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

PAUL T. CONTE,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

HOME BUILDERS ASSOCIATION OF LANE COUNTY
and BETTER HOUSING TOGETHER,
Intervenors-Respondents.

LUBA No. 2021-049

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Paul T. Conte filed the petition for review and reply briefs and argued on behalf of themselves.

Lauren Sommers filed a response brief and argued on behalf of respondent.

Bill Kloos filed a response brief and argued on behalf of intervenors-respondents.

ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board Member, participated in the decision.

REMANDED 12/17/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals Ordinance 20647, a legislative decision that amends provisions of the city's land use code concerning clear and objective approval criteria for the development of housing.

MOTION TO WITHDRAW

Intervenor-respondent Eugene Chamber of Commerce moves to withdraw from this appeal. The motion is unopposed and allowed.

BACKGROUND

ORS 197.307(4) requires local governments to "adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing." However, ORS 197.307(6) authorizes local governments to adopt an alternative process for approving the development of housing under standards that are not clear and objective, as long as the applicant retains the option of proceeding under an approval process that complies with ORS 197.307(4). The city has adopted such a two-track system for housing applications in its land use code, offering an approval track that is "clear and objective" and another "general" track that allows the city discretion in reviewing applications. *See Dreyer v. City of Eugene*, 78 Or LUBA 391, 394-95 (2018), *aff'd*, 296 Or App 490, 437 P3d 1236 (2019) (describing the city's two-track framework); *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 383 (2002) (*Home Builders*) (same).

In 2018, the city began a project referred to as the "clear and objective update" in an attempt to remove barriers to the development of housing, including amending some clear and objective track standards in the city's land use code in order to make them easier to satisfy. Some of the proposed amendments allow increased density in some areas of the city where density was previously lower due to larger setbacks and other density-limiting mechanisms. Those land use code amendments are post-acknowledgment plan amendments (PAPAs) for which the city was required to satisfy ORS 197.610 to 197.625. We discuss those statutes later in this opinion.

The clear and objective update consisted of multiple phases, including multiple opportunities for public input. After preliminary opportunities for public input, the city formally initiated the land use code amendment process, which included a public hearing before the planning commission, a planning commission recommendation on the proposed amendments, a public hearing before the city council, and a city council decision. Petitioner appeals the city council ordinance (the ordinance) amending the land use code.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city made multiple errors in adopting the ordinance. We begin by describing the city's adoption of the ordinance as relevant to petitioner's first assignment of error.

On October 20, 2020, the planning commission held a public hearing on the proposed amendments. From November 2020 through February 2021, the

planning commission held a series of meetings deliberating on the proposed amendments. On February 9, 2021, the planning commission recommended that the city council adopt the amendments along with draft findings in support of the amendments. Record 1128, 1197, 1253-71.

On March 6, 2021, petitioner submitted testimony to the city council arguing that the city's findings in support of to the proposed amendments should include findings of consistency with the Westside Neighborhood Plan (WNP), an adopted refinement plan, and that the proposed amendments were not consistent with the WNP. Record 1210.

On March 8, 2021, the city council held a public hearing on the proposed amendments. The draft ordinance included in the March 8, 2021 city council hearing packet included draft findings of compliance with applicable plan provisions, including some refinement plans, but it did not include draft findings of compliance with the WNP. Record 1187-95.

Adopting the draft ordinance was an action item on the city council's April 12, 2021 meeting agenda. Record 74. The city council's April 12, 2021 meeting packet included an Agenda Item Summary (AIS) for that action item, and a copy of the draft ordinance was included as Attachment B to the AIS. Record 75-79, 86-123. In turn, supportive findings were included as Exhibit C to Attachment B. Record 126-46. Those findings include findings of consistency with applicable refinement plan provisions, including the WNP. Record 142-44. At its April 12, 2021 meeting, the city council voted to "adopt an Ordinance concerning clear and

objective approval criteria for housing, included as Attachment B" to the AIS. Supplemental Record 183; Audio Recording, City Council, April 12, 2021, at 2:28:10, 2:50:47.

This is where the city's ordinance adoption procedure went awry. On April 14, 2021, after the city council voted on April 12, 2021, to adopt the ordinance and attached findings, the mayor signed the copy of the ordinance provided to them by staff. Due to a clerical error, the ordinance provided to and signed by the mayor on April 14, 2021, did not include the findings attached to the ordinance adopted by the city council on April 12, 2021. Instead, it incorrectly included earlier draft findings that did not include findings of consistency with the WNP. Record 5-61.

The city was apparently alerted to its error in late May or early June 2021 when petitioner conferred with the city's attorney regarding petitioner's record objections in this appeal.[1] Thereafter, the city did two things. First, on June 7, 2021, the findings attached to the ordinance signed by the mayor on April 14, 2021, were administratively replaced on the city's website with the findings that were actually adopted by the city council on April 12, 2021, and the cover page of the ordinance was amended to note that change. Supplemental Record 120. Additionally, the city attached to the ordinance a memo dated June 4, 2021,

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[1] The record that the city initially filed in this appeal included the earlier draft findings.

signed by the mayor, explaining that they intended to sign an ordinance identical to the ordinance adopted by the city council, and that the inclusion of the incorrect findings was a mistake. Supplemental Record 121. Second, on June 15, 2021, the city submitted the corrected ordinance and findings to the Department of Land Conservation and Development (DLCD), an action which we discuss in more detail below.

