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NATURE OF THE DECISION

Petitioner appeals an ordinance that adopts new city design review guidelines and standards.

MOTION TO INTERVENE

David Reeves Baker and Charlotte Gallagher move to intervene on the side of petitioner in this appeal. Raymond J. Bradley moves to intervene on the side of respondent in this appeal. There is no opposition to the motions, and they are allowed.

FACTS

The city adopted the Historic Nye Beach Overlay District and implementing regulations in 1997. Ordinance 1865, which is the subject of this appeal, repeals the Historic Nye Beach Overlay District and replaces it with the Newport Design Review Guidelines and Standards.

Ordinance 1865 was produced in a series of planning commission noon meetings and work sessions. The first document in the record that the city filed in this appeal is the planning commission agenda for November 12, 2002. At that meeting, the planning commission considered a “draft ordinance for City of Newport Design Review and Nye Beach Design Review Criteria.” Record 613. The draft ordinance that the planning commission considered at its November 12, 2002 meeting apparently was the product of a number of other meetings and work sessions that preceded the November 12, 2002 meeting, but the record submitted by the city does not include any documentation of those meetings.

The draft ordinance was considered at additional planning commission meetings and work sessions on December 9, 2002, January 13, 2003, January 27, 2003 and February 10, 2003. On February 26, 2003, the city provided notice to the Department of Land Conservation and Development that it proposed to adopt the disputed ordinance. Record 555-56. On March 21, 2003, the city provided notice to affected property owners that the planning commission would hold a public hearing on the proposed ordinance on April 14, 2003. After the April 14, 2003 public

1 hearing, the planning commission provided notice to affected property owners and persons who
2 appeared at the April 14, 2003 public hearing that it would “hold work sessions with the public for
3 informational and general discussion purposes” on May 14, 2003 and on May 21, 2003 and hold a
4 second public hearing on June 9, 2003. Record 331. At the May 21, 2003 work session, the
5 planning commission decided to hold another work session on June 4, 2003. A second planning
6 commission public hearing was held on June 9, 2003. At the conclusion of the June 9, 2003 public
7 hearing the planning commission directed that a number of changes be made to the proposed
8 ordinance and that the amended ordinance be brought back to the planning commission on June 23,
9 2003. At petitioner’s request, the planning commission left the record open for seven days to
10 receive additional written testimony. Record 292. At its June 23, 2003 meeting, the planning
11 commission forwarded the proposed ordinance and the planning commission’s recommended
12 changes to the city council.

13 The proposed ordinance was considered by the city council at an August 4, 2003 work
14 session and notice of an August 18, 2003 city council public hearing on the proposed ordinance
15 was provided. At the August 18, 2003 city council public hearing, petitioner appeared and
16 opposed the ordinance. The city council held the record open for written comments. At its
17 September 2, 2003 meeting, the city council passed a motion “to refer the proposal back to staff to
18 address issues concerning parking, commercial frontage, the mandatory review process, and the C-
19 2 reconstruction.” Record 152. The city council considered several changes at its October 6,
20 2003 meeting. Following a first reading at its November 17, 2003 meeting, the city council adopted
21 Ordinance 1865 on December 1, 2003. This appeal followed.

22 **JURISDICTION**

23 The city earlier moved to dismiss this appeal, and we denied that motion to dismiss.
24 *Dobson v. City of Newport*, ___ Or LUBA ___ (LUBA No. 2003-212, Order on Motion to
25 Dismiss, May 3, 2004). The city renews its motion to dismiss and repeats its argument that
26 petitioner failed to file a timely notice of intent to appeal. The city contends that petitioner never

1 requested in writing that the city provide her with notice of its decision in this matter. Therefore, the
2 city argues, it was not required to provide petitioner with written notice of its December 1, 2003
3 decision. Because the city was not legally required to provide petitioner notice of its December 1,
4 2003 decision, the city reasons that the 21-day deadline for petitioner to file her appeal with LUBA
5 began on December 1, 2003, when the ordinance was adopted. The city views the December 10,
6 2003 notice that it provided to petitioner and other participants in the local proceedings that led to
7 city adoption of Ordinance 1865 as a “courtesy” notice of its decision, rather than notice that the
8 city was required to provide under ORS 197.615(2). In our May 3, 2004 order, we denied the
9 city’s motion to dismiss. We concluded that because the city did not clearly state that the notice it
10 provided to petitioner on December 10, 2003 was a “courtesy” notice, rather than notice the city
11 was required to provide to petitioner under ORS 197.615(2), petitioner was entitled to treat that
12 notice as notice provided under ORS 196.615(2). If the ORS 197.830(9) 21-day deadline for
13 filing a notice of intent to appeal is measured from December 10, 2003, petitioner’s December 31,
14 2003 notice of intent to appeal was timely filed.¹

