BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTHWEST AGGREGATES COMPANY,
*Petitioner,*

vs.

CITY OF SCAPPOOSE,
*Respondent.*

LUBA No. 99-195

FINAL OPINION
AND ORDER

Appeal from City of Scappoose.

Ty K. Wyman, Portland, and Steven W. Abel, Portland, filed the petition for review. With them on the brief was Stoel Rives. Ty K. Wyman argued on behalf of petitioner.

Jeffrey J. Bennett, Portland, and E. Andrew Jordan, Portland, filed the response brief. With them on the brief was Tarlow, Jordan and Schrader. Jeffrey J. Bennett argued on behalf of respondent.

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

AFFIRMED 06/23/2000

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

Opinion by Bassham.

## NATURE OF THE DECISION

Petitioner appeals the city's legislative decision adopting an amended Transportation System Plan (TSP).[1]

## FACTS

The challenged decision in this case was adopted on remand from LUBA. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998) (*Northwest Aggregates*). The following passage from *Northwest Aggregates* describes the relevant history:

> "Petitioner operates an aggregate mining facility outside the city's urban growth boundary, near the Scappoose Industrial Airpark (Airpark). The city recently annexed the Airpark, bringing it within the city limits. The Airpark is operated by the St. Helens Port Authority, which in 1991 adopted the Scappoose Industrial Airpark Master Plan (Airpark Plan). The Airpark Plan was approved by the Columbia County planning commission in August 1991, and updated in 1995. The Airpark Plan requires 'Safety Compatibility Zones' oriented along the approach and takeoff paths for aircraft.
>
> "In 1997, the city drafted a comprehensive Transportation System Plan (TSP) in order to comply with the Transportation Planning Rule (TPR) at OAR chapter 660, division 12. The TPR requires the city to include an air transportation plan for any airports within its jurisdiction, and permits one jurisdiction to incorporate by reference the transportation plan of another jurisdiction. By reference, the city's TSP incorporates, unchanged, the 1991 Airpark Plan developed by the St. Helens Port Authority." 35 Or LUBA at 31-32 (footnote omitted).

In *Northwest Aggregates*, LUBA remanded the city's decision adopting the TSP to address whether the 1991 Airpark Plan met the requirements of the Airport Planning Rule

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[1]The challenged decision, literally read, merely adopts *amendments* to the city's TSP. As petitioner correctly notes, and as explained below, the city's earlier decision adopting the TSP was remanded to the city and thus is not acknowledged under ORS 197.625 and is not part of the city's acknowledged comprehensive plan. Petitioner assumes, and the city does not dispute, that the intent of the challenged decision was to readopt the TSP, as amended, into the city's comprehensive plan. We follow the parties in assuming that the challenged decision has that intent and that effect.

1 (APR) at OAR 660-013-0010 to 660-013-0160.[2]

2 On remand, the city conducted hearings on December 7, 1998, March 15, 1999, and
3 July 19, 1999, which were limited to the issue of whether the city's TSP complies with the
4 APR. On September 20, 1999, the city council instructed planning staff to draft amendments
5 to the TSP and set the matter for hearing. The proposed amendments remove the
6 incorporation of the 1991 Airpark Plan from the TSP, and add text and a map that identifies
7 the location and extent of the Scappoose Industrial Airpark. The city council held hearings
8 on the proposed amendment on November 4, 1999, and November 15, 1999. On December
9 6, 1999, the city council approved those amendments as Ordinance 692. This appeal
10 followed.

11 **FIRST ASSIGNMENT OF ERROR**

12 Petitioner argues that the city erred in failing to apply and demonstrate compliance
13 with the APR. Petitioner argues that, pursuant to OAR 660-013-0160(5), the APR applies to
14 the challenged decision because the decision amends the city comprehensive plan provisions
15 affecting the Airpark without achieving "full compliance" with the APR.[3] Petitioner

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[2]In the interim between *Northwest Aggregates* and the city's decision on remand, the Land Conservation and Development Commission (LCDC) amended the APR, effective February 12, 1999. We need not decide which version of the APR applies to the city's decision on remand, because the parties appear to agree that the 1999 amendments did not change the substantive provisions of the APR that are relevant to the city's decision on remand. Accordingly, we follow the parties in citing to the 1999 version of the APR.

