. Is "the decision bound to apply preexisting criteria to concrete facts?"

3. Is the action "directed at a closely circumscribed factual situation or a relatively small number of persons?"

The more definitely these questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. The answer to each of the questions must be weighed; no single answer is determinative. Estate of Paul Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987).

1. 1996 Ordinance

Petitioners first point out that the process leading to the adoption of the 1996 Ordinance was initiated by petitioners' neighbor, who prepared the first draft of the amendments creating new standards and procedures for the development of a mobile home park on petitioners' property. See App 6, 43. Thus, petitioners argue that the process was initiated as a result of one particular neighbor's "application" for the amendments, and that the process was bound to result in a decision because "[t]he city was bound to either accept petitioners' neighbor's proposed amendments or to reject them." Petition for Review 8.

Although petitioners appear to be correct that one neighboring property owner drafted the 1996 Ordinance and spearheaded its passage, these facts do not transform the proposed amendments to the city code into an "application" that is bound to result in a decision. Petitioners have not identified any section of the applicable local procedures or other law that would require a formal decision on a proposal to amend a city ordinance. The city could at any time have stopped the proceedings that led to the adoption of the 1996 Ordinance. The process was not "bound to result in a decision," and the first question must be answered in the negative.

Second, petitioners assert that the city's decision was bound to apply preexisting criteria to concrete facts. As we have repeatedly noted, the second Strawberry Hill factor is

present to some extent in nearly all land use decisions, which almost invariably apply preexisting criteria to concrete facts. Valerio v. Union County, ___ Or LUBA ___ (LUBA No. 97-150, October 27, 1997); Churchill v. Tillamook County, 29 Or LUBA 68, 71 (1995). As in the cited cases, the second factor is present in this case because amendment of the city's land use regulations must comply with the Statewide Planning Goals and the local comprehensive plan. However, we have stated that lesser weight should be attributed to this factor where the challenged decision establishes new policy objectives for the local government. Andrews v. City of Brookings, 27 Or LUBA 39, 42 (1994); McInnis v. City of Portland, 27 Or LUBA 1, 7 (1994). The 1996 Ordinance adopts new standards and procedures applicable to the development of mobile home parks within the city; as such, the decision establishes new policies for the local government.

Regarding the third factor, petitioners allege that the 1996 Ordinance is directed at a narrow factual situation and a small number of persons because it is specifically directed only at petitioners' property:

> "The findings for the 1996 decision establish the subject property is the only property to which the new mobile home park standards apply, stating 'The City has zoned 15.88 acres of land for mobile home park usage.' 97-073 Record 91. Petitioners' property is exactly 15.88 acres in size." Petition for Review 10.

The city does not dispute petitioners' contention that petitioners own the only undeveloped parcel of property within

the city that is currently zoned MHP.[2] The fact that the challenged code amendments were initiated and drafted by petitioners' neighbor also suggests that the purpose of the 1996 Ordinance was to regulate petitioners' proposed development of their property as a mobile home park.[3] On March 11, 1996, petitioners submitted a mobile home park site plan for development approval. See 97-073 Record 49. After the March 12, 1996 city council meeting, petitioners argued that the proceedings had become quasi-judicial in nature, pointing to the fact that copies of their mobile home park site plan were on the table in front of the council members during the meeting. 97-073 Record 49.

The city responds that the decision was not directed at a narrow factual situation or a small number of persons because the standards and procedures adopted by the city will apply to any property that is or will be zoned MHP. Because the challenged decision affects an entire zone that could be expanded in the future, the city argues, the third Strawberry Hill factor is not met under this Board's decision in Waite v. City of LaGrande, 31 Or LUBA 77 (1996). In Waite, we held

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[2]There is an additional parcel within the city zoned MHP with a developed mobile home park. App 51-52. Documents cited by the city suggest that the park is .32 acres in size. App 280.

[3]At the outset of the March 5, 1996 work session on the proposed amendments, the Mayor stated:

> "Then after we have all asked our questions what we would like to do is give [petitioner's neighbor] and [petitioner] * * * five minutes apiece * * * since they are the ones primarily affected by this Ordinance." App 6.

that a decision amending the city's development code to allow solid waste transfer facilities in an M-2 zone was a legislative decision:

> "The amendment affects an entire zone and may well reflect a policy determination that there is a need to site waste transfer facilities somewhere within the city's urban growth boundary. Even if a relatively small area is presently zoned M-2, that area could be expanded in the future. Therefore, it seems unlikely, if not impossible, that the amendment should be viewed as 'directed at a closely circumscribed factual situation or a relatively small number of persons.'" Id. at 82.