A. PAPA Procedures

As we have explained, DLCD acts as a statewide "clearing-house" for PAPAs by reviewing proposed amendments, providing advice and comments to local governments, and providing notice of proposed changes to the public. *Save TV Butte v. Lane County*, ___ Or LUBA ___, ___ (LUBA No 2019-002, Oct 16, 2019) (slip op at 7-8), *aff'd*, 301 Or App 853, 455 P3d 1051 (2020). If a local government complies with the statutory PAPA procedures, and no appeal is filed or the PAPA is affirmed on appeal, then that PAPA is "deemed to be acknowledged" by DLCD as consistent with the statewide planning goals. ORS 197.625(1).[2]

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[2] ORS 197.625(1) provides:

> "A local decision adopting a change to an acknowledged comprehensive plan or a land use regulation is deemed to be acknowledged when the local government has complied with the requirements of ORS 197.610 and 197.615 and either:
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> "(a) The 21-day appeal period set out in ORS 197.830(9) has expired and a notice of intent to appeal has not been filed; or

Before a local government adopts a change to an acknowledged land use regulation, the local government must submit the proposed PAPA to DLCD. ORS 197.610(1). In turn, DLCD provides notice of the proposed change to persons that have requested notice of such changes and persons that are generally interested in such changes. ORS 197.610(4). The local government must also submit a decision adopting a PAPA to DLCD within 20 days after making the decision. ORS 197.615(1). In turn, DLCD provides notice of the decision adopting a PAPA and an explanation of the requirements for appealing that decision to LUBA to persons that have requested notice of such changes and persons that are generally interested in such changes. ORS 197.615(3).

On September 15, 2020, the city provided DLCD with notice of the proposed amendments. Record 1747. On April 16, 2021, the city submitted what it thought was the adopted ordinance to DLCD by uploading an electronic notice of adoption to DLCD's website, which is how DLCD currently requires local governments to submit adopted PAPAs. Record 1-4. However, the ordinance materials that the city submitted to DLCD on April 16, 2021, consisted of a cover page and 56 pages of repeating text that were not the adopted ordinance and findings. Supplemental Record 63-119. On June 15, 2021, following the city's discovery of the errors in the materials uploaded to DLCD's website, the city

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> "(b) If an appeal has been timely filed, [LUBA] affirms the local decision or, if an appeal of the decision of [LUBA] is timely filed, an appellate court affirms the decision."

submitted to DLCD a complete copy of the ordinance, including the findings adopted by the city council on April 12, 2021, and the mayor's June 4, 2021 correction memo. Supplemental Record 1-62.

Petitioner assigns error to the city's post-adoption failure to comply with ORS 197.615. As we discuss in more detail below, petitioner argues that the city failed to comply with ORS 197.615(1) because the post-adoption material that the city submitted to DLCD on April 16, 2021, did not contain an accurate copy of the adopted ordinance and because the city did not submit the corrected ordinance to DLCD until June 15, 2021.

Petitioner further argues that, even if the late submission of the ordinance is not reversable or remandable error, the June 15, 2021 submission to DLCD nevertheless violates ORS 197.615(2)(c), which requires "[a] brief narrative summary of the decision, including a summary of substantive differences from the proposed change submitted under ORS 197.610 and any supplemental information that the local government believes may be useful to inform [DLCD] or members of the public of the effect of the actual change." Petitioner argues that the inclusion of the WNP findings in the adopted ordinance is a "substantive difference" from the proposed amendments submitted to DLCD in September 2020 under ORS 197.610(1), which required that the city submit a narrative summary explaining that change in the post-adoption submission. Petition for Review 17-18.

Petitioner also argues that the city violated ORS 197.615(4), which requires a local government, on the same day that it submits a decision adopting a PAPA to DLCD, to provide notice of the decision to parties who both participated in the proceedings that led to the decision and requested notice of the change. The city provided ORS 197.615(4) notice to interested persons on April 16, 2021, but it did not send a separate notice of the decision on June 15, 2021, when the city transmitted the correct documents to DLCD.

ORS 197.835(9)(a)(B) authorizes LUBA to reverse or remand a local government decision where the local government committed procedural errors "that prejudiced the substantial rights of the petitioner." Here, petitioner asserts that prejudice is "immaterial" when a violation of the DLCD notice process is established. Petition for Review 17. Before turning to petitioner's arguments, we briefly describe the Court of Appeals and LUBA decisions that have addressed this issue.

In *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993), *rev den*, 318 Or 661 (1994), the Court of Appeals held that a *complete* failure to provide the *pre*-adoption PAPA notice required by ORS 197.610(1) is a *substantive*, not procedural, error that requires remand, without regard to whether the deviation results in prejudice to a party's substantial rights.

In *Stallkamp v. City of King City*, we interpreted *Oregon City Leasing* and explained our understanding that "not every deviation from the requirements of ORS 197.610(1) or its implementing rule is a 'substantive' error that must result

in remand." 43 Or LUBA 333, 352 (2002), *aff'd*, 186 Or App 742, 66 P3d 1029 (2003). In *Stallkamp*, the city failed to identify in its notice to DLCD certain property that it proposed to rezone from rural residential to recreational open space (ROS). The materials submitted to DLCD, however, included a map depicting the properties that would be subject to the ROS zone. We held that any error in failing to identify the properties that would be subject to the ROS zone in the text of the notice was procedural error, and that the petitioners' failure to demonstrate prejudice to their substantial rights precluded remand under ORS 197.835(9)(a)(B). *Id.*; *see also Bryant v. Umatilla County*, 45 Or LUBA 653, 657 (2003) (holding that the county's failure to provide a full 45 days' notice to DLCD, as required by the then-applicable version of ORS 197.610(1), did not provide a basis for reversal or remand where the petitioner participated during the proceedings below and did not allege any prejudice to their substantial rights); *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647, 658 (2003) (holding that a corrected notice received by DLCD only 26 days prior to the initial evidentiary hearing was sufficient to apprise those parties who may have relied on notice from DLCD, and would not otherwise receive notice from the city, of the nature and scope of the matters under review by the planning commission, where the notice set out when the initial evidentiary hearing would be held and the date the notice was mailed, explained that the notice of the proposed action that was previously sent briefly described the amendments, and included copies of the proposed text and maps).

