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

KY LE,
Petitioner,

vs.

CITY OF TIGARD,
Respondent.

LUBA No. 2025-018

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

Ky Le filed the petition for review and argued on behalf of themselves.

Shelby Rihala filed the respondent's brief and argued on behalf of respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

AFFIRMED 12/4/2025

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner challenges the city council's adoption of an ordinance amending the Tigard Development Code (TDC) to establish a new chapter governing food carts and food cart pods.

FACTS

Food carts are an increasingly common feature of urban life, and the City of Tigard is no exception. In 2020, the city began a long-range planning project to update its commercial, industrial, and mixed-use zones, including regulation of food carts. Prior to 2024, the city had treated food carts and food cart pods as accessory uses in at least some zones, pursuant to an informal planning staff interpretation. As a result of the 2020 planning project, in 2024 the city council approved code amendments that, for the first time, formally assigned food carts to a particular land use category as a type of temporary use permitted under *former* TDC 18.440.

Former TDC 18.440.030(E) allowed the city to issue a temporary permit for up to three food carts. Temporary permits are generally limited to one year in duration, but *former* TDC 18.440.040(B) specified that food cart permits were valid indefinitely. *Former* TDC 18.440 included no express provisions allowing for food cart pods, which the code defined as "[f]our or more mobile food carts on the same site." *Former* TDC 18.30.020(F) (2024).

As directed by the city council, planning staff monitored the effectiveness of *former* TDC 18.440 and subsequently concluded that regulating food carts as temporary uses was a problematic approach, identifying the following issues:

> "A temporary use permit is not the proper approval type for a use that is more permanent in nature.
>
> "The standards applied to food carts were not sufficiently well developed compared to the standards in other peer cities and sometimes lacked clarity.
>
> "There is no clear pathway to modify a food cart approval.
>
> "There is not an approval pathway or any standards for food cart pods as a standalone use." Record 4.

Accordingly, staff proposed legislative TDC amendments to create a new chapter governing food carts and food cart pods, to be codified at TDC 18.750.

In 2025, the city initiated the legislative TDC amendments challenged in this appeal. Under the proposed TDC 18.750, food carts are allowable as accessory uses on a site with a legal nonresidential primary use, with up to three food carts per site, subject to site design standards. Food cart pods are allowable as a stand-alone use, subject to site design standards, and limited to 20 food carts. In addition, staff proposed to incorporate into TDC 18.750 a number of standards that could apply to food carts and pods, including some standards that were apparently codified elsewhere than under the TDC. These standards include ones that govern health and safety, pedestrian accessibility, right-of-way conflicts, public infrastructure (including disposal of fats, oil and grease into sanitary sewer systems), and site design elements, including provisions for outdoor dining areas.

The city provided notice of the proposed amendments to the Department of Land Conservation and Development (DLCD), and scheduled a hearing before the planning commission on January 6, 2025. The city posted notice of the proposed amendments on its website, but otherwise provided no individualized written notice to any person or entity. Petitioner, who operates a number of food carts on one or more sites that he leases from property owners, did not attend the January 6, 2025 planning commission hearing. At the conclusion of the January 6, 2025 hearing, the planning commission voted to recommend that the city council approve the proposed amendments.

The city council took up the planning commission recommendation at its regularly scheduled January 28, 2025 meeting. The initial phase of the meeting included a public comment section. The minutes of the city council meeting state that during the public comment portion, petitioner "shared his experience regarding his food cart pod business within the city." Record 44. After concluding several other matters on its business agenda, the city council then opened a legislative public hearing on the proposed amendments. Staff presented the report on the amendments. The minutes and record reflect that no person signed up to submit oral testimony during the hearing on the amendments. Record 45, 50. After closing the record, the city council deliberated and voted unanimously to approve Ordinance 25-01, adopting the proposed amendments, and declaring an emergency. In a separate action, the city council voted to approve Resolution 25-

05, which amends the city's schedule of fees and charges to include fees for obtaining a permit for a food cart or food cart pod.

On February 20, 2025, petitioner appealed Ordinance 25-01 to LUBA.

STANDING

In an order dated June 23, 2025, we rejected the city's motion to dismiss this appeal, which argued that petitioner had failed to "appear" before the city orally or in writing in any of the proceedings on the adoption of Ordinance 25-01, and therefore failed to satisfy ORS 197.830(2), which provides:

> "* * * [A] person may petition [LUBA] for review of a land use decision or limited land use decision if the person:
>
> "(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 * * * orally or in writing."