As in Waite, the challenged decision affects an "entire zone" within the city. In this case, the MHP zone is almost entirely comprised of petitioners' undeveloped parcel. Petitioners contend that, because the 1996 Ordinance applies almost exclusively to their single parcel, the third Strawberry Hill factor is controlled by our decision in Dean v. City of Oakland, ___ Or LUBA ___ (LUBA No. 96-253, August 21, 1997).

In Dean, the petitioner submitted an application requesting an amendment to the city's comprehensive plan expanding the allowable uses in the city's general industrial zone to include "tourist related activities." Id. at slip op 1. Petitioner's amendment would have allowed petitioner to convert certain of his properties into a proposed recreational vehicle (RV) park. The application included a detailed description of how the petitioner's proposed RV park would comply with applicable criteria. The city denied petitioner's application, and argued that its decision was not appealable

to LUBA under ORS 197.620(1) because it was a decision not to adopt a legislative amendment. This Board disagreed, concluding that the decision was quasi-judicial. Regarding the third Strawberry Hill factor, we held:

> "[T]he challenged decision in this case focuses so heavily on the specific details of petitioner's proposed RV park and the characteristics of his parcels relative to his proposed use that we conclude the decision was directed at a narrow factual situation, affecting few persons." Dean at slip op 6.

Petitioners are correct that the standards and procedures adopted by the city in the 1996 Ordinance apply, at present, almost exclusively to petitioners' property. However, unlike Dean, we are directed to no evidence indicating that the city's decision hinged on the specific details of petitioner's proposed mobile home park. In Dean, the city's decision not to expand the allowable uses in its industrial zone was based on a specific development proposal submitted by the petitioner. The mere presence of petioners' site plan before the council members during the March 12, 1996 meeting does not compel the same conclusion in this case.

The 1996 Ordinance implements standards and procedures that affect the entire MHP zone; although a relatively small area is currently zoned MHP, that area could be expanded in the future. While the challenged ordinance currently affects a relatively small number of persons, due in part to the relatively small size of the City of Lowell, we believe the decision would be incorrectly characterized as being "directed

at" a relatively small number of persons. Rather, the facts relied upon by the parties more strongly suggest that the city's decision is directed at the city's policies regarding the regulation of its entire MHP zone.

We conclude that the third Strawberry Hill factor is controlled by our decision in Waite, and the 1996 Ordinance is not directed at a closely circumscribed factual situation or a relatively small number of persons. Because only the second factor is answered in the affirmative, we conclude that the city's decision amending its mobile home park ordinance is a legislative land use decision, and the notice and hearing requirements of ORS 197.763 do not apply.

2. 1995 Ordinance

At various points in their brief, petitioners assert that the process leading to the adoption of the 1995 Ordinance was also quasi-judicial in nature. However, petitioners do not present sufficient analysis regarding the three Strawberry Hill factors for us to determine that the 1995 Ordinance was anything but legislative in nature.

STANDING

A. 1995 Ordinance

Intervenors contend that petitioners lack standing to challenge the 1995 Ordinance because they did not participate in the local proceedings leading to the adoption of that

ordinance as required by ORS 197.620(1).[4]

Petitioners do not dispute that they did not participate in the 1995 proceedings, but present several arguments asserting why they have standing to appeal the 1995 Ordinance. First, petitioners assert that the two challenged decisions were part of a single proceeding, and petitioners have standing because they participated in the proceedings leading to the 1996 Ordinance. Next, petitioners contend that the decision was quasi-judicial in nature, and petitioners were not provided the requisite notice under ORS 197.763(2)(a)(A). We have already rejected these two arguments, and do not revisit them here.

Petitioners further contend that they have standing to appeal the 1995 Ordinance under ORS 197.620(2), which provides that a person who did not appear during the local proceedings leading up to the adoption of a land use regulation amendment may still appeal that decision to LUBA if the adopted amendment

> "differs from the proposal submitted under ORS 197.610 to such a degree that the notice under ORS 197.610 did not reasonably describe the nature of the local government final action." ORS 197.620(2).