15 The city contends our earlier order is inconsistent with our decision in *Knodel v. City of*
16 *Gaston*, __ Or LUBA __ (LUBA No. 2004-023, April 13, 2004), where we found that a city’s
17 erroneous statement in its notice of a variance decision that the petitioner in that appeal had 21
18 *working* days to appeal to LUBA did not enlarge the 21 *calendar* day deadline set out in ORS
19 197.830(9). We do not see any inconsistency. The question in this appeal is what kind of notice
20 the city gave on December 10, 2003, not whether the city provided erroneous information about the
21 appeal deadline. Based on the city’s failure to state that its December 10, 2003 notice was simply a
22 “courtesy notice,” we concluded that the December 10, 2003 notice that the city provided to

¹ As relevant, under ORS 197.830(9), the deadline for filing a notice of intent to appeal a post-acknowledgment land use regulation amendment is 21 days after the local government provides notice of the amendment to those persons who are entitled to notice under ORS 197.615.

1 participants in this post-acknowledgment land use amendment proceeding constituted the notice
2 required under ORS 197.615(2).

3 The city's renewed motion to dismiss this appeal is denied.

4 **PETITIONER'S STANDING**

5 Under ORS 197.830(2), the requirements for standing to appeal to LUBA are (1) that the
6 petitioner have appeared before the local government, orally or in writing, and (2) that petitioner file
7 a timely notice of intent to appeal with LUBA. The city argues that petitioner neither alleges that she
8 filed a timely notice of intent to appeal nor alleges that she appeared during the local proceedings.

9 The city is correct. Petitioner's failure to allege facts in her petition for review that establish
10 her standing to bring this appeal and her failure to respond to the city's argument that she has failed
11 to allege sufficient facts to establish her standing would normally require that we dismiss this appeal.
12 However, we have already rejected the city's arguments that petitioner failed to file a timely notice
13 of intent to appeal. It is clear from the minutes of the August 18, 2003 city council meeting that
14 petitioner did appear before the city council and oppose the proposal. In fact, the city alleges facts
15 in its response brief that establish that petitioner appeared during the local proceedings.
16 Respondent's Brief in Response to Petitioner Karen Dobson's Petition for Review 10. Because the
17 city alleges facts that establish that petitioner has standing to bring this appeal under ORS
18 197.830(2), we will overlook petitioner's failure to do so.

19 **ASSIGNMENTS OF ERROR**

20 **A. The Record**

21 As we noted in our discussion of the facts, the earliest document in the record that the city
22 filed in this matter is the agenda for the November 12, 2002 planning commission meeting. There
23 were a number of earlier meetings of both the planning commission and the design review
24 commission. The draft ordinance that was considered by the planning commission at that
25 November 12, 2002 planning commission meeting was prepared as a result of these earlier
26 meetings. In responding to petitioners' record objections that audiotapes and minutes of these

1 earlier meetings should be included in the record that the city filed with LUBA, the city took the
2 position that the record of the city council’s decision in this matter is the record that the city council
3 itself compiled through its hearing and deliberations. The city took the position that no record of the
4 planning commission or design review committee deliberations prior to November 12, 2003 was
5 placed before the city council. Based on that contention by the city, we rejected petitioners’
6 argument that the city should be required to supplement the record it filed with LUBA with the
7 record of the planning commission and design review commission deliberations that occurred before
8 November 12, 2002, during which the draft ordinance was prepared.

