BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OLD TOWN CORNELIUS NEIGHBORHOOD
ASSOCIATION (OTCNA) and
BARBARA STOREY,
Petitioners,

vs.

CITY OF CORNELIUS,
Respondent.

LUBA No. 2000-089

FINAL OPINION
AND ORDER

Appeal from City of Cornelius.

John A. Rankin, Sherwood, filed the petition for review and argued on behalf of petitioners.

Christopher A. Gilmore, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Beery & Elsner LLP.

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

REMANDED 11/08/2000

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

Petitioners appeal the city's decision amending the comprehensive plan text and map and the text and map of the city's code to create a Main Street Mixed Use Planning District.

FACTS

The relevant facts in this case were set forth in our previous order, *OTCNA v. City of Cornelius*, ___ Or LUBA ___ (LUBA No. 2000-089, Order on Motion to Dismiss, August 30, 2000), and are repeated here:

> "The challenged decision amends the city's comprehensive plan text and map and the zoning map to create a special 'Main Street' planning district affecting 86 acres in and around the city's downtown. Petitioners allege that members of the Old Town Cornelius Neighborhood Association (OTCNA) and individual petitioner Barbara Storey own residential property within two or three blocks from the city's downtown that was redesignated and rezoned as part of the challenged decision.
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> "The challenged amendments originated in a series of public workshops conducted by a steering committee from October 1996 to June 1997. A description of the proposal before the steering committee was distributed to every property owner in the city in an October 1996 insert in the local newspaper. The steering committee developed a final 'Main Street' plan by June 1997, and forwarded that plan to the city planning commission. On June 27, 1997, the city provided a Notice of Proposed Amendment to the Department of Land Conservation and Development (DLCD), pursuant to ORS 197.610. The city's notice states that the date of final hearing would be August 4, 1997, 38 days from the date of the notice.
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> "The city planning commission conducted public hearings on July 8, July 29, and August 19, 1997, for which public notice was provided by publication in the local newspaper. The planning commission approved the recommendations on September 9, 1997, and forwarded them to the city council. The city council held public hearings on October 6, 1997, and February 2, 1998, for which notice was also provided by publication. Petitioners did not participate in any of the proceedings before the planning commission or city council.
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> "The city council adopted the proposed amendments at the February 2, 1998 hearing. However, the city failed to provide notice of the adopted amendments to DLCD, as required by ORS 197.615(1), until May 25, 2000. DLCD thereupon issued a Notice of Adopted Amendment on June 2, 2000,

> stating that the city's Notice of Proposed Amendment was submitted to DLCD with less than the 45-day notice required by ORS 197.610(1). DLCD's Notice of Adopted Amendment stated that the deadline to appeal the city's decision to LUBA was June 16, 2000. On June 16, 2000, petitioners filed a notice of intent to appeal with LUBA." Slip op 1-3 (footnotes omitted).

JURISDICTION

The city's response brief renews the city's earlier motion to dismiss, arguing that LUBA lacks jurisdiction over this appeal because petitioners have not demonstrated that they have standing to appeal the city's decision. *See OTCNA*, slip op 5-6 (concluding that the city's failure to comply with ORS 197.610(1) allows petitioners standing to appeal pursuant to ORS 197.610(2)(b)). The city advances a number of arguments why our denial was incorrect. However, the city's renewed motion to dismiss raises no issues that were not considered, and rejected, in our earlier order. The city's motion provides no basis to reconsider our earlier order, and that motion is denied without further discussion.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city failed to provide adequate notice of the proceedings leading up to the adoption of the challenged decision, and thus the city failed to follow the applicable procedures in a manner that prejudiced petitioners' substantial rights.[1]

Petitioners concede that the city's decision is a legislative decision, and that the procedural requirements for quasi-judicial hearings at ORS 197.763, including the requirement to provide notice of hearings at ORS 197.763(2)(b), do not apply to the city's decision. However, petitioners argue that the city failed to give adequate notice of the proceedings before the steering committee, the planning commission, and the city council, as

[1]Petitioners also argue under this assignment of error that the city failed to provide timely notice to DLCD, as required by ORS 197.610 and 197.615. However, petitioners' only contention is that these statutory violations provide petitioners standing to appeal the city's decision. Petitioners do not contend that such violations provide a basis for reversal or remand of the city's decision. Because our previous order resolved challenges to petitioners' standing in this case, we do not consider these arguments further.

required by the city's comprehensive plan and the city code.