Petitioners argue that because the city failed to provide

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[4]ORS 197.620(1) provides, in relevant part:

> "Notwithstanding the 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."

notice of the proposed amendments to DLCD prior to the final hearing as required by ORS 197.610(1), the nonexistent notice did not "reasonably describe" the nature of the city's final action, and the ORS 197.620(2) exception to the appearance requirement applies.

We agree. In the course of adopting the 1995 Ordinance, the city never provided DLCD with notice of the proposed amendments as required by ORS 197.610(1). The only notice provided by the city to DLCD regarding the 1995 Ordinance was the notice of adopted amendment required by ORS 197.615(1), which was not submitted until March 28, 1997, seventeen months after the amendments were adopted. 97-072 Record 28-30. In Williams v. Clackamas County, 27 Or LUBA 602 (1994), we recognized that, in the context of a challenge to a post-acknowledgment land use regulation amendment, "[p]etitioners * * * may be excused from failing to appear during the local proceedings if * * * the notice of the proposed amendment given under ORS 197.610 did not reasonably describe the nature of the local government's final decision (ORS 197.620(2)) * * *." Where, as here, the local government provides no prehearing notice of proposed amendment as required by statute, there is no reasonable description of the nature of the local government's proposed decision, and the exception to the appearance requirement set forth in ORS 197.620(2) applies.

We conclude that petitioners have standing to challenge

the 1995 Ordinance.

B. 1996 Ordinance

The city contends that petitioners do not have standing to challenge the 1996 Ordinance because petitioners did not file their notice of intent to appeal within 21 days after the date the decision became final as required by ORS 197.830(8). This argument is more accurately described as a jurisdictional challenge, and is addressed below. Regarding petitioners' standing, petitioners appeared during the local proceedings and filed a notice of intent to appeal as required by ORS 197.830(1). Petitioners have standing to challenge the 1996 Ordinance.

JURISDICTION

Under the second sentence of ORS 197.830(8), a notice of intent to appeal land use regulation amendments processed pursuant to ORS 197.610 to 197.625 "shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615." ORS 197.615(2) provides:

> "Not later than five working days after the final decision, the local government also shall mail or otherwise submit notice to persons who:
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> "(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."

A. 1996 Ordinance

The city's decision adopting the 1996 Ordinance was final on August 6, 1996. Petitioners' appeal was filed on April 18, 1997. Petitioners contend that this Board has jurisdiction over their appeal of the 1996 Ordinance because they requested notice from the city, and the city never provided petitioners with the notice required by ORS 197.615(2). On December 14, 1995, petitioners' attorney sent a letter to the city council requesting "notice to our office of any council limited land use decision, whether legislative or quasi-judicial, that affects [petitioners'] property in Lowell." 97-073 Record 74. The city did not provide notice to petitioners of the August 6, 1996 decision. Petitioners assert that they did not obtain actual notice of the city's decision until April 1, 1997, and filed their appeal within 21 days after that date.

The city responds that petitioners were not entitled to notice under ORS 197.615(2) because the letter sent by petitioners' attorney on December 14, 1995 requested notice of any limited land use decisions affecting petitioners' property, and the 1996 Ordinance was a land use decision, not a limited land use decision. The city points out that the proceedings leading to the adoption of the 1996 Ordinance had not yet been proposed on December 14, 1995, and asserts that petitioners' letter was most likely submitted in the context of the site review application that petitioners were preparing to submit to the city.

A similar situation arose in Club Wholesale v. City of Salem, 19 Or LUBA 576 (1990), which involved a challenge to the city's adoption of an ordinance amending its comprehensive plan map and zoning map designations for property that was owned by the intervenor. In that case, after the first reading of the ordinance but before the final decision, the petitioner's attorney wrote to the city requesting "a copy of that ordinance." Id. at 580. The decision became final on March 26, 1990, and the city did not provide the petitioner with notice of the decision. The petitioner appealed to LUBA on April 23, 1990, and the city moved to dismiss for lack of jurisdiction, arguing that the appeal was not timely filed under ORS 197.830(8). The petitioner argued that the ordinance did not become final for purposes of appeal to LUBA until the notice required by ORS 197.615(2) was provided, and because the petitioner never received such notice, the appeal was timely.