[3]OAR 660-013-0160 provides in relevant part:

> "This division applies as follows:
>
> "(1) Local government plans and land use regulations shall be updated to conform to this division at periodic review, except for provisions of Chapter 859, OR Laws 1997 that became effective on passage. * * *
>
> "(2) Amendments to plan and land use regulations may be accomplished through plan amendment requirements of ORS 197.610 to 197.625 in advance of periodic review where such amendments include coordination with and adoption by all local governments with responsibility for areas of the airport subject to the requirements of this division.

1 contends that the amended provisions are not the same as the requirements they replace, and
2 thus the city's decision does not fall within the exception in the last clause of OAR 660-013-
3 0160(5).

4 The unamended TSP contains two paragraphs of text under the heading "Air
5 Service." The challenged decision removes the following paragraph from the TSP:

6 "The Scappoose Industrial Airpark is governed by the 1991 Scappoose
7 Industrial Airpark Master Plan and subsequent updates included as Appendix
8 F attached hereto and incorporated herein." Record II 29.[4]

9 The challenged decision replaces that text with the following:

10 "A map which identifies the location of the Scappoose Industrial Airpark and
11 all areas within the airpark imaginary surface is attached hereto and
12 incorporated herein as Appendix F. The City acknowledges that, as of the
13 date of this amendment, a portion of the Scappoose Industrial Airpark
14 imaginary surfaces lie outside the corporate boundaries of the City of
15 Scappoose and the Scappoose Urban Growth Boundary." Record II 6.

16 The map referenced in Appendix F is a map of the Airpark and its imaginary surfaces taken
17 from the 1991 Airpark Plan.[5] In the challenged decision, the city explains why it chose to
18 remove the 1991 Airpark Plan from the TSP and replace it with the above-quoted text and
19 map:

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"(3) Compliance with the requirements of this division shall be deemed to satisfy the requirements of Statewide Planning Goal 12 (Transportation) and OAR 660, Division 12 related [to] Airport Planning.

"* * * * *

"(5) Notwithstanding the provisions of OAR 660-013-0140 *amendments to acknowledged comprehensive plans and land use regulations, including map amendments and zone changes, require full compliance with the provisions of this division, except where the requirements of the new regulation or designation are the same as the requirements they replace*." (Emphasis added.)

[4]The record of this appeal includes the record of the original proceedings, which we cite as "Record I," and the record of the proceedings on remand, consisting of a record and a supplemental record, which we cite as "Record II" and "Supplemental Record," respectively.

[5]As explained in *Northwest Aggregates*, "imaginary surfaces" are parts of the flight paths for approaching and departing aircraft. 35 Or LUBA at 39 n 3.

"The basis for Northwest Aggregates' appeal, and the basis for LUBA's decision that the [APR] applied to the City's adoption of its [TSP], was the incorporation of the entire Airpark Master Plan into the [TSP]. Northwest Aggregates' fundamental argument was that the Airpark Master Plan did not satisfy the requirements of the [APR].

"There is no requirement that the City adopt the Airpark Master Plan at this time. * * * Staff proposes that the City Council remove the language from Ordinance 658 that incorporates the Scappoose Industrial Airpark Master Plan into the [TSP]. The removal would simplify compliance with the [TPR] and facilitate adoption of the [TSP]. The purpose of the proposed amendment to the Scappoose [TSP], attached as Exhibit A and incorporated herein, is to implement this recommendation. Compliance with all other requirements of the [TSP] has been previously demonstrated in findings adopted by the Scappoose City Council in Scappoose Municipal Ordinance 658.

"The [APR] is a separate set of regulations codified as OAR 660, Division 13. The City will address compliance with these requirements separate from compliance with the [TPR], and at the time required in ORS 836.610.

"Based on these findings, the Scappoose [TSP] amended as set forth in the attached Exhibit A complies with OAR 660-012-0020(2)." Record II 28-9 (emphasis in original).