9 It can be difficult to identify precisely when a legislative land use proceeding begins. The
10 city’s choice to view this proceeding as beginning with the consideration of the draft ordinance on
11 November 12, 2002, rather than with the work sessions that produced that ordinance, is somewhat
12 questionable. As petitioners argue below, it is certainly possible to read the city comprehensive plan
13 citizen participation goal to require earlier citizen involvement. If early citizen participation is
14 required under the city’s plan, that abbreviated record may leave the city in a position where it
15 cannot demonstrate that required opportunities for early citizen participation were provided.
16 However, petitioners have not established that the city’s decision to limit the record it provided to
17 the city council, in and of its self, provides a basis for reversal or remand.²

18 **B. Failure to Appoint a Citizens’ Advisory Committee**

19 Statewide Planning Goal 1 (Citizen Involvement) requires that the city “develop a citizen
20 involvement program that insures the opportunity for citizens to be involved in all phases of the
21 planning process.” The city has done so. City of Newport Comprehensive Plan Goal 1 provides,
22 in part:

² Although petitioner and intervenor-petitioner suggest in several places in their briefs that it was error for the city not to include a record of these early proceedings, they do not include a specific assignment of error to that effect. For the reasons stated in the text, we reject the suggestions.

1 Goal 1: To involve citizens in the development and implementation of the city’s
2 Comprehensive Plan and its implementing ordinances.

3 ‘Policy 1: The city shall develop methods of community outreach that
4 encourage participation in the planning process.

5 Implementation Measure #1: The Planning Commission shall serve
6 as the official citizens’ advisory committee to the city council.
7 Whenever a major change (as determined by the Commission) to
8 the Comprehensive Plan or an implementing ordinance is under
9 consideration, three persons from the community at large shall be
10 designated by the Planning Commission as a Citizens’ Advisory
11 Committee.

12 Implementation Measure #2: The city may promote or assist
13 neighborhood organizations to assist in decision making. When
14 appropriate, the Planning Commission and/or City Council may
15 hold meetings in neighborhoods affected by the issues under
16 consideration.

17 Implementation Measure #3: If an important issue needs study,
18 then the Planning Commission or the City Council may call for the
19 formation of an ad hoc committee. The Committee shall be
20 appointed by the Mayor and confirmed by the City Council. Effort
21 shall be made to select persons from different sides of the issue.”

22 Notwithstanding Implementation Measure #1, it is undisputed that the planning commission
23 did not (1) determine that adopting the disputed design review guidelines and standards is a “major
24 change” to the city’s land use regulations or (2) “appoint three persons from the community at large
25 * * * as a Citizens’ Advisory Committee.” Petitioners allege it was error for the planning
26 commission not to make the “major change” finding or appoint the three person citizens’ advisory
27 committee. Petitioner and intervenor-petitioner argue that Ordinance 1865 is a “major change” and
28 that the city therefore erred by failing to appoint a special three-person citizen advisory committee.

29 The city takes the position that it is within the planning commission’s discretion whether to
30 declare a proposal a “major change.” We understand the city to contend that it is entirely up to the
31 planning commission whether to make the finding or not and that a “major change” is whatever the
32 planning commission says it is.

1 We reject the city’s extreme interpretation of Implementation Measure #1. That
2 interpretation is presented in the city’s brief, but there is no interpretation of Implementation
3 Measure #1 in the challenged decision. Reading the Implementation Measures as a whole, some
4 directives are mandatory and expressed as “shalls” and some are discretionary and expressed as
5 “mays.” The directive in Implementation Measure #1 to appoint a citizens’ advisory committee
6 when considering a “major change” in the city’s land use regulations is mandatory. However, the
7 Newport Comprehensive Plan does not define or provide guidelines for the planning commission to
8 apply in determining whether a proposal constitutes a “major change.” Given the lack of definition
9 or guidelines, an admittedly subjective inquiry is necessary to determine if a proposed change is a
10 “major change.” In that circumstance, the planning commission, as the body Implementation
11 Measure #1 designates to decide whether a change is a “major change,” likely would have a fair
12 amount of discretion in deciding whether a proposed land use regulation amendment constitutes a
13 “major change.” But that discretion would not be without limits.

14 Turning to the land use regulation amendments at issue in this appeal, we are inclined to
15 agree with petitioners that the changes adopted by the city here at least could be considered a major
16 change, for the reasons set out in intervenor-petitioner Baker’s petition for review. If it is a major
17 change, the planning commission should have addressed that question and appointed a three-person
18 citizens advisory committee. However, we need not and do not decide here whether the adopted
19 change is properly viewed as a major change. Even if it is a major change and even if the planning
20 commission should have appointed a three-person citizens’ advisory committee, petitioners did not
21 object to the planning commission’s failure to do so and petitioners have not demonstrated that the
22 citizen input the planning commission actually sought and received in this case prejudiced their
23 substantial rights, or the substantial rights of any other resident of the city for that matter.