In *OCAPA v. City of Mosier*, we attempted "to clarify what kind or degree of deviation from the requirements of ORS 197.610 warrants remand, regardless of whether the petitioners before LUBA have demonstrated that the deviation prejudiced *their* substantial rights." 44 Or LUBA 452, 471 (2003) (emphasis in original). *OCAPA* concerned the city's failure to include the correct date for the initial evidentiary hearing in its notice to DLCD of the proposed PAPA. The hearing actually occurred one day *before* the date specified in the notice to DLCD. The petitioner in that appeal did not allege that that failure caused it to miss its opportunity to appear at the initial evidentiary hearing.[3] We explained:

> "[T]he larger statutory scheme at ORS 197.610 to 197.625 * * * is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice and instead rely on notice from DLCD of proposed [PAPAs]. The ORS 197.610([4]) requirement for secondary notice by DLCD and the broader participation that such secondary notice may stimulate in any given post-acknowledgment proceeding is to ensure that proposed [PAPAs] receive appropriate scrutiny to ensure that the

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[3] ORS 197.610(1) provides:

> "Before a local government adopts a change, including additions and deletions, to an acknowledged comprehensive plan or a land use regulation, the local government shall submit the proposed change to [DLCD]. The Land Conservation and Development Commission [(LCDC)] shall specify, by rule, the deadline for submitting proposed changes, but in all cases the proposed change must be submitted at least 20 days before the local government holds the first evidentiary hearing on adoption of the proposed change. [LCDC] may not require a local government to submit the proposed change more than 35 days before the first evidentiary hearing."

> acknowledged comprehensive plan and land use regulations are not amended in ways that violate the statewide planning goals. * * * Viewed in that context, possible prejudice to DLCD and to the persons who are entitled to notice from DLCD under ORS 197.610([4]), who may not be parties in an appeal to LUBA, is also relevant in determining whether a city's errors in its ORS 197.610(1) notice to DLCD warrant remand. In our view, whether such errors warrant remand depends upon whether the errors are of the kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. If so, whether the particular petitioners before LUBA can demonstrate prejudice to their substantial rights is not dispositive." *Id.* at 471-72.

In summary, if errors in a local government's pre-adoption notice of a proposed PAPA to DLCD are of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process performed its function, then the decision must be remanded so that the required notice is provided. *Id.* at 472. Contrary to petitioner's argument, *OCAPA* does not stand for the categorical proposition that prejudice is immaterial whenever a violation of the DLCD notice process is established. In *OCAPA*, we explained that inadequate notice under ORS 197.610(1), as opposed to a complete failure to provide that notice, requires remand only if that inadequacy (1) prejudiced the petitioner's substantial rights or (2) was likely to prejudice the substantial rights of DLCD or other persons who may be relying on DLCD's notice to participate in the PAPA process.

We pause to note a significant difference between the present appeal and *OCAPA* and the other cases we cited and relied on in *OCAPA*, which all concerned errors in the *pre*-adoption PAPA notice to DLCD required by ORS

197.610(1). Differently, this appeal concerns the city's errors in the *post*-adoption PAPA notices required by ORS 197.615.

Pre-adoption and post-adoption PAPA notices serve different functions within the PAPA adoption statutory scheme. Pre-adoption PAPA notices "ensure that proposed [PAPAs] receive appropriate scrutiny to ensure that the acknowledged comprehensive plan and land use regulations are not amended in ways that violate the statewide planning goals." *Id.* at 471. The pre-adoption notice alerts DLCD to the proposed changes and then DLCD provides notice of the proposed changes to interested parties who may not be provided notice by the local government. Those parties may then participate in the local proceedings on the proposed PAPA and thereby obtain standing to appeal the adopted PAPA. *See* ORS 197.620(2) (explaining general requirement that a petitioner have appeared before the local government to seek review of a PAPA); n 5. Differently, post-adoption PAPA notices alert DLCD and interested persons that the local government has adopted the changes and that the time to appeal the adopted PAPA to LUBA has begun.

In this appeal, there is no dispute that the city complied with the pre-adoption notice requirement in ORS 197.610(1). A local government must provide DLCD *additional* pre-adoption notice at least 10 days before the final evidentiary hearing on the proposal if the proposed PAPA "is altered to such an extent that the [initial] materials submitted no longer reasonably describe the proposed change." ORS 197.610(6). "Circumstances requiring resubmission of a

proposed change may include, but are not limited to, a change in the principal uses allowed under the proposed change or a significant change in the location at which the principal uses would be allowed, limited or prohibited." *Id.* Petitioner does not argue that the city's adoption of findings after the final evidentiary hearing on the ordinance was an alteration to the proposed amendments that required additional notice under ORS 197.610(6) or otherwise violated ORS 197.610.[4]

