

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

3
4 SCHULTENS FAMILY LAND, LLC,
5 RAY SCHULTENS MOTORS INC.,
6 ROBERT SCHULTENS, and JENNIFER DEWEY,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF THE DALLES,
12 *Respondent.*

13
14 LUBA No. 2022-021

15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from City of The Dalles.

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21 Ty K. Wyman represented petitioners.

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23 Christopher D. Crean represented respondent.

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

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28 RUDD, Board Member, did not participate in the decision.

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30 DISMISSED 06/07/2022

31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city ordinance amending the city’s Land Use and Development Ordinance.

BACKGROUND

On January 10, 2022, the city council adopted Ordinance 22-1388 (the Ordinance), which amends the city’s Land Use and Development Ordinance (LUDO) to allow Shelter Housing as a permitted use in the Commercial General and Commercial Light Industrial zones. The Ordinance is a post-acknowledgement land use regulation amendment (PAPA).

Prior to adopting the Ordinance, on October 13, 2021, the city sent a copy of the proposed LUDO amendments to the Department of Land Conservation and Development (DLCD). In November, 2021, the planning commission conducted a public hearing on the LUDO amendments, and at the conclusion, recommended that shelter housing be allowed as a conditional, rather than permitted, use in the zones. On December 13, 2021, the city council conducted a public hearing on the proposed amendments. At that hearing, the city council rejected the planning commission’s proposal to make shelter housing a conditional use and directed planning staff to revise the proposed amendments to reflect their decision that shelter housing be a permitted use in the zone, as the LUDO amendments originally proposed. Thereafter, on January 10, 2022, the city council considered and voted to approve the LUDO amendments to allow shelter housing as

1 permitted uses in the zones. On March 7, 2022, petitioners filed their Notice of
2 Intent to Appeal (NITA) the Ordinance.

3 **MOTION TO DISMISS**

4 ORS 197.830(2)(b) requires that in order to appeal a land use decision, the
5 petitioner must have “[a]ppeared” during the proceedings that led to the decision.
6 The city moves to dismiss the appeal on the basis that none of the petitioners
7 appeared below, and therefore petitioners lack standing under ORS 197.830(2).¹
8 There is no dispute that petitioners did not “[a]ppear[]” during the proceedings
9 that led to the appealed decision, as required by ORS 197.830(2).

10 At the outset, we note petitioners argue that the city incorrectly relies on
11 ORS 197.830(3) to support its argument. We agree with petitioners on that issue.
12 ORS 197.830(3) applies in cases in which a party either fails to receive, or
13 receives inadequate, notice of a *quasi-judicial hearing* that he or she is entitled
14 to receive under statute. *Aleali v. City of Sherwood*, 262 Or App 59, 325 P3d 747
15 (2014) (the legislature intended ORS 197.830(3) to expand the time to file a
16 notice of intent to appeal to LUBA under ORS 197.830(9) when a quasi-judicial
17 hearing is not held in some circumstances or when a party is precluded from

¹ The city does not argue that the appeal was not timely filed in accordance with ORS 197.830(9), which requires in relevant part that “[a] notice of intent to appeal plan and land use regulation amendments 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.”

1 participating in a quasi-judicial land use hearing because the notice of the hearing
2 is defective under state law). Thus ORS 197.830(3) would apply and entitle
3 petitioners who failed to appear during a quasi-judicial hearing under ORS
4 197.797 (2021) to file an appeal under the statute if (1) the city failed to provide
5 statutorily required pre-hearing notice to the petitioners; or (2) the city provided
6 that notice, but made “a land use decision that is different from the proposal
7 described in the notice of hearing to such a degree that the notice of the proposed
8 action did not reasonably describe the local government’s final actions[.]” ORS
9 197.830(3); *see Bigley v. City of Portland*, 168 Or App 508, 4 P3d 741 (2000)
10 (ORS 197.830(3) applies where decision converts temporary parking lot to
11 permanent parking lot and notice of hearing does not mention that action).

12 Here, the Ordinance is a legislative PAPA controlled exclusively by ORS
13 197.610 to 197.625. *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428,
14 432, 899 P2d 720 (1995) (appeals of legislative PAPAs are controlled exclusively
15 by ORS 197.610 to 197.625). Thus, petitioners are correct that the provisions of
16 ORS 197.610 to 197.625 apply to their appeal.