A. Steering Committee Activities

Petitioners first argue that the city's use of the steering committee violated the citizen involvement program of the city's comprehensive plan, because the city neither invoked the committee on citizen involvement (CCI) required by that program, nor delegated CCI authority to the steering committee. Further, petitioners argue, even assuming such authority was delegated, the steering committee did not provide adequate notice of its proceedings, as required by the citizen involvement program.[2]

The citizen involvement program, described at CCP II-1 to II-3, requires appointment of a CCI made up of one city council member, one planning commissioner, three other city residents, and one person who lives outside the city.[3] The CCP contemplates that the CCI will act as a liaison and information conduit between the city and certain identified civic groups and, if appropriate, the citizens at large, with respect to all aspects of city government, with emphasis on land use planning. The CCP does not appear to grant to the CCI any advisory or policy role. The city argues that nothing in the citizen involvement program prevents the city from also appointing a special steering committee, or delegating to that committee the liaison and informational responsibilities of the CCI, with respect to a particular planning proposal. We agree.

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[2]The Citizen Involvement provisions of the Cornelius Comprehensive Plan (hereafter CCP or plan) provide that:

> "Notification of community groups and the public at large will be coordinated by the CCI. Methods of notification will include newspaper stories; postings at City Hall, Post Office, and other public locations; mailed notices to groups; and inclusion of notices in water bills where city-wide coverage is needed."

[3]The steering committee apparently consisted of 14 people, including a planning commission member, several community participants, several downtown business owners, the directors of two nonprofit organizations, a grade school principal, the city engineer, a representative from the regional transportation agency Tri-Met, and a representative from the state Department of Transportation. Record 57.

With respect to notice of the steering committee proceedings, petitioners argue that the city failed to employ all of the means for notification listed in the plan, and further that the notice provided inadequately described the Main Street proposal. The city responds that the citizen involvement program requires notification to residents only where "appropriate and helpful," and that the program does not require that all of the methods of notification listed in the plan be used. The city also argues that the notice provided of the steering committee activities—a two-page insert in the city newspaper mailed to every resident, a flyer advertising an open house, a community Charrette, and various postings—were adequate to satisfy the communication requirements of the program.

We agree with the city. The city's citizen involvement program grants the city and CCI considerable discretion in determining whether and what kind or level of public notice is appropriate. Petitioners fault the notice provided, particularly the insert mailed to every resident, because it provides only a general explanation of the Main Street project without specifying particular event dates, and because the map provided is small and difficult to read. However, nothing in the citizen involvement program requires greater specificity or a map of a particular size in providing general notice to the public of a proposed planning effort. The insert describes the Main Street project, sets out a general timetable for the city's proceedings, and instructs interested citizens how to obtain more information and participate. Petitioners have not demonstrated that the citizen involvement program requires more.

This subassignment of error is denied.

B. Planning Commission and City Council Proceedings

Petitioners argue next that the city erred in failing to provide individual written notice of the proceedings before the planning commission and city council to citizens such as petitioner Barbara Storey, whose house is within the area redesignated and rezoned under the challenged decision. According to petitioners, the CCP and city code both require that notice

of plan amendments such as that proposed here requires individual written notice to all owners of property within 250 feet of the property affected by the amendment.

The citizen involvement element of the CCP contains provisions governing plan amendments, described at CCP II-5 to II-7, requiring that a hearing will be held on any proposed comprehensive plan change, and requiring that "at least a 7-day notice of the hearing will be given to all owners within 250 feet of the property boundary for which the change is proposed."[4] The plan then states that "Major and minor revisions to the plan will be treated differently." The text following then describes major and minor revisions. As we discuss below, the parties disagree whether the challenged decision is the type of plan

[4]CCP II 5-6 provides:

> "The citizens of Cornelius and affected governmental units will be given an opportunity to review and comment on any proposed plan changes. *A public hearing on the proposed change will be held, and at least a 7-day notice of the hearing will be given to all owners within 250 feet of the property boundary for which the change is proposed. Major and minor revisions to the plan will be treated differently.*
>
> "Major revisions include land use changes that have widespread and significant impact beyond the immediate area. These include quantitative changes producing large volumes of traffic; qualitative changes in the character of the land use itself such as conversion of residential to industrial use; or spatial changes that affect large areas or many different ownerships. A complete rethinking of the plan and the needs of the public will be necessary before major revisions are approved.
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> "Minor revisions have little significance beyond the immediate area of the change. Their evaluation will be based on special studies or other information which justifies the public need for the change.
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> "The following criteria shall be used to establish whether or not a plan amendment or change is justified.
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> "[A] The fact that an applicant owns the land for which the change is being sought is not in itself sufficient justification for the change or amendment.
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> "[B] The proposed change or amendment must meet a public need.
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> "[C] The proposed change or amendment must be in conformance with the goals and policies of the [CCP].
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> "[D] The amendment must meet the standards and requirements of the zone in which it is located." (Emphasis added.)

amendment that requires written notice to landowners within 250 feet of the affected property under this CCP provision.