There is also no dispute here that the city's DLCD post-adoption notice process involved significant procedural errors. Under the reasoning in *OCAPA*, and extending it to the circumstances presented here, we conclude that the city's deviation from the requirements of the post-adoption PAPA notice process is more than an insignificant deviation that would otherwise require petitioner to establish that the procedural errors prejudiced *their* substantial rights. ORS 197.835(9)(a)(B); *Stallkamp*, 43 Or LUBA at 352. Rather, the procedural errors

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[4] As we explained in *OCAPA*,

> "The statutes expressly recognize the reality that proposed [PAPAs] may be revised during the course of local proceedings. * * * ORS 197.620(2) provides a remedy where an adopted [PAPA] deviates substantially from the text that was provided to DLCD in its notice of initial hearing under ORS 197.610(1). Under ORS 197.620(2), * * * DLCD and 'any other person' may appeal the final decision without regard to whether [DLCD] or [the] other person appeared during the local proceedings that led to the [PAPA]." 44 Or LUBA at 469; see n 5 (setting out ORS 197.620(2)).

warrant reversal or remand if petitioner establishes that they likely prejudiced the substantial rights of DLCD or other persons who may be relying on DLCD's notice to participate in the post-adoption PAPA appeal process. *OCAPA*, 44 Or LUBA at 471-72. Accordingly, our resolution of this assignment of error depends on whether petitioner has established that the city's incomplete April 16, 2021 DLCD notice was likely to prejudice the substantial rights of DLCD or other persons who may have been relying on DLCD's notice to them in order participate in the post-adoption PAPA process, such as by appealing the city's adoption of the ordinance to LUBA. For the reasons explained below, we conclude that petitioner has not met that burden.

We understand petitioner to first argue that the city's April 16, 2021 post-adoption notice to DLCD prevented DLCD from carrying out its statutory notice function and prevented DLCD and other unspecified interested persons from appealing the decision because the April 16, 2021 notice to DLCD did not contain an accurate copy of the adopted ordinance. Thus, petitioner argues, neither DLCD nor any interested persons could tell from that notice what PAPA the city actually adopted or make an informed decision whether to appeal the ordinance. Petition for Review 18.

Petitioner has not identified any interested party that may have relied solely on DLCD's notice of adoption of a PAPA under ORS 197.615(3) to determine whether to appeal the ordinance. We observe that interested persons are generally required to participate in the local PAPA proceeding in order to have standing to

appeal an adopted PAPA, with limited exceptions that are not applicable here. ORS 197.830(2); ORS 197.620(2).[5] Thus, it would be difficult for a party that

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[5] ORS 197.830(2) provides:

> "Except as provided in ORS 197.620, a person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
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> "(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
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> "(b) Appeared before the local government, special district or state agency orally or in writing."

ORS 197.620(2) provides:

> "Notwithstanding the requirements of ORS 197.830(2) that a person have appeared before the local government orally or in writing to seek review of a land use decision, [DLCD] or any other person may appeal the decision to [LUBA] if:
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> "(a) The local government failed to submit all of the materials described in ORS 197.610(3) or, if applicable, ORS 197.610(6), and the failure to submit the materials prejudiced substantial rights of [DLCD] or the person;
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> "(b) Except as provided in subsection (3) of this section, the local government submitted the materials described in ORS 197.610(3) or, if applicable, ORS 197.610(6), after the deadline specified in ORS 197.610(1) or (6) or rules of [LCDC], whichever is applicable; or
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> "(c) The decision differs from the proposed changes submitted under ORS 197.610 to such an extent that the materials submitted under ORS 197.610 do not reasonably describe the decision."

did not participate in the city's proceedings on the amendments to argue that they have a substantial right to appeal the ordinance that was prejudiced by the city's errors in the post-adoption DLCD submission.

In all events, the city's June 15, 2021 notice to DLCD included a correct copy of the adopted ordinance (and the mayor's memo summarizing the errors that impacted the original DLCD notice and identifying the findings that the city council actually adopted). We agree with the city that that information was sufficient for DLCD to make an informed decision about whether to appeal, and to provide adequate notice to an interested person who may have relied on DLCD notice under ORS 197.615(3) to determine what the ordinance entails and make an informed decision about whether to appeal the ordinance.

Relatedly, petitioner points out that the city submitted the June 15, 2021 corrected ordinance to DLCD after the usual 21-day deadline for appealing a PAPA had passed. *See* ORS 197.830(9) ("A notice of intent to appeal [PAPAs] processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615."). Petitioner does not explain why this error should result in remand, but we understand petitioner to argue that the error precluded DLCD or an unspecified interested person from appealing the decision to LUBA in a timely manner. However, as the city correctly points out, a party that relied exclusively on DLCD notice under ORS 197.615(3) would have been entitled to an extended appeal period due to the

city's administrative errors. *See Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 431, 899 P2d 720 (1995) (the 21-day deadline for appeals of a PAPA under ORS 197.610 to 197.625 runs from the time that the notice specified in those statutes is given to persons entitled to notice under them); *Ludwick v. Yamhill County*, 72 Or App 224, 229-30, 696 P2d 536, *rev den*, 299 Or 443 (1985) (notice containing the required information under ORS 197.615(2) is a prerequisite to the running of the 21-day period for appeals to LUBA); *Craig Realty Group v. City of Woodburn*, 37 Or LUBA 1041, 1043, 1048 (citing *ODOT v. City of Oregon City*, 153 Or App 705, 708, 959 P2d 615 (1998); *Barton v. City of Lincoln City*, 29 Or LUBA 612, 614-15 (1995)) (the time for appealing PAPAs is measured from the time of the required notice under ORS 197.615). No party other than petitioner has appealed or attempted to appeal the ordinance.