The city's response to the petitioner's argument in Club Wholesale was similar to the city's response in the present case. The city argued that the petitioner was not entitled to the notice required by ORS 197.615(2) because the request for notice was insufficient, as it requested a copy of the decision, and not the notice of decision required by statute. This Board denied the motion to dismiss, holding that petitioner's request was sufficient:

> "In view of the remedial nature of ORS 197.615(2), we believe it elevates form over substance to argue

> petitioner failed to satisfy ORS 197.615(2)(a)(B) simply because its written request was for the 'decision' rather than 'notice of the decision.' See Ludwick v. Yamhill County, supra, 10 Or LUBA at 448 (construction of statutes governing rights of appeal in a manner that would forfeit the right of appeal is not favored). The detailed notice requirements of ORS 197.615(2) were adopted by the legislature to ensure that potential appellants are advised of their appeal rights. The literal reading and application of ORS 197.615(2)(a)(B) advanced by respondents is inconsistent with the clear legislative intent that potential appellants, who may not be familiar with the statutes governing appeals of land use decisions, are to be given timely notice that an appealable decision has been adopted and basic information about how to go about appealing that decision." Club Wholesale, 19 Or LUBA at 581.

We believe the analysis set forth in Club Wholesale applies to the facts currently before this Board, and that petitioners' December 14, 1995 notice request was sufficient to require notice of the final decision on the 1996 Ordinance. As we stated in Club Wholesale, given the remedial nature of ORS 197.615(2), we believe it would elevate form over substance to hold that petitioner failed to satisfy ORS 197.615(2)(a)(B) simply because the written request was for notice of a "limited land use decision" rather than a "land use decision."

Further, the city's assertion that petitioners' notice request was actually submitted as part of a different proceeding cannot be reconciled with the fact that the city included the December 14, 1995 letter as part of the record of this proceeding. 97-073 Record 74. Thus, we must assume the notice request was placed before the decision makers during

the course of the city's proceedings leading to the adoption of the challenged ordinance. See OAR 661-10-025(1).

Because the city did not provide petitioners with the requisite notice under ORS 197.615(2), their notice of intent to appeal is timely under the second sentence of ORS 197.830(8). Ludwick v. Yamhill County, 72 Or App 224, 229-230, 696 P2d 536, rev den 299 Or 443 (1985); Barton v. City of Lincoln City, 29 Or LUBA 612, 614-15 (1995); Club Wholesale, 19 Or LUBA at 583.

B. 1995 Ordinance

The 1995 Ordinance was an amendment to the city's land use regulations, subject to the post-acknowledgment procedures set forth in ORS 197.610 through 197.625. The city failed to provide notice of the proposed amendments to DLCD 45 days prior to the final hearing as required by ORS 197.610(1), and failed to provide notice of adoption to DLCD within five days after the decision as required by ORS 197.615(1). The city's decision was adopted on October 17, 1995, but a correct notice of adoption was not provided to DLCD until March 28, 1997. The city did not provide notice of decision to petitioners. After receiving notice from the city, DLCD issued a notice of adopted amendment on April 3, 1997 stating a deadline to appeal to LUBA of April 18, 1997. Petitioners filed their notice of intent to appeal on April 18, 1997. Petitioners' appeal of the 1995 Ordinance was timely filed.

This Board has jurisdiction to consider both appeals.

REMAND OF 1995 ORDINANCE

The city concedes that if this Board reaches the merits of the city's decision adopting the 1995 Ordinance, that decision is subject to remand as a result of the city's violation of the prehearing notice requirement of ORS 197.610(1). See Oregon City Leasing, Inc. v. Columbia County, 121 Or App 173, 177, 854 P2d 495 (1993); Western PCS, Inc. v. City of Lake Oswego, ___ Or LUBA ___ (LUBA No. 96-260, July 16, 1997), slip op 12.

When the city adopted the 1996 Ordinance, it repealed and replaced the 1995 Ordinance in its entirety. 97-073 Record 7. Accordingly, we see no reason to make a determination regarding petitioners' substantive challenges to the 1995 Ordinance. The city's decision adopting the 1995 Ordinance, which is the subject of LUBA No. 97-072, is remanded for failure to provide DLCD with notice of proposed amendment as required by ORS 197.610(1).

SCOPE OF LUBA REVIEW OF 1996 ORDINANCE

Petitioners contend that the 1996 Ordinance is reviewable for compliance with the statewide planning goals under ORS 197.835(6) because it amends the city's comprehensive plan. Petitioners are incorrect. Petitioners' argument is based on the fact that the challenged decision amends a document entitled "Comprehensive Zoning Plan of the City of Lowell." However, that document is clearly the city's zoning code. See generally App 162-189. The city's comprehensive plan is set

forth in a separate document entitled "Lowell Comprehensive Land Use Plan." App 206.