Petitioner disputes the city's premise in these findings, that it can adopt the challenged amendments without demonstrating that the city's legislation complies with the APR. Petitioner explains that the Scappoose Comprehensive Plan (SCP) has long incorporated an earlier version of the Airpark Plan, dated 1975-76. That version of the Airpark Plan was adopted at a time when the Airpark was one mile outside the city limits. Petitioner argues that because the 1975-76 Airpark Plan and the SCP fail to acknowledge that the airport is now located within the city, the above-quoted textual changes to the TSP impose different "requirements" than the ones they replace. Consequently, petitioner argues, the city's decision does not fall within the exception at OAR 660-013-0160(5) and the city must therefore demonstrate that its legislation fully complies with the APR.

The city responds that the SCP and 1975-76 Airpark Plan depict the location of the Airpark, and the challenged amendments merely add text and a map at Appendix F that depict the Airpark at the same location. The city also points out that the map attached to its

1 Airport Overlay District and the map at Appendix F reflect the same runway protection zones
2 and imaginary surfaces. Consequently, the city argues, whatever requirements the
3 challenged decision adds merely duplicate existing requirements in the city's legislation, and
4 thus the city's decision falls within the exception at OAR 660-013-0160(5).

5 We agree with the city. OAR 660-013-0160 prescribes the circumstances under
6 which the APR applies. The starting point is OAR 660-013-0160(1), which generally
7 requires local governments to conform to the APR during periodic review. *See* n 3.
8 OAR 660-013-0160(2) allows a local government to amend its plan and land use regulations
9 with respect to an airport within its jurisdiction in advance of periodic review, if the local
10 government coordinates with other local governments having responsibility for the area of
11 the airport. OAR 660-013-0140 provides a "safe harbor" that allows a local government to
12 rely on those portions of existing acknowledged comprehensive plans and land use
13 regulations that contain specific provisions relating to APR requirements, even if those
14 provisions do not comply with APR requirements.[6] OAR 660-013-0160(5) provides that,
15 notwithstanding those safe harbor provisions, amendments to plan and land use regulations
16 require full compliance with the APR, unless the "requirements of the new regulation or
17 designation are the same as the requirements they replace." Read in this context, it is

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[6]OAR 660-013-0140 provides in relevant part:

> "A 'safe harbor' is a course of action that satisfies certain requirements of this division. Local governments may follow safe harbor requirements rather than addressing certain requirements in these rules. The following are considered to be 'safe harbors':
>
> "(1) Portions of existing acknowledged comprehensive plans, land use regulations, Airport Master Plans and Airport Layout Plans adopted or otherwise approved by the local government as mandatory standards or requirements shall be considered adequate to meet requirements of these rules for the subject areas of rule requirements addressed by such plans and elements, unless such provisions are contrary to provisions of ORS 836.600 through 836.630. To the extent these documents do not contain specific provisions related to requirements of this division, the documents can not be considered as a safe harbor. The adequacy of existing provisions shall be evaluated based on the specificity of the documents and relationship to requirements of these rules[.]"

1 reasonably clear that OAR 660-013-0160(5) triggers a requirement for full compliance with
2 the APR only when a local government amends its plan or land use regulations to add
3 different requirements respecting airports than the plan or land use regulations previously
4 imposed. Even assuming that the text and map changes that the city adopted here constitute
5 "requirements," petitioner does not claim that those changes are different in any material way
6 from preexisting requirements. Both before and after the challenged decision, the SCP
7 contained a map and text that identified the location of the Airpark and its imaginary
8 surfaces. The fact that some of the preexisting SCP text and maps describe and depict the
9 Airpark as outside the city is immaterial, because that difference does not impose any
10 "requirements" different than preexisting requirements.

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioner argues that the city's decision is inconsistent with the TPR requirements at
14 OAR 660-012-0020(2)(e), because it adopts a "plan" for the Airpark that consists entirely of
15 a map and text identifying the location and extent of the Airpark, without setting forth any of
16 the information or policy choices necessary for an adequate "plan."