Petitioners argue that the notice requirements of this CCP provision do not distinguish between legislative or quasi-judicial types of plan amendments. The city disagrees, noting that the CCP states that "Major and minor revisions to the plan will be treated differently." The city argues that "major" and "minor" revisions are both considered "legislative" decisions, and that the portion of the CCP requiring notice to landowners within 250 feet of the affected property should be read to refer only to plan amendments that are neither major nor minor, *i.e.* quasi-judicial plan amendments. In other words, the city argues, this CCP provision imposes a notice requirement for quasi-judicial plan amendments, and then clarifies that major and minor revisions (both of which are legislative revisions, in the city's view) are "treated differently" with respect to notice.

Petitioners respond that the reference to treating major and minor revisions "differently" should be understood as stating that *major* revisions are treated differently from *minor* revisions, and the differences, petitioners argue, are spelled out in the next paragraph, which describes both types of revisions. The differences, according to petitioners, are that major revisions require a "complete rethinking of the plan," while minor revisions do not, and further that minor revisions require special studies or other information that justifies the public need for the change. In petitioners' view, while "major" revisions could be understood to refer to legislative amendments, "minor" revisions should be understood to include quasi-judicial amendments.

The challenged decision does not interpret this CCP provision, either expressly or implicitly. The city concedes that it is awkwardly drafted and ambiguous. We agree that it is not clear from the text of this provision whether it refers to three or only two types of plan amendments, whether different notice requirements apply to different types, or how those various types track the commonly understood concepts of legislative and quasi-judicial

decisions.[5] The city argues, however, that we need not resolve these ambiguities, because the city code provision implementing this CCP provision clearly places the plan amendment at issue in a category that requires only publication notice. We turn, accordingly, to the city's code.

Cornelius Code (CC) 11.132 sets forth the notice requirements for land use proceedings:

> "Prior to considering any land development application or the amendment to the text of any ordinance relating to land development which application requires the action, decision, report, or recommendation of the Planning Commission or the Council, the City Recorder shall give notice of the time, place, and purpose of the required public hearing in the following manner:
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> "1. By publication in a newspaper of general circulation within the city not less than three days nor more than 15 days prior to any such required public hearing; and
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> "2. Written notice to the owners and contract purchasers, if any, of all real property located within 250 feet of the property line of the real property subject [to] the action, decision, report, or recommendation. * * * The notice shall be deposited in the mail in the city, not less than seven days prior to the required public hearing. The notice shall state the time, place, and purpose of the hearing.
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> "3. In the event that the required action, decision, report or recommendation relates *only to a proposed amendment to the text of any code provision, ordinance, rule or regulation of the City under which a land development application could be made*, notice of the required public hearing shall be given by publication only under the provisions of [CC] 11.132(1).
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> "* * * * *
>
> "5. Nothing contained in [CC] 11.132 is intended to amend or modify the mandatory notification requirements established by state law." (Emphasis added.)

Petitioners read CC 11.132 to require the city to provide both publication notice

[5]The city argues that this CCP provision was drafted in 1979, at a time when the distinction between legislative and quasi-judicial land use decisions was not well defined.

under CC 11.132(1) and individual written notice under CC 11.132(2) for all types of land use decisions except those that fall under the exception at CC 11.132(3). According to petitioners, CC 11.132(3) allows the city to provide only publication notice where the city decision amends only the *text* of a city ordinance under which a land development application could be made. Petitioners argue that the plan amendment at issue here amends the plan and zoning *map* as well as the text of the plan and zoning ordinance. Consequently, petitioners contend, the present case does not fall within the exception at CC 11.132(3) and the city must provide both publication and individual written notice under CC 11.132(1) and (2).