The "appeared" standard in ORS 197.830(2) is broadly construed. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572, 582, 586, *aff'd*, 207 Or App 8, 139 P3d 990 (2006) (explaining that "[a] bare neutral appearance," meaning "[a]n oral or written statement of almost any kind," will satisfy the appearance requirement). Petitioner responded that he appeared during the public comment portion of the city council meeting on January 28, 2025, and spoke about his frustrations with the city's enforcement of its food cart regulations. Petitioner contended that that appearance was sufficient to establish standing under ORS 197.830(2). The city did not respond to petitioner's argument that his

statements during the public comment period were sufficient to establish standing. In the absence of any response, we denied the city's motion to dismiss. *Le v. City of Tigard*, LUBA No 2025-018 (June 23, 2025). Subsequently, the city renewed its motion, disputing that petitioner's statements during the public comment portion of the January 28, 2025 meeting were sufficient to establish standing. The city also argued that the notice of hearing gave clear instructions on how to submit testimony and appear during the hearing, instructions that petitioner failed to follow. We denied the renewed motion, concluding in relevant part that the city's instructions regarding how to submit testimony and make an appearance were not as clear as the city argued, and that a reasonable person could have, as petitioner apparently did, believed that speaking about his frustrations with the city's regulation of food carts during the public comment portion of the meeting would constitute an appearance in the contemporaneous proceeding on Ordinance 25-01 to adopt regulations on food carts. *Le v. City of Tigard*, LUBA No 2025-018 (Sept 18, 2025).

The city again renews its motion to dismiss in the respondent's brief. However, the city provides no compelling reason for us to revisit our earlier ruling that, given the lack of clarity in the city's proceedings regarding how to present testimony, petitioner's testimony during the public comment period was sufficient, under the circumstances of this case, to constitute an appearance in the proceeding on Ordinance 25-01, for purposes of ORS 197.830(2). Accordingly, the city's renewed standing challenge is denied.

FIRST ASSIGNMENT OF ERROR

As noted, the city adopted Ordinance 25-01 subject to an emergency declaration, so it became effective immediately rather than after 30 days, pursuant to ORS 221.310(1)[1] and City of Tigard Charter section 6.8.[2] A "Whereas" clause of Ordinance 25-01 states that "an emergency is requested in order to prevent potential delays to approval of proposed food cart operations." Record 1. The declaration itself states, in Section 4:

> "As these amendments are deemed necessary to protect the health, safety, and welfare of the city's residents and business owners, an emergency is declared to exist; therefore, this ordinance shall take effect immediately upon passage." Record 1.

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[1] ORS 221.310(1) provides:

> "In cities having a population of 2,000 or more, an ordinance or a franchise shall not take effect until 30 days after its passage by the city council and approval by the mayor * * *. However, measures necessary for the immediate preservation of the peace, health and safety of the city are excepted. These emergency measures shall become immediately effective if they state in a separate section the reasons why it is necessary that they should become immediately effective and if they are approved by the affirmative vote of three-fourths of all the members elected to the city council, taken by ayes and noes, and also by the mayor.* * *"

[2] City of Tigard Charter section 6.8 provides:

> "Effective Date of Ordinances. Ordinances normally take effect on the 30th day after adoption or on a later day provided in the ordinance. An ordinance may take effect as soon as adopted or on another date less than 30 days after adoption if the ordinance contains an emergency clause."

Petitioner contends that the emergency declaration in Section 4 is conclusory boilerplate, and does not state any reasons "why it is necessary that [the ordinance] should become immediately effective," as required by ORS 221.310(1). According to petitioner, one purpose of the 30-day effective date in ORS 221.310(1) is to allow time for opponents to organize and gather signatures to file for a referendum on the ordinance. That purpose is easily thwarted, petitioner argues, if the city can render its ordinances effective immediately, without setting forth any facts or reasons that establish the existence of an actual emergency or need for urgent action. Petitioner contends that in the present case, the declaration does not establish any urgent reasons why Ordinance 25-01 must become effective immediately.