17 OAR 660-012-0020(2)(e) provides in relevant part that the TSP must include "[a]n
18 air, rail, water and pipeline transportation plan which identifies where public use airports,
19 mainline and branchline railroads and railroad facilities, port facilities, and major regional
20 pipelines and terminals are located or planned within the planning area."[7] Petitioner argues

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[7]Because the context of OAR 660-012-0020(2)(e) is significant in our analysis, we quote OAR 660-012-0020(2) in full:

> "The TSP shall include the following elements:
>
> "(a) A determination of transportation needs as provided in OAR 660-012-0030;
>
> "(b) A road plan for a system of arterials and collectors and standards for the layout of local streets and other important non-collector street connections. Functional classifications of roads in regional and local TSPs shall be consistent with functional

classifications of roads in state and regional TSPs and shall provide for continuity between adjacent jurisdictions. The standards for the layout of local streets shall provide for safe and convenient bike and pedestrian circulation necessary to carry out OAR 660-012-0045(3)(b). New connections to arterials and state highways shall be consistent with designated access management categories. The intent of this requirement is to provide guidance on the spacing of future extensions and connections along existing and future streets which are needed to provide reasonably direct routes for bicycle and pedestrian travel. The standards for the layout of local streets shall address:

"(A) Extensions of existing streets;

"(B) Connections to existing or planned streets, including arterials and collectors; and

"(C) Connections to neighborhood destinations.

"(c) A public transportation plan which:

"(A) Describes public transportation services for the transportation disadvantaged and identifies service inadequacies;

"(B) Describes intercity bus and passenger rail service and identifies the location of terminals;

"(C) For areas within an urban growth boundary which have public transit service, identifies existing and planned transit trunk routes, exclusive transit ways, terminals and major transfer stations, major transit stops, and park-and-ride stations. Designation of stop or station locations may allow for minor adjustments in the location of stops to provide for efficient transit or traffic operation or to provide convenient pedestrian access to adjacent or nearby uses.

"(D) For areas within an urban area containing a population greater than 25,000 persons, not currently served by transit, evaluates the feasibility of developing a public transit system at buildout. Where a transit system is determined to be feasible, the plan shall meet the requirements of paragraph (2)(c)(C) of this rule.

"(d) A bicycle and pedestrian plan for a network of bicycle and pedestrian routes throughout the planning area. The network and list of facility improvements shall be consistent with the requirements of ORS 366.514;

"(e) An air, rail, water and pipeline transportation plan which identifies where public use airports, mainline and branchline railroads and railroad facilities, port facilities, and major regional pipelines and terminals are located or planned within the planning area. For airports, the planning area shall include all areas within airport imaginary surfaces and other areas covered by state or federal regulations;

"(f) For areas within an urban area containing a population greater than 25,000 persons a plan for transportation system management and demand management;

1 that the requirement in OAR 660-012-0020(2)(e) that the TSP identify where public use
2 airports are located or planned merely states what the air component of such a plan must
3 contain, and does not state or imply that a plan containing only that identification complies
4 with the TPR. Petitioner argues that, because the TSP must be adopted as part of the city's
5 comprehensive plan, the components of the TSP must contain the information and policy
6 choices required of comprehensive plans. Thus, petitioner argues, the TPR must be
7 interpreted to require the city to "evaluate the type and amount of traffic accommodated by
8 the Airpark currently, make a policy choice regarding the type and amount of traffic that the
9 City wishes the Airpark to accommodate over the planning period, and direct the manner in
10 which the City is to implement that policy." Petition for Review 15-16.

11 In support of the foregoing interpretation, petitioner cites to OAR 660-012-0015(6),
12 which requires that airport districts and port districts, such as the Port of St. Helens, must
13 adopt plans for transportation facilities and services they provide. Further, such plans "shall
14 be consistent with and adequate to carry out relevant portions of applicable local and
15 regional TSPs." Petitioner argues that because port district plans such as the Airpark Plan
16 must be "adequate to carry out" the city's TSP, there should be something in the city's TSP
17 with respect to the Airpark to "carry out."