Next, petitioner argues that the city did not comply with ORS 197.615(2)(c), quoted above, because it failed to provide DLCD with a summary of changes from the *pre*-adoption notice of the proposed amendments, which did not include findings addressing the WNP, to the adopted ordinance, which does include findings addressing the WNP. Petition for Review 17. We reject that argument. As far as we are aware, the pre-adoption notice to DLCD did not include any proposed findings. Record 1745-47. Petitioner does not explain why the addition of WNP findings constitutes a "substantive difference" requiring summary under ORS 197.615(2)(c), and it is not obvious to us that it does. The city's decision is a legislative decision that does not require specific findings.

Restore Oregon v. City of Portland, ___ Or LUBA ___, ___ (LUBA Nos 2018-072/073/086/087, Aug 6, 2019) (slip op at 6), *aff'd*, 301 Or App 769, 458 P3d 703 (2020).

In sum, we agree with the city that petitioner has not established that the city's errors submitting its post-adoption notices to DLCD likely prejudiced the substantial rights of persons other than petitioner who may have relied exclusively on DLCD notice under ORS 197.615(3) to participate in the post-adoption PAPA process.

Finally, petitioner argues that the city failed to satisfy ORS 197.615(4) when it failed to deliver notice of the corrected ordinance with the findings that the city council actually adopted to persons entitled to notice. ORS 197.615(4) provides:

> "On the same day the local government submits the decision to [DLCD], the local government shall mail, or otherwise deliver, notice to persons that:
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> "(a) Participated in the local government proceedings that led to the decision to adopt the [PAPA]; and
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> "(b) Requested in writing that the local government give notice of the [PAPA]."

It is undisputed that the city provided notice under ORS 197.615(4) on April 16, 2021. The city explains that the April 16, 2021 notices directed recipients to the copy of the ordinance that was posted on the city's website. Record 2. When the April 16, 2021 notice was provided, the signed version of

the ordinance on the city's website included unadopted draft findings. The city asserts that the ordinance was "administratively replaced" and "updated" on June 7, 2021, by which we assume the city means that the corrected version of the ordinance, with the mayor's correction memo, was posted on the city's website. Petition for Review 14; City Response Brief 5, 12. As we understand it, the city argues that parties entitled to notice under ORS 197.615(4) could have reviewed the corrected version of the ordinance on the city's website after June 7, 2021, so the original April 16, 2021 notices of adoption were sufficient to put such parties on notice, notwithstanding the city's failure to comply with ORS 197.615(4) on June 15, 2021.[6]

We agree with petitioner that, under the unusual circumstances of this case, the city's failure to provide a second notice on June 15, 2021 is procedural error. However, we conclude that error is not of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process performed its function, and that petitioner has not established that that procedural error likely prejudiced the substantial rights of other persons who may have relied on the original notice of decision. The adopted text amendments to the city's land use code, which were undisputedly posted to the city's website on April 16, 2021, were unchanged by

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[6] The city does not explain why an interested party who reviewed the April 16, 2021 notice would, even if it was physically possible, without prompting, review the city's website again on June 7, 2021, and learn that the ordinance had been corrected to include the adopted findings.

the June 7, 2021 "updated" online posting that included the correct findings. Accordingly, we agree with the city that the April 16, 2021 notice provided the notice of adoption required by ORS 197.615(4), notwithstanding that the version of the ordinance posted on the city's website on that date contained a prior version of the findings that the city council did not adopt. Interested parties who relied on the notice provided on April 16, 2021, were provided notice and an opportunity to appeal the adopted ordinance. We conclude that the city's error did not likely prejudice the substantial rights of persons who requested notice of the ordinance but were not specifically alerted by the city that the city later posted the correct, adopted findings. Again, there is no general requirement to adopt any findings in support of a legislative decision. Given that legal reality, we fail to see, and petitioner has not explained, how the city's error in initially posting the wrong findings to its website could prejudice the substantial rights of persons who received the April 16, 2021 notice of the decision under ORS 197.615(4).

Petitioner's arguments in this portion of the assignment of error provide no basis for reversal or remand.

B. City Charter Ordinance Adoption Requirements

Petitioner argues that the city council's adoption of the ordinance violated the city's charter provisions governing the adoption of ordinances. Eugene Charter 28(1) requires the city to publish notice of a proposed ordinance and post the notice and text of the ordinance on the city's website at least 10 working days prior to the city council meeting at which the proposed ordinance is to be

considered.[7] Eugene Charter 28(3) requires the city council to consider a proposed ordinance during at least two city council meetings as part of the adoption process, unless the city council unanimously consents to consider and enact the ordinance in a single meeting and "the council does not amend the ordinance in a manner that modifies its substantive effect."[8]

Petitioner argues that the city did not provide notice of, make available, or post on the city's website the version of the ordinance that was adopted at the April 12, 2021 meeting—which includes findings of compliance with the WNP—until only three or four days before that meeting. The only difference that

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[7] Eugene Charter 28(1) provides, in part:

> "At least ten working days prior to the council meeting at which the proposed ordinance is to be considered, notice of the proposed ordinance shall be published in a newspaper of general circulation in the city and the notice and text of the ordinance shall be posted on the city's web site. The notice shall include the title of the proposed ordinance and the date, time and place of the council meeting and shall state that copies of the ordinance are posted on the web site and available at the city manager's office."