Further, petitioner argues that, where it is apparent on the face of the ordinance that there is no urgency for its passage, and it is clear the real reason for the emergency declaration is to thwart a potential referendum, the consequence is that courts may declare the ordinance ineffective. Petition for Review 20 (citing *Greenberg v. Lee*, 196 Or 157, 173-74, 248 P2d 324 (1952)). In the present case, petitioner argues that LUBA should find that Ordinance 25-01 fails to demonstrate the existence of any emergency, and that the city made the declaration solely to thwart a potential referendum. Accordingly, petitioner requests that we declare Ordinance 25-01 ineffective, and reverse the city's decision.

Greenberg did not involve ORS 221.310(1), but a city charter provision requiring that an emergency declaration "specify with distinctness the facts and reasons constituting such emergency," and further providing that ordinances without an emergency clause are "subject to the referendum[.]" 196 Or at 162-63. The plaintiff sought to invalidate an ordinance prohibiting "punchboards," a type of game apparently used for gambling, in order to continue with a referendum petition he had filed to overturn the ordinance. The court ultimately concluded that deference was owed to the city's determination that a police emergency exists regarding punchboards, found that the declaration specified with sufficient "distinctness the facts and reasons constituting" the emergency, and accordingly upheld the ordinance under the charter provision.

Because *Greenberg* concerned a city charter provision that required emergency declarations to set forth both facts and reasons with a sufficient degree of "distinctness," it is of limited utility in the present case. As noted, *Greenberg* did not concern ORS 221.310(1), and that statute requires only a statement of reasons. No supporting facts need be cited, and no level of specificity is dictated.[3]

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[3] Petitioner contends that under Article IV, section 28, of the Oregon Constitution, where the legislature declares an emergency in passing a law, the declaration must be accompanied by a "brief statement of the facts." Petition for Review 19. Petitioner cites no authority for that proposition, and the text of Article IV, section 28 includes no such requirement. We understand petitioner to argue, based on his misreading of the Oregon Constitution, that we should infer into ORS 221.310(1) an obligation to provide a statement of facts. However, the

Further, the applicable city charter equivalent, City of Tigard Charter section 6.8, simply requires that the ordinance include an emergency declaration, without specifying minimum standards for the content of that declaration. *Greenberg* does indicate, however, that deference is due to a city's determination that cited reasons are sufficient to constitute an emergency, and that reviewing bodies should not second-guess that determination.

The city responds, and we agree, that petitioner has not established that the emergency declaration in Ordinance 25-01 is deficient under ORS 221.310(1) and City of Tigard Charter section 6.8, or that any deficiency warrants reversal or remand. While the emergency clause itself does not state any specific "reasons why it is necessary that [the ordinance] should become immediately effective," in the words of ORS 221.310(1), we note that the whereas clause in the ordinance sets forth one specific reason—"to prevent potential delays to approval of proposed food cart operations." Petitioner does not challenge that reason as insufficient, or argue that that reason should not be considered in support of the emergency declaration for purposes of ORS 221.310(1).

To the extent ORS 221.310(1) or our review requires some evidentiary support for the declaration, the city notes that the agenda summary for the city council hearing states that an emergency declaration is warranted due to "the imminent need for regulations to support food cart entrepreneurs who have

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text of the statute requires only a statement of reasons. We decline to read into the statute an obligation to also provide a statement of facts.

received city grants or have made significant investments into food cart businesses and need a pathway to an approved land use to complete their projects." Record 52. Further, the record includes discussions of the need for an emergency declaration at Record 45 (city council minutes)[4] and Record 145 (staff report to the planning commission). Petitioner does not argue that these record statements and discussions fail to provide evidentiary support for the emergency declaration. And, notably, petitioner cites nothing in the record supporting his suggestion that the emergency declaration was intended to foreclose filing of a referendum petition.

Even if petitioner had demonstrated some deficiency in the emergency declaration, petitioner cites no authority for the proposition that, under ORS 221.310(1) or any other applicable law, a defective emergency clause renders the ordinance itself invalid. In *O'Brien v. Lincoln County*, 65 Or LUBA 286, 292 (2012), we opined that even if an emergency clause is deemed invalid, the only apparent consequence is that the ordinance becomes effective on the date it otherwise would have, absent the emergency clause. *See also Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142, 157 (2012) (same). We note that Ordinance 25-01 includes a severance clause. Record 1. Giving effect

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[4] As the city notes, the city council discussed the need to regulate food cart disposal of fats, oils, and grease to protect city sanitary sewers, as required by federal discharge permits. Respondent's Brief 5 (citing Audio Recording, City Council Hearing, Jan 28, 2025, at 1:01:45).

to that severance clause to sever a defective emergency clause would presumably leave Ordinance 25-01 itself valid and effective. The only apparent immediate consequence is that the ordinance would have become effective 30 days after passage rather than immediately upon passage.