18 The city responds that OAR 660-012-0020(2)(e) requires only the content specified
19 in that provision: that the city's TSP identify where public use airports, etc., are located or
20 planned within the planning area. If LCDC had intended that the plan required by OAR 660-
21 012-0020(2)(e) contain other information, the city argues, it would have said so. The city

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"(g) A parking plan in MPO areas as provided in OAR 660-012-0045(5)(c);

"(h) Policies and land use regulations for implementing the TSP as provided in OAR 660-012-0045;

"(i) For areas within an urban growth boundary containing a population greater than 2500 persons, a transportation financing program as provided in OAR 660-012-0040."

points out that OAR 660-012-0020(2)(b)-(d) and (f)-(i) specify the contents of a TSP, or identify other rule provisions governing those contents. Given that context, the city argues, OAR 660-012-0020(2)(e) should also be read to comprehensively specify the contents of the required "air, rail, water and pipeline transportation plan." As further support for that reading, the city argues that it is difficult to imagine what kind of policy choices the city could adopt with respect to rail and pipeline transportation systems, which are transportation systems that local governments or public districts typically do not own or control.

We agree with the city that the text of OAR 660-012-0020(2)(e), read in context, does not require that the city include in the required "air, rail, water and pipeline transportation plan" any additional information than that specified in that provision, *i.e.*, the location and extent of existing or planned facilities. Had LCDC intended that the air component of the plan required by OAR 660-012-0020(2)(e) contain the same detail and type of information required by the APR or of comprehensive plans generally, it could have so specified.[8] Both the terms and the context of OAR 660-012-0020(2)(e) strongly suggest that the minimum content of the required plan is specified in that provision. We are not persuaded by petitioner's contextual arguments to the contrary. Specifically, although the TSP is incorporated into the city's comprehensive plan, that does not mean that every component of the TSP must consist of the detailed information and policy choices typical of comprehensive plans. Similarly, that port district plans such as the Airpark Plan must be consistent with and adequate to carry out the city's TSP suggests that a TSP may contain requirements that may

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[8]We note that OAR 660-013-0160(3), part of the APR, states that "[c]ompliance with the requirements of the [APR] shall be deemed to satisfy the requirements of * * * OAR 660, Division 12 related [to] Airport Planning." *See* n 3. OAR 660-013-0160(3) does not state what *are* the requirements of OAR 660, Division 12 related to Airport Planning, other than to imply that those requirements are not more extensive than the APR's requirements. To the extent OAR 660-013-0160(3) could be read to suggest an equivalence between the two sets of requirements, *i.e.* that the detailed information and policy choices required by the APR are also required to satisfy the "Airport Planning" requirements of the TPR, that reading of OAR 660-013-0160(3) is vitiated by the fact that the relevant portions of the TPR were adopted in 1991, while the APR was first adopted in 1996. That is, when the "air, rail, water and pipeline transportation plan" requirement in OAR 660-012-0020(2)(e) was adopted, no APR requirements existed.

be implemented by such a plan, but it does not follow that a TSP must necessarily contain such policy choices or other requirements. In sum, we agree with the city that the TPR does not require the "air, rail, water and pipeline transportation plan" element of the city's TSP to contain more information than that specified in OAR 660-012-0020(2)(e).

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

OAR 660-012-0015(5) requires that "[t]he preparation of TSPs shall be coordinated with affected * * * special districts[.]" Petitioner argues that the city erred in failing to coordinate its TSP with the Port of St. Helens, a special district. According to petitioner, compliance with OAR 660-012-0015(5) requires the city to notify the Port that it is considering the adoption of the challenged amendments, and solicit comments. Petitioner contends that there are no findings or evidence in the record establishing that the city sent specific notice to the Port, specifically invited the Port's participation or comments, or adopted findings addressing any concerns the Port might have raised.

The parties agree that the OAR 660-012-0015(5) coordination requirement is coextensive with the coordination requirement of Statewide Planning Goal 2 (Land Use Planning). We agree. *See Melton v. City of Cottage Grove*, 28 Or LUBA 1, 11 (*Melton I*), *aff'd* 131 Or App 626, 887 P2d 359 (1994) (coordination requirement of OAR 660-012-0060(3) should be interpreted consistently with the Goal 2 coordination requirement). So understood, OAR 660-012-0015(5) requires that the city (1) engage in an exchange of information with affected governmental units, or at least invite such an exchange; (2) use the information obtained to balance the needs of all governmental units; and, (3) although the city need not accede to every request, it must adopt findings responding to the affected local government's legitimate concerns. *DLCD v. Douglas County*, 33 Or LUBA 216, 221-22 (1997).