24 Implementation Measure #1 makes the *planning commission* the “official citizens’ advisory
25 committee to the city council.” The Implementation Measure #1 requirement for a special three-
26 person citizens’ advisory committee to assist the planning commission is a procedural requirement.

1 If the challenged ordinance is a major change and the planning commission should have appointed a
2 special three-person citizens advisory committee, the planning commission's error in failing to do so
3 is a procedural error. To assert a procedural error as a basis for remand at LUBA, petitioners must
4 establish that they objected below and that the error prejudiced their substantial rights. ORS
5 197.835(9)(a)(B); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd and*
6 *rem'd on other grounds sub nom, Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d
7 529 (1985).

8 The city contends that no one argued before the planning commission or the city council that
9 the challenged ordinance constitutes a "major change" under Implementation Measure #1, and no
10 one raised any issue concerning whether the city should appoint a special three-person citizens
11 advisory committee in this matter. Although petitioners suggest that someone might have raised the
12 issue during one of the work sessions before November 12, 2002 or during one of the work
13 sessions after November 12, 2002 or during the planning commission hearing, for which the city has
14 not submitted audiotapes, they do not affirmatively assert that anyone did so. At one point during
15 oral argument petitioner conceded that no one raised any issue concerning Implementation Measure
16 #1, but took the position that it was the city's responsibility to know about Implementation Measure
17 #1 and follow its requirements.³

18 Even if someone had asserted below that Implementation Measure #1 mandates
19 appointment of a citizens' advisory committee to assist the planning commission, it is undisputed that
20 four members of the design review committee that was responsible for implementing the old Nye
21 Beach Design Review Ordinance provided input to the planning commission and played a significant
22 role in preparing the draft ordinance. Neither Implementation Measure #1 nor any other part of the
23 City of Newport Comprehensive Plan cited to us (1) dictates any particular role for the special

³ It is our understanding from statements petitioner made at oral argument that she obtained copies of all available tapes of the many work sessions the planning commission held and the planning commission public hearing. Petitioner has not argued that any of those tapes show that any issue was raised at any time below that appointment of a special citizens' advisory committee was required under Implementation Measure #1.

1 citizens advisory committee that the implementation measure calls for or (2) provides guidelines for
2 who can be or must be appointed to such a citizens advisory committee, other than the requirements
3 that there be three members and that they be from the community at large.

4 Petitioners dismiss the design review committee members' role in developing the draft
5 ordinance and suggest that the design review committee members do not represent a true cross-
6 section of the community because, petitioners argue, the design review committee from the
7 beginning favored the much more extensive and comprehensive set of regulations that were adopted
8 by Ordinance 1865.

9 Implementation Measure #1 does not require that the special citizens' advisory committee
10 be made up of any particular "cross section" of the community, only that the members be from the
11 "community at large." We do not understand petitioners to allege that the four design review
12 committee members who assisted the planning commission in this matter are not members of the
13 community at large.⁴ We agree with the city that the planning commission's utilization of four design
14 review committee members to assist it in preparing the first draft of the ordinance either rendered its
15 failure to formally name a special citizens' advisory committee harmless error or constituted *de*
16 *facto* compliance with Implementation Measure #1. In either event, petitioners' arguments provide
17 no basis for reversal or remand.

18 Petitioner's assignment of error B and intervenor-petitioner's assignments of error A
19 through D are denied.

20 **C. Petitioner's Constitutional Arguments**

21 Petitioner's petition for review includes the following argument:

⁴ Petitioners do point out that while *four* design review committee members participated in preparing the draft ordinance, Implementation Measure #1 calls for a special citizens' advisory committee of *three* members. Given the nature of the role that a citizens' advisory committee typically performs, it is hard to see how appointing one extra member could constitute reversible error. Because Implementation Measure #1 does not expressly state that no more than three members can be appointed to a special citizens' advisory committee, we do not agree that appointing four members to a special citizens' advisory committee is inconsistent with Implementation Measure #1.