[8] Eugene Charter 28(3) provides:

> "Except as provided in this subsection, an ordinance shall not be adopted unless it has been considered by the council during at least two meetings. With the unanimous consent of the council, the council may consider and enact an ordinance at a single meeting if the council does not amend the ordinance in a manner that modifies its substantive effect. Nothing in this section requires the council to consider an ordinance at more than two meetings prior to its adoption."

petitioner identifies is the addition of the WNP findings. Petitioner argues that the city did not consider the adopted ordinance during at least two meetings or unanimously consent to enact the ordinance in a single meeting.

Petitioner argues that those procedural errors specifically prejudiced petitioner's substantial rights in two ways. First, the fact that the city council provided a copy of the revised ordinance only a few days prior to the meeting at which that version of the ordinance was considered and adopted provided no reasonable opportunity to submit evidence and argument in opposition prior to the adoption. Petitioner argues that, if the city had either posted a copy of the ordinance with revised supportive findings at least 10 working days before the April 12, 2021 meeting, or delayed the adoption and consideration of the ordinance with revised supportive findings to another meeting after the April 12, 2021 meeting, then petitioner would have submitted additional testimony in opposition to the ordinance arguing that the ordinance is inconsistent with the WNP. Second, petitioner argues that the city's "failure to record the correct ordinance caused Petitioner to initiate this appeal months earlier than is required by statute and based on an ordinance that may or may not be in effect." Petition for Review 22.

The city responds the city adopted the ordinance in a manner that is consistent with the procedural requirements in the city charter. The city explains that the city published notice of the ordinance on February 21, 2021, 10 working days before the March 8, 2021 public hearing. Record 1217. That notice states

that the ordinance text is posted and available on the city's website. *Id.* The city explains that the city council considered the ordinance at two city council meetings: (1) the March 8, 2021 public hearing and (2) the April 12, 2021 city council meeting.

Petitioner's argument relies on the premise that the cited charter provisions required the city to (1) provide notice that the city modified the findings between the March 8, 2021 public hearing and the April 12, 2021 city council adoption of the ordinance and (2) set a third city council meeting to consider the ordinance in light of the modified findings. The city responds, and we agree, that nothing in the cited charter provisions required the city to provide additional notice or an additional city council meeting on the ordinance due to the city's modified findings in support of the ordinance. Accordingly, petitioner has not established any procedural error.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued Eugene Code (EC) 9.8065(2), adopted inadequate findings in support of the city's conclusion that EC 9.8065(2) is satisfied, and committed a procedural error in adopting the findings that the ordinance is consistent with the WNP.

EC 9.8065(2) is a code amendment approval criterion that provides:

> "If the city council elects to act, it may, by ordinance, adopt an amendment to this land use code that:

"* * * * *

"(2) Is consistent with applicable provisions of the comprehensive plan and applicable adopted refinement plans."

To ensure consistency with that approval criterion, the city made findings of consistency with the WNP policies codified at EC 9.9680(l)(a) and (c), EC 9.9680(3)(a) and (b), and EC 9.9680(4)(d). Record 142-44.

Starting with the procedural argument, petitioner argues that the city's WNP findings were adopted without any opportunity for public review and comment. However, petitioner cites no applicable law that required the city to provide an opportunity for public review and comment on the proposed findings supporting the ordinance. Accordingly, petitioner's procedural argument is undeveloped for our review and provides no basis for reversal or remand.

Petitioner argues that the city's findings of consistency with the WNP are inadequate, citing *Heiller v. Josephine County*, where we explained that, generally, findings must (1) identify the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are or are not met. 23 Or LUBA 551, 556 (1992).

The city responds, and we agree, that the standard for adequate findings that we articulated in *Heiller* applies to quasi-judicial proceedings. "Because the challenged decision is a legislative rather than a quasi-judicial decision, there is no generally applicable requirement that the decision[] be supported by findings, although the decision and record must be sufficient to demonstrate that applicable criteria were applied and 'required considerations were indeed considered.'"

Restore Oregon, ___ Or LUBA at ___ (slip op at 6) (quoting *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002)). The decision and record, and the city's findings, demonstrate that the city considered the applicable WNP policies. Petitioner has not established that more detailed findings are required for a legislative decision. Petitioner's findings challenge provides no basis for reversal or remand and is denied.

Petitioner argues that the city misconstrued WNP Land Use Element Policy 1 (Policy 1), which is to "[p]revent erosion of the neighborhood's residential character." The city council found that

> "the proposed code amendments will not contribute to the erosion of residential character. The proposed code amendments update existing approval criteria for land use applications related to housing. The proposed amendments will not rezone, re-designate, or otherwise change the character of the residentially zoned properties. To the extent that [Policy 1] is applicable to the proposed code amendments, the proposed amendments are not inconsistent with the policy." Record 142.

Petitioner observes that the ordinance will allow more dense housing development in areas subject to the WNP by removing requirements for a 30-foot buffer along the perimeter of planned unit developments (PUDs) and 40 percent open space for PUDs and argues that increased density will not "prevent erosion of the neighborhood's residential character."[9]

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[9] The ordinance also adds new "transition standards" intended to "reduce impacts of higher intensity development when located near property zoned for

The city does not dispute that the ordinance is intended to allow more housing development overall, including more dense housing development within areas subject to the WNP. The city responds by citing *Jefferson Westside Neighbors v. City of Eugene*, 57 Or LUBA 421 (2008). In that case, the petitioners challenged a hearings officer's interpretation of Policy 1 as being "concerned only with preventing conversion of residential lands to non-residential uses." *Id.* at 425. The petitioners contended that Policy 1 "is concerned with preventing the erosion of the residential *character* of the neighborhood, its existing features, including the predominant pattern of single-family dwellings on largely grid-patterned lot layout, not merely preserving residential *uses* as a broad use category." *Id.* (emphases in original). We agreed with the hearings officer's interpretation that the intent of Policy 1 "is to retain the neighborhood as a residential area" and "to prevent non-residential forces from eroding the neighborhood's residential character." *Id.* at 425-26.