The city responds that the record demonstrates compliance with the coordination

1 requirement in this case. The city points out that during the initial proceedings it sent the
2 Port specific notice of the proposal to adopt a TSP, with a request for comments. Record I
3 264-65. The record does not reflect that the Port submitted any comments on the proposal.
4 The city did not send a second specific notice or an invitation to comment to the Port on
5 remand; however, the city argues that one of the Port's commissioners participated in an
6 August 24, 1998 city council meeting and the Port's legal counsel participated in a December
7 7, 1998 hearing, both of which concerned the city's decision on remand. Supplemental
8 Record 101; Record II 57. The city argues that the coordination requirement is satisfied if
9 the record shows that the Port's representatives participated in the city's proceedings leading
10 up to the decision, and the city addressed any concerns or comments during those
11 proceedings that required the city's consideration and accommodation. *See Tektronix, Inc. v.*
12 *City of Beaverton*, 18 Or LUBA 473, 485 (1989) (the city need not provide distinct
13 opportunities for affected local governments to comment each time the proposal is refined,
14 where affected local governments actively participated in a continuous process leading to the
15 city's decision); *see also Melton v. City of Cottage Grove*, 30 Or LUBA 331, 338 (1996)
16 (*Melton II*) (the OAR 660-012-0060(3) coordination obligation does not require that the city,
17 on remand, reconsult affected local governments previously consulted, where the petitioner
18 failed to show that the proposal changed after LUBA's remand). The city submits that the
19 Port's representatives did not, in fact, raise any concerns or make any comments during the
20 proceedings they attended that required the city's consideration and accommodation.

21 Read together, *Tektronix, Inc.* and *Melton II* suggest that where the proposal
22 significantly changes after effective notice has been provided and an invitation to comment
23 has been extended, the local government must afford affected local governments an
24 additional opportunity to comment on the changed proposal, at least where those affected
25 local governments have not actively participated in the proceedings leading up to the
26 challenged decision. Applying that rule in the present case, and perhaps in most cases, is

1 problematic. Determining whether a change constitutes a "significant" change or what
2 degree of participation is required to insulate the adopting local government from the
3 obligation to reconsult affected local governments are inherently uncertain inquiries. In our
4 view, affected local governments share some of the responsibility for fulfilling the
5 coordination obligation. Once an affected local government receives effective notice of the
6 proposal and an opportunity to comment, it should assume that the specifics of the proposal
7 may change during the proceedings before the adopting local government, and participate to
8 the extent necessary to inform itself of those changes. Adopting local governments are not
9 required to provide additional written notice or an additional invitation for comment
10 whenever the proposal is subsequently modified.[9] We believe the coordination obligation is
11 satisfied if the adopting local government provides affected local governments notice of the
12 proposal and an opportunity to comment at the beginning of the local proceedings.[10]

13 In the present case, the initial proposal was to adopt a TSP that incorporated the 1991
14 Airpark Plan, while the proposal ultimately adopted on remand was to adopt the TSP without
15 incorporating any part of the 1991 Airpark Plan other than its map. Although the city did not
16 send the Port additional written notice or a specific invitation to comment on the changed
17 proposal, the city sent notice and an invitation to comment to the Port at the beginning of the
18 original local proceedings.[11] The city's actions in this case were sufficient to satisfy its

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[9]However, it would certainly be appropriate for the adopting local government to do so. If the adopting local government fails to provide such additional notice or invitation to comment regarding modified proposals, and the decision ultimately adopted differs sufficiently from that proposed in the notice of hearing or proposed action, or the notice sent to the Department of Land Conservation and Development (DLCD) under ORS 197.610(1), the consequence may be that the deadline for appealing the adopted decision to LUBA is extended and the statutory requirement that a petitioner at LUBA have appeared during the local proceedings is obviated. ORS 197.830(3); 197.620(2).