Petitioners further contend that, under ORS 197.835(7)(b), LUBA must review the 1996 Ordinance for compliance with the statewide planning goals because the challenged decision does not implement specific comprehensive plan policies.[5] The city concedes that the 1996 Ordinance does not implement specific plan policies. Response Brief 24. Accordingly, this Board has authority under ORS 197.835(7)(b) to reverse or remand the city's decision amending its land use regulations if the decision does not comply with the goals or the administrative rules adopted by LCDC implementing the goals. Churchill v. Tillamook County, 29 Or LUBA 68, 72-73 (1995); Opus Development Corp. v. City of Eugene, 28 Or LUBA 670, 677-78 (1995) (quoting 1000 Friends of Oregon v. Marion County, 27 Or LUBA 303, 305-06 (1994)).

FIFTH ASSIGNMENT OF ERROR

Petitioners contend that, in adopting the 1995 and 1996 Ordinances, the city failed to comply with statutory and local

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[5]ORS 197.835(7) provides, in relevant part:

> "(7) The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:
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> "* * * * *
>
> "(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."

procedural requirements.

A. 1995 Ordinance

We have already determined that the 1995 Ordinance must be remanded due to the city's failure to comply with ORS 197.610 and 197.615.

B. 1996 Ordinance

Petitioners contend that the city failed to comply with LZC 25.05(a), which requires the city to provide notice of land use regulation amendments "by one publication in a newspaper of general circulation in the City not more than 20 days nor less than 10 days within which the meeting is to be held." App 173. Petitioners argue that the notice published by the city regarding the first reading of the 1996 Ordinance on July 23, 1996 was not published until July 14, 1996, which is only nine days before the meeting. Petitioners also argue that the city did not publish any notice of the final reading of the 1996 Ordinance on August 6, 1996, and that these procedural errors prejudiced petitioners' substantial rights because they were denied the opportunity to participate further in the proceeding, and were not provided notice of their appeal rights. Petitioner for Review 43. Although petitioners appeared and provided substantial input at the March 5, 1996 and March 12, 1996 meetings, petitioners did not attend either the July 23, 1996 meeting or the final meeting on August 6, 1996.

The city concedes that it provided only nine days' notice

by publication of the July 23, 1996 meeting and that it provided no notice of the August 6, 1996 meeting, thereby violating the provisions of LZC 25.05. However, under ORS 197.835(9)(a)(B), this Board may reverse or remand a local decision based on a local government's failure to comply with applicable notice requirements only if the defect prejudices a petitioner's substantial rights. Thomas v. Wasco County, 30 Or LUBA 142 (1995). The city argues that petitioners' substantial rights were not prejudiced because petitioners "actively participated in the adoption process for the 1996 Ordinance" during their appearances at the meetings in March 1996, and the city did not make any changes to the ordinance after the last meeting that petitioners attended. Response Brief 30.

We disagree. The city's failure to provide notice of the August 6, 1996 meeting as required by local ordinance effectively denied petitioners their right to participate in the process. In Thomas, we noted that "[i]f the county's procedural error deprived petitioner of the opportunity to participate in the process, his substantial rights were violated." Id. at 145; Wicks-Snodgrass v. City of Reedsport, 32 Or LUBA ___, ___ (LUBA No. 95-240, January 16, 1997), slip op 9-10, rev'd on other grounds, 148 Or App 217 (1997). We conclude that the city's failure to publish notice of the final hearing on August 6, 1996 as required by LCZ 25.05(a) deprived petitioners of the opportunity to participate in the

process before the city, thereby violating their substantial rights.

This subassignment of error is sustained.

C. ORS 197.763

Petitioners contend that the city failed to comply with the notice procedures for quasi-judicial proceedings, in violation of ORS 197.763. We have already determined that the city's adoption of the 1996 Ordinance was a legislative decision; accordingly, the provisions of ORS 197.763 are inapplicable.

This subassignment of error is denied.