Petitioner replies that *Jefferson Westside Neighbors* is distinguishable because that appeal involved the meaning of the version of Policy 1 that is codified at EC 9.9680(1)(a), while petitioner relies on the refinement plan version of Policy 1. Reply Brief to Intervenors-Respondents 1-2. Those two versions are identical, and petitioner has not explained why the fact that there are two versions

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lower intensity development." Record 54; Record 10-13 (setting out the new transition standards at EC 9.5860).

distinguishes *Jefferson Westside Neighbors* so that our reasoning in that case does not apply equally here.

The city responds, and we agree, that our task in this appeal is to determine whether the city's interpretation of the phrase "residential character" in Policy 1 is plausible. We must defer to the city council's interpretation of Policy 1 if that interpretation is not inconsistent with the express language, underlying purposes, or policies of the WNP. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

The city concluded that the ordinance does not erode the "residential character" of the neighborhood because the ordinance does not rezone or redesignate any residentially zoned properties in the neighborhood. That interpretation is consistent with the interpretation that we affirmed in *Jefferson Westside Neighborhood.* Even if our reasoning in *Jefferson Westside Neighborhood* were not controlling or persuasive in this appeal, petitioner has not explained why the city's interpretation of Policy 1 is inconsistent with the express language or underlying purpose of that policy. Accordingly, we must defer to the city council's interpretation. ORS 197.829(1); *Siporen*, 349 Or 247.

Petitioner argues that the city's interpretation of Policy 1 "fails to take into account" the definition of the phrase "residential character" in EC 9.0500, which the city adopted by ordinance on August 11, 2008, and which provides that "residential character" means "[a] combination of qualities and features that gives

identity to a particular area where the predominant use is housing and that distinguishes the area from other areas."

We agree with intervenors-respondents that the definition of "residential character" in EC 9.0500 does not provide context for the interpretation of Policy 1. Policy 1 was adopted in 1987 and does not contain a definition of "residential character." The later-enacted code definition of "residential character" has no bearing on the interpretation of the phrase "residential character" in Policy 1. That is so because the focus of the interpretive inquiry is what the enacting city council intended at the time of enactment. *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997); *Holcomb v. Sunderland*, 321 Or 99, 105, 894 P2d 457 (1995) ("The proper inquiry focuses on what the legislature intended at the time of enactment and discounts later events."). Thus, in interpreting Policy 1, the city did not err by failing to address the definition of the phrase "residential character" in EC 9.0500.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In 2001, the city undertook comprehensive amendments to its land use code that included adopting a two-track system for review of development applications involving housing. That project is referred to as the Land Use Code Update (LUCU). The LUCU was the subject of a prior appeal and it was ultimately acknowledged. *Home Builders*, 41 Or LUBA at 387 ("[T]he LUCU represents a comprehensive effort to conform [the city's] land use regulations

with [ORS 197.307(4)]."); *see also Simons Investment Properties v. City of Eugene*, 303 Or App 199, 201, 463 P3d 57 (2020) ("[T]he city * * * initiated an effort to update its entire land use code, which was passed by the city in 2001, and finalized in 2002, after a remand from LUBA of the original ordinance. That updated code is referred to as the [LUCU]. The LUCU repealed and replaced Chapter 9 of the [EC]."). Petitioner argues that some of the development standards that were adopted for the clear and objective track in the LUCU, but that were not amended in the clear and objective update, are not clear and objective, in violation of ORS 197.307(4). The city responds, and we agree, that most of petitioner's arguments under the third assignment of error are not within our scope of review in this appeal.

We explained in *Home Builders* that, where a local government makes a legislative land use decision that represents a comprehensive effort to conform local land use regulations with a state law mandate, unamended portions of the local government's code may be subject to a facial challenge because, even though they were not amended, they are part of the local government's comprehensive effort to bring its land use code into compliance with state law. 41 Or LUBA at 386-88.

Here, however, the challenged ordinance does not constitute an effort to bring the city's land use code into compliance with ORS 197.307(4). As the city explains, the challenged ordinance targets existing clear and objective standards that have operated as barriers to housing development because they were overly

restrictive or difficult to satisfy. The challenged ordinance is the product of the city council's policy decision to attempt to remove barriers to housing development within the city's clear and objective track. In that context, only the code provisions that are actually amended or newly adopted by the ordinance are subject to a facial challenge under ORS 197.307(4). *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441, 447-49 (2018) (newly applied standards are subject to review for consistency with state law); *see also Volny v. City of Bend*, 37 Or LUBA 493, 513-15, *aff'd*, 168 Or App 516, 4 P3d 768 (2000) (existing unamended approval standards for housing are not subject to review for compliance with ORS 197.307(4)). The standards that are unamended by the ordinance are not subject to facial challenge in this appeal.[10] Accordingly, we address only those standards that were newly adopted or amended by the ordinance.

The only such standard that petitioner challenges is EC 9.8445(6), which is a newly adopted site review approval criterion under the clear and objective track and which provides:

> "If the standards addressed under EC 9.8445(4) require a public street, or if the applicant proposes the creation of a public street, the proposal will provide pedestrian and bicycle circulation to adjacent residential areas, transit stops, neighborhood activity centers, parks, schools, commercial centers, office parks, and industrial parks

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[10] However, as petitioner notes, those standards may be challenged as inconsistent with ORS 197.307(4) in an as-applied, quasi-judicial proceeding.