1 “The City Council has imposed these requirements in a manner that discriminates
2 against petitioner and a certain group of Newport citizens, and not others, and the
3 legislation as written is not rationally related to a legitimate government purpose nor
4 does it fulfill the stated goals stated in the legislation itself. Thus it violates the Equal
5 Protection clause of the US Constitution, 14th Amendment, and the Privileges and
6 Immunities Clause of the Oregon State Constitution, Art. I, Sec. 20. The issue of
7 the taking of a cognizable property interest was raised at the public hearings by
8 many citizens, as was limiting the beneficial use of the property. * * * No other
9 district of Newport will have these regulations imposed on them (that is, the
10 neighborhoods where the officials and decisionmaker live will not be burdened by
11 this restrictive, expensive, time consuming, and political process).” Petition for
12 Review 3-4.

13 We reject petitioner’s apparent argument that it is inherently impermissible under both the
14 U.S. Constitution and the Oregon Constitution to impose different land use regulations in different
15 parts of the city. Petitioner makes no attempt to explain why she believes the city’s decision to limit
16 the geographic scope of the new design review ordinance to the Nye Beach area of the city
17 constitutes improper discrimination. Similarly, petitioner’s assertions that the challenged design
18 review guidelines and standards are not rationally related to any legitimate governmental purpose
19 and that they could result in a taking of property that requires compensation are simply undeveloped
20 assertions. Petitioners’ undeveloped arguments provide no basis for reversal or remand.

21 Petitioner’s assignment of error A is denied.

22 **D. Petitioner’s Disagreement With the Terms of the Ordinance**

23 Petitioner expresses disagreement with a number of provisions of the new design review
24 guidelines and standards. Specifically, petitioner objects to eliminating scale as a consideration
25 under the new design guidelines and standards, allowing commercial development without off-street
26 parking under certain conditions, and eliminating regulation of signage. Petition contends that the
27 design review guidelines and standards are inadequate to further the stated goals in the design
28 review guidelines and standards.

29 Petitioner makes no attempt to explain why the identified changes in the design review
30 ordinance are inconsistent with or otherwise violate any applicable legal standard. Petitioner’s
31 disagreement with the substance of the design review guidelines is, in and of itself, insufficient to

1 provide a basis for reversal or remand. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587,
2 606 (2000); *Dougherty v. Tillamook County*, 12 Or LUBA 20, 33 (1984).

3 Petitioner’s assignment of error C is denied.

4 **E. Failure to Respond to Requests to be Excluded from the Design Review**
5 **Overlay District**

6 Intervenor-petitioner Baker argues the city committed reversible error by failing to respond
7 specifically to numerous requests from persons to have their property excluded from the Nye Beach
8 design review overlay district. Intervenor cites no legal requirement that the city provide a specific
9 response to such requests, and we are aware of none.

10 Intervenor petitioner’s assignment of error E is denied.

11 **F. Defective Notice**

12 Finally, petitioner argues the city erred because the notice that preceded the planning
13 commission and city council hearings in this matter did not specifically point out that a 50-foot height
14 limit under the prior ordinance could be reduced to 35 feet in the new ordinance and that other new
15 limitations and burdens were proposed in the new regulations. Petitioner also contends the city
16 erred by making changes to Ordinance 1865 after the conclusion of the final public hearing in this
17 matter.

18 Petitioner cites no legal authority that notice of a post-acknowledgment land use regulation
19 amendment must separately specify or list every proposed change. We are aware of no such
20 requirement. The amendments adopted by Ordinance 1865 were subject to three public hearings
21 and a great deal of testimony was presented at those hearings. Given the length of time over which
22 the amendments adopted by Ordinance 1865 were available to the public and subject to public
23 hearings, any lack of detail in the initial notice of hearing did not deny the public an opportunity to
24 know the substance of the proposed amendments or the amendments that were ultimately adopted
25 by Ordinance 1865.

1 Petitioner’s final argument is that the city erred by changing the proposed amendments
2 following the close of the final public hearing. We are aware of no general prohibition against
3 amending a proposed land use regulation amendment after the close of the final evidentiary hearing.
4 In fact, it is not unusual for proposed land use regulation amendments to be revised during the post-
5 hearing deliberative stage to respond to public testimony. While it may be that a proposal could be
6 so radically changed following the conclusion of the final public hearing on proposed land use
7 legislation that an additional public hearing would be necessary, petitioner does not argue that the
8 changes in this case were significant. In fact, petitioner does not even identify or discuss the changes
9 that were made following the final evidentiary hearing.

10 Petitioner’s assignment of error D is denied.

11 The city’s decision is affirmed.