The fifth assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the 1996 Ordinance violates Statewide Planning Goal 10 and needed housing statutes.[6] The essence of petitioners' argument is that the challenged decision constructively eliminates the MHP zone by adopting a 7,000 square foot minimum lot size for mobile home parks. According to petitioners, the 7,000 square foot minimum lot size is too large for a mobile home park to be economically practical. Because the ordinance effectively precludes the development of a mobile home park within the city, petitioners argue, the city has eliminated one element of its needed

[6]In substance, the first assignment of error alleges violations of Goal 10, while violations of ORS 197.307 and other "needed housing" statutes are alleged in petitioners' eighth assignment of error.

housing inventory without making the requisite findings under Goal 10.

We concluded above that because of the city's failure to comply with local notice requirements, petitioners were effectively denied an opportunity to participate in the local proceedings. Because the evidentiary record may be expanded by additional proceedings before the city on remand, it would be premature for this Board to address petitioners' evidentiary challenges. See Spencer Creek Neighbors v. Lane County, ___ Or LUBA ___, ____ (LUBA No. 96-079, January 31, 1997), slip op 11.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that the 1996 Ordinance violates provisions of the city's comprehensive plan, including a provision that states: "Mobile home parks shall be encouraged and adequate standards for this type of development provided." App 233. Petitioners argue:

> "The restrictive provisions in the challenged action described above do not 'encourage' mobile home park development. To the contrary, the only evidence in the record [the letter from the Oregon Manufactured Housing Association] states that the restrictions make it economically impossible to develop a mobile home park in the city." Petition for Review 35-36.

We understand the second assignment of error to present evidentiary challenges. As with the first assignment of error, because the evidentiary record may be expanded by the city on remand, we do not address petitioners' evidentiary challenges at this time.

THIRD ASSIGNMENT OF ERROR

Petitioners contend "the city violated Goal 1 by failing to provide meaningful public input into this land use planning process and follow the acknowledged citizen involvement process." Petition for Review 37.

Goal 1 (Citizen Involvement) requires a local government to adopt a citizen involvement program (CIP). Where amendments to a local government's comprehensive plan or land use regulations do not amend or affect the local government's acknowledged CIP, as is the case here, the only way a petitioner can demonstrate a violation of Goal 1 is by demonstrating a failure to comply with the acknowledged CIP. Churchill, 29 Or LUBA at 73; Wade v. Lane County, 20 Or LUBA 369, 376 (1990). Petitioners allege violations of the city's CIP in their fourth assignment of error.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend that the city violated provisions of its citizen involvement program that require a public hearing before the Citizens' Planning Advisory Committee and the Planning Commission prior to the adoption of any amendment to the city's comprehensive plan. As we previously explained, neither of the challenged decisions amended the city's comprehensive plan; therefore, the plan provisions relied upon by petitioners do not apply.

The fourth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners contend that the 1996 Ordinance was adopted without disclosing certain ex parte contacts as required by ORS 227.180(3). However, that statute applies to local governments acting on an application in a quasi-judicial capacity. Because the challenged decision was a legislative decision, the statutory provisions requiring disclosure of ex parte contacts do not apply. Union Station Bus. Community Assoc. v. City of Portland, 14 Or LUBA 556, 559-60 (1986).

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioners contend that the 1996 Ordinance "unlawfully restricts housing opportunities" because the decision distinguishes between single-wide manufactured homes and double-wide manufactured homes. Petitioners argue that, based on the definitions of "manufactured dwellings" set forth in ORS 446.003, "the challenged decisions impermissibly limit access to both single and double wide housing." Petition for Review 48-49.

This Board is authorized to reverse or remand a local government decision where the decision improperly construes applicable law. ORS 197.835(9)(a)(D). Petitioners do not explain why the statutory definition of "manufactured dwelling" is applicable to the city's decision, and do not adequately explain how the city's decision improperly construes the statute. Petitioners do not allege any specific

violation of applicable law. This assignment of error presents no legal basis upon which this Board has authority to reverse or remand the local decision.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioners allege that the city's decision violates ORS 197.307(6), which provides:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

Petitioners argue that the city's procedural errors in adopting the 1996 Ordinance, together with the restrictive standards set forth in the ordinance, have operated to "significantly increase the cost to petitioners of developing a mobile home park on the subject property." Petition for Review 50.

Petitioners cite no evidence in the record supporting their assertion that the standards and procedures adopted by the city will discourage needed housing by causing "unreasonable cost" to petitioners. However, as with the first and second assignments of error, because petitioners may expand the evidentiary record on this issue on remand, it would be premature for this Board to address this assignment of error.

The city's decision is remanded.