> *located within 1/4 mile radius of the development site*, provided the city makes findings to demonstrate consistency with constitutional requirements." Supplemental Record 35 (emphasis added).

Petitioner argues that standard is not clear and objective because it fails to specify how the one-quarter-mile distance is measured. Petitioner points out that the standard does not identify the point of origin for that measurement—that is, whether the point of origin is the center of the subject property, the subject property boundary, or some other location. Similarly, the standard does not specify whether a listed use is "located" at the property boundary for a property containing one of the listed uses or some other point of reference such as a building entrance. Petitioner also argues that the standard is not clear and objective because it does not specify the route by which the one-quarter mile is measured from the point of origin to the destination, that is, whether the one-quarter-mile distance is measured as a straight line or a meandering pedestrian or bike path.

Petitioner contrasts EC 9.8445(6) with EC 9.8325(7)(a), which requires that a PUD reviewed under the clear and objective track be "located within 1/2-mile of a public park, public recreation facility, or public school (determined using the shortest distance as measured along a straight line between a point along the perimeter of the development site and a point along a property line of a public park, public recreation facility, or public school)." Supplemental Record 32. Petitioner also quotes *Walter v. City of Eugene*, wherein we pointed to existing EC 9.8325(9), which requires that "[a]ll proposed dwellings within the PUD [be]

within 1/4 mile radius (measured from any point along the perimeter of the development site) of an accessible recreation area or open space that is at least 1 acre in size and will be available to residents," as an example of a clear and objective standard. 73 Or LUBA 356, 362-63, *aff'd*, 281 Or App 461, 383 P3d 1009 (2016).

The city responds that "within 1/4 mile radius of the development site" "clearly means all the points within 1/4 mile of the boundaries of the development site. In other words, the 1/4 mile measurement radiates from the boundaries of the development site." City Response Brief 28-29. The city argues:

> "Petitioner's questions about how the distance between the development site and the listed uses is measured seem to assume that the standard focuses on the *distance traveled* by a pedestrian or bicyclist from the development site to one of the listed uses. That is not the case. In fact, the standard focuses on the distance *between* the development site and the listed uses; that is, if one of the listed uses is located within a certain distance of the development site, a bicycle or pedestrian connection is required, provided that the City can make the required constitutional findings. Because the distance *between* the development site and a listed use is what matters, the only reasonable way to measure that distance is by utilizing a straight line, or as Petitioner phrases it 'as the crow flies.'" City Response Brief 29 n 11 (emphases in original).

Approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999).

We have explained that the term "clear" means "easily understood" and "without obscurity or ambiguity," and that the term "objective" means "existing independent of mind." *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6). ORS 227.173(2) provides: "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance." We have explained that

> "[t]he fact that some interpretation is required does not make a term not clear and objective. Instead, a standard is not clear and objective if it is capable of being applied in multiple ways in a manner that allows the city to exercise significant discretion in choosing which interpretation it prefers." *Roberts v. City of Cannon Beach*, ___ Or LUBA ___, ___ (LUBA No 2020-116, July 23, 2021) (slip op at 25), *aff'd*, 316 Or App 305 (2021).

In *Home Builders*, we explained that

> "the ultimate question under ORS 197.307[(4)] is whether the *standard* is clear and objective, viewed in context. That the standard may contain imprecise or ambiguous terms is a relevant and, depending on the terms and their function in the standard, perhaps sufficient, consideration in answering that ultimate question. However, the existence of imprecise or ambiguous terms in a standard does not *necessarily* resolve whether that standard violates ORS 197.307[(4)]." 41 Or LUBA at 393 n 20 (emphases in original).

EC 9.8445(6) uses the term "radius," which is not defined in the city's land use code. The plain meaning of "radius" is a measurement from a single point, such as the center of a circle, or the circular area implicated by a stated radius. *See Webster's Third New Int'l Dictionary* 1874 (unabridged ed 2002) ("**2 :** a line

segment extending from the center of a circle or sphere to the curve or surface * * * **4 a :** the distance of a radius <a ~ of 10 miles from home> * * * **b :** the circular area implicated by a stated radius <40 inland lakes within a ~ of 20 miles —*Amer. Guide Series: Mich.*> **c :** a bounded or circumscribed area"). Applying that plain meaning to EC 9.8445(6), it is not clear to what area the applicant must provide pedestrian and bicycle circulation.

While we agree with the city that the plain meaning of "radius" contemplates a measurement using a straight line from a point of origin to a point of termination, we agree with petitioner that EC 9.8445(6) does not specify the manner in which the origin and the destination are identified, which renders that standard not clear and objective. The "radius" could originate in the center of the subject property, at each point around the subject property boundary, or at some other location, such as the margin of a building or parking lot. Those interpretations would bear very different results in terms of the applicant's obligation to provide pedestrian and bicycle circulation between the housing development and the listed uses. Similarly, the standard could be construed to mean that that obligation is triggered if the one-quarter-mile radius contains the property boundary for a property containing one of the listed uses, or it could be triggered if the radius contains the closest edge of development, such as a building, parking lot, or park field.

While EC 9.8445(6) could be construed to mean what the city contends it means, we agree with petitioner that the standard is not clear and objective on its

face because it allows the city to exercise significant discretion regarding the origin and termination points of the one-quarter-mile measurement. ORS 227.173(2); *Roberts*, ___ Or LUBA at ___ (slip op at 25).

The third assignment of error is sustained.

The city's decision is remanded.