The city's view of CC 11.132 is quite different. The city cites to CC 11.132(5) as supporting its argument that the city did not intend to impose notice requirements that are different from or in addition to statutory requirements, and that petitioners' proposed interpretation would require that the city provide a type of notice for certain legislative decisions (but not others) that the statute only requires for quasi-judicial decisions. Further, the city argues that CC 11.132(3) is not concerned with whether the proposed city action amends the text as opposed to the map of the plan or code. It makes no sense to distinguish legislative *text* amendments from legislative *map* amendments, the city argues, and impose a quasi-judicial notice requirement on one but not the other. Instead, the city contends, CC 11.132(3) should be read to apply where, as here, the proposed amendment changes city legislation under which a separate land development application *could be made* in the future, as opposed to an amendment proposed by an application from a property owner in conjunction with a land development application. The city argues that the first sentence of CC 11.132, although no model of clarity, also distinguishes between city land use decisions based on an *application* for development and city land use decisions that are not based on such an application.

In the same vein, the city points out that CC 11.088 distinguishes between plan and

map amendments that are initiated by the city council or planning commission, and plan and map amendments that are initiated by the application of a property owner.[6] The city's decision recites that the plan amendment at issue here was initiated by the city council and not by an individual property owner, and was thus legislative in nature. Record 3. Read in this context and as a whole, the city argues, CC 11.132 should be understood to distinguish between legislative and quasi-judicial actions, the latter being those initiated by an application of a property owner, and to require individual written notice to landowners within 250 feet only for quasi-judicial decisions.

The CCP notice provisions discussed above are not clarified by CC 11.132. To the contrary, CC 11.132 obscures even further the city's intent regarding what notice requirements apply to the type of decision at issue here. The challenged decision contains no interpretation of this provision. Where a local government fails to interpret a local provision, LUBA may interpret the provision *ab initio*, or remand the decision to the local government for an interpretation in the first instance. *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768 (1998). LUBA will decline to interpret a local provision in the first instance, where the purpose of the provision is unclear and subject to numerous interpretations. *Thomas v. Wasco County*, 30 Or LUBA 302, 313 (1996). Here, as expressed in the CCP and CC 11.132, the city's intent regarding the notice required for this type of decision is unclear, to say the least. The parties proffer numerous conflicting interpretations of the relevant provisions.[7] Under one or more of petitioners' interpretations, the city failed to provide

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[6]CC 11.088(1) provides:

> "An amendment to the text or the map of the Comprehensive Plan of Development may be initiated by the council, the planning commission or by application of a property owner, or his or her authorized agent."

[7]The city council is not bound on remand to adopt the interpretations of the CCP and CC offered in the city's response brief in this case, and therefore we need not decide whether those interpretations would be sustainable under ORS 197.829(1) and the deferential standard of review in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), if adopted by the city council on remand. However, it is only fair to observe that the

petitioners with individual written notice of the proceedings before the planning commission and city council, and thus, petitioners allege, prejudiced their substantial rights. In this circumstance, remand is appropriate to allow the city to interpret these provisions in the first instance.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioners argue that the city's decision fails to comply with applicable statewide planning goals and CCP provisions implementing those goals, and fails to address the Transportation Planning Rule (TPR) at OAR chapter 660, division 12.

As discussed above, remand is necessary in this case to allow the city to interpret the notice requirements of its code and plan, and determine whether petitioners were entitled to individual written notice of the planning commission and city council hearings. If the answer to that question is yes, then the city's failure to provide such notice before adopting the challenged decision prejudiced petitioners' substantial rights, and the city must conduct a hearing at which petitioners can appear and present evidence and argument regarding the proposed amendments. *Krieger v. Wallowa County*, 35 Or LUBA 305, 308 (1998); *see also Concerned Citizens v. Jackson County*, 33 Or LUBA 70, 90 (1997) (failure to provide a hearing on a legislative plan amendment as required by the county's code is a procedural error that prejudices the petitioners' substantial rights). If the city conducts such a hearing, testimony and evidence might be submitted regarding, and the city might adopt findings addressing, issues related to those raised in the second and third assignments of error.

CCP and CC interpretations offered in the city's response brief read a great deal into, and tend to ignore some of the language in, those provisions. In particular, the city's interpretation of CC 11.132 does not explain how a decision amending the plan map or zoning map would fall within the scope of CC 11.132(3), which appears to be limited by its terms to text amendments.

Accordingly, it would be premature for the Board to resolve these assignments of error.

The city's decision is remanded.