[10]We similarly conclude in our discussion of the fourth assignment of error, below, that ORS 197.610(1) does not require the adopting local government to send DLCD additional notice of a proposed plan or land use regulation amendment, even if that proposal is significantly modified after the initial notice.

[11]We note that the city sent notice of the final decision to the Port and that the Port did not appeal the city's decision to LUBA. Record II 1-2.

1 coordination obligation under OAR 660-012-0015(5).

2 The third assignment of error is denied.

3 **FOURTH ASSIGNMENT OF ERROR**

4 Petitioner argues that the city violated ORS 197.610(1) by failing to send notice of 5 the proposed post-acknowledgment plan amendment to DLCD at least 45 days before the 6 first evidentiary hearing regarding the amendment.[12] According to petitioner, the first 7 evidentiary hearing on remand was conducted on November 4, 1999, but the city failed to 8 provide notice of the proposed amendment to DLCD at any time, much less 45 days before 9 that date. Petitioner contends that failure to provide notice as required by ORS 197.610(1) is 10 a substantive error that warrants remand. *Oregon City Leasing, Inc. v. Columbia County,* 11 121 Or App 173, 177, 854 P2d 495 (1993); *Concerned Citizens v. Jackson County*, 33 Or 12 LUBA 70, 91 (1997).

13 The city responds that it complied with the notice requirement of ORS 197.610(1) 14 when, as part of the original proceedings, it sent DLCD notice of the proposed adoption of 15 the TSP. Record I 266. The city argues that proceedings on remand from LUBA or the 16 Court of Appeals are generally considered continuations of the original proceedings. *DLCD* 17 *v. Klamath County*, 25 Or LUBA 355, 361 (1993) (citing to *Beck v. City of Tillamook*, 313 18 Or 148, 151, 831 P2d 678 (1992)); *see also Citizens for Resp. Growth v. City of Seaside*, 26

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[12]Effective June 30, 1999, ORS 197.610(1) provides:

> "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 the Department of Land Conservation and Development *at least 45 days before the first evidentiary 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 notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending." (Emphasis added.)

Prior to June 30, 1999, ORS 197.610(1) required that notice of proposed post-acknowledgment plan amendments be sent to DLCD at least 45 days prior to the *final* hearing regarding the amendment. As discussed below in the text, we resolve this assignment of error in a manner that makes it unnecessary to decide which version of ORS 197.610(1) applies to the city's decision on remand.

Or LUBA 458, 462 (1994) (the term "initial evidentiary hearing" in ORS 197.763(6) refers to the first evidentiary hearing conducted during the original local proceedings, not to evidentiary hearings conducted on remand). The city argues that ORS 197.610(1) requires the city to send DLCD only one notice of a proposal to amend its comprehensive plan, and nothing in the statute obligates the city to send additional notice either during the original proceedings or during the proceedings on remand.

We agree with the city that its proceedings on remand were a continuation of its original proceedings, and that nothing in the statute or the rules implementing the statute requires additional notice of the proposed amendment during the remand proceedings. ORS 197.615(1) requires the local government to send to DLCD a copy of the adopted text of the comprehensive plan amendment within five days after the governing body's final decision. ORS 197.615(1) further provides that "[i]f the proposed amendment or new regulation that [DLCD] 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 [DLCD]." *See also* OAR 660-018-0045 (imposing the same requirement). ORS 197.620(2) allows DLCD or any other person to appeal the local government's decision to LUBA, notwithstanding lack of appearance before the local government, 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." *See also* OAR 660-018-0060(2) (same).

It is clear from the foregoing context that, once notice of the proposed amendment is provided under ORS 197.610, no further notice is required under that statute even if the local government eventually adopts a substantially modified version of the proposed amendment. Because the statute contemplates only one notice of proposed amendment, even if the amendment is later substantially modified, and proceedings on remand are a continuation of the original proceedings, the city complied with ORS 197.610(1) by providing DLCD with

1 notice of the proposed amendment during the original proceedings.

2 The fourth assignment of error is denied.

3 The city's decision is affirmed.