17 Petitioners argue that the circumstances set out in ORS 197.620(2)(a) and
18 (c) apply and obviate the requirement that they “[a]ppeared.” ORS 197.620(2)
19 provides:

20 “Notwithstanding the requirements of ORS 197.830(2) that a person
21 have appeared before the local government orally or in writing to
22 seek review of a land use decision, the Director of the Department
23 of Land Conservation and Development or any other person may

1 appeal the decision to the Land Use Board of Appeals if:

2 “(a) The local government failed to submit all of the materials
3 described in ORS 197.610(3) or, if applicable, ORS
4 197.610(6), and the failure to submit the materials prejudiced
5 substantial rights of the Department of Land Conservation
6 and Development or the person;

7 “(b) Except as provided in subsection (3) of this section, the local
8 government submitted the materials described in ORS
9 197.610(3) or, if applicable, ORS 197.610(6), after the
10 deadline specified in ORS 197.610(1) or (6) or rules of the
11 Land Conservation and Development Commission,
12 whichever is applicable; or

13 “(c) The decision differs from the proposed changes submitted
14 under ORS 197.610 to such an extent that the materials
15 submitted under ORS 197.610 do not reasonably describe the
16 decision.”

17 Petitioners first argue that the city failed to submit the materials described
18 in ORS 197.610(3)(e) and (f) to DLCD and pursuant to ORS 197.620(2)(a), their
19 failure to appear is waived.² The city does not reply to that argument, and we

² ORS 197.610(3) provides:

“Submission of the proposed change must include all of the following materials:

“(a) The text of the proposed change to the comprehensive plan or land use regulation implementing the plan;

“(b) If a comprehensive plan map or zoning map is created or altered by the proposed change, a copy of the map that is created or altered;

1 assume that petitioners are correct that the city failed to submit those materials.
2 However, in order to rely on that provision, petitioners must establish that the
3 city's failure to provide the materials "prejudiced substantial rights of the
4 Department of Land Conservation and Development or the person." ORS
5 197.620(2)(a). Petitioners make no attempt to establish prejudice to them or
6 DLCD, and accordingly they are not entitled to rely on that provision to waive
7 the ORS 197.830(2)(b) requirement to have appeared below.

8 Petitioners next rely on ORS 197.620(2)(c) and argue that the "decision
9 differs from the proposed changes submitted under ORS 197.610 to such an
10 extent that the materials submitted under ORS 197.610 do not reasonably
11 describe the decision." In support of their argument, petitioners point to
12 declarations attached to their response, submitted by two of the petitioners, that
13 state they learned that a non-profit corporation planned to construct a "Navigation

"(c) A brief narrative summary of the proposed change and any supplemental information that the local government believes may be useful to inform the director or members of the public of the effect of the proposed change;

"(d) The date set for the first evidentiary hearing;

"(e) The form of notice or a draft of the notice to be provided under ORS 197.797, if applicable; and

"(f) Any staff report on the proposed change or information describing when the staff report will be available, and how a copy of the staff report can be obtained."

1 Center” on property to the west of their property, and an attached screen shot
2 from a website describing the project. The declarations state “had I known that
3 [the Ordinance] would entitle a range of services beyond shelter, then I would
4 have testified at the Planning Commission and City Council as to terms and
5 conditions appropriate for such uses.” Response to Motion to Dismiss Ex 2, at 3;
6 *id.* Ex 3, at 2-3.

7 Petitioners’ argument that a potential use of property zoned General
8 Commercial for a “Navigation Center” is not allowed under the newly enacted
9 LUDO provisions does not establish that the text amendments that were proposed
10 and submitted to DLCD under ORS 197.610 “do not reasonably describe the
11 decision.” ORS 197.620(2)(c). Absent any attempt to establish that the final
12 adopted amendments to the LUDO differ from proposed text amendments that
13 were submitted to DLCD “to such an extent that the materials submitted under
14 ORS 197.610 do not reasonably describe the decision,” petitioners are not
15 entitled to rely on ORS 197.620(2)(c) to overcome their failure to satisfy the
16 appearance requirement in ORS 197.830(2)(b).

17 The appeal is dismissed.