A more remote consequence of severing the emergency declaration is that Ordinance 25-01 could become the subject of a referendum petition under Article IV, section 1, of the Oregon Constitution, and implementing city regulations, and ultimately go before a vote of the city electorate. Unlike *Greenberg*, there is no pending referendum petition in the present case. Petitioner does not state that he or anyone else has filed a referendum petition, or even intends to attempt to gather the required signatures and file a petition. Petitioner cites no basis under our limited scope of review at ORS 197.835 to reverse or remand Ordinance 25-01 on the mere speculation that severance of the emergency declaration could theoretically lead to the filing of a referendum petition.

The closest petitioner comes to articulating a basis under our scope of review to reverse or remand Ordinance 25-01 is to argue that the city committed procedural error that prejudiced petitioner's substantial rights, under ORS 197.835(9)(a)(B) (LUBA may reverse or remand a land use decision if it finds that the local government failed to follow the procedures applicable before it in a manner that prejudiced the substantial rights of the petitioner). However, petitioner does not explain why adoption of an emergency clause is properly viewed as a "procedure" applicable to this legislative land use proceeding for

purposes of ORS 197.835(9)(a)(B). Further, the only potential prejudice that petitioner identifies is the alleged inability to seek and file a referendum petition. ORS 197.835(9)(a)(B) is concerned with procedures that are applicable to the land use proceeding under review by LUBA, and violation of such procedures that cause prejudice to a petitioner's substantial rights *in that review proceeding*. ORS 197.835(9)(a)(B) does not authorize LUBA to reverse or remand a land use decision based on potential collateral consequences to a non-land use proceeding that is not before LUBA.

In sum, petitioner has not demonstrated either that the emergency declaration is deficient in failing to state reasons for the emergency, or that any deficiency warrants reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, after adopting Ordinance 25-01 at the January 28, 2025 hearing, the city council proceeded to adopt, via Resolution 25-05, an amendment to its schedule of system development charges (SDCs) to include food carts and food cart pods. Record 46-47. Ordinance 25-01, the only decision before us, says nothing about SDCs. Generally, the establishment or modification of a system development charge is not a land use decision subject to LUBA's jurisdiction. ORS 223.314.

Petitioner's arguments under this assignment of error start with the mistaken premise that the SDCs that staff will apply to food carts pursuant to

Resolution 25-05 were authorized by Ordinance 25-01, and therefore can be challenged in this appeal. We agree with the city that Ordinance 25-01 did not modify the city's SDC schedule, and for that reason alone no challenge to that modified schedule can be advanced in this appeal.

Petitioner next faults the city for relying on staff interpretations of Ordinance 25-01 to impose SDCs, rather than formally amending its SDC schedule via resolution or ordinance. Petitioner fails to recognize that the city did precisely that in adopting Resolution 25-05. Because all of petitioner's arguments under this assignment of error are based on a mistaken understanding regarding the source of the SDCs petitioner wishes to challenge, petitioner's arguments provide no basis for remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

TDC 18.710.120(A)(2) requires that, for a legislative land use decision, the city must provide a "notice of hearing * * * as required by state law[.]" Further, the record must include "an affidavit of mailing * * * that identifies the mailing date and the names and addresses of the mailing recipients." The city provided notice of the hearing by posting its notice on the city's website, and did not provide any media outlet publication or mailed notice.

Petitioner faults the city for failing to publish the notice of hearing in a local newspaper or comparable media outlet. According to petitioner, TDC 18.710.120(A)(2) is part of the city's citizen involvement program implementing

Statewide Planning Goal 1 (Citizen Involvement). Petitioner argues that Goal 1 obligates the city to communicate with its citizens regarding pending land use legislation using the broadest possible form of communication to the general public, which petitioner contends would require publication in a local newspaper, or some comparable means of communicating to the general public. Petitioner contends that the city's failure to provide more widespread notice of the hearing prejudiced his substantial rights, by denying other persons notice of the hearing and hence the ability to participate in the hearing in support of petitioner. ORS 197.835(9)(a)(B).

The city responds, and we agree, that petitioner has not demonstrated that posting the city's notice of hearing on its website violated TDC 18.710.120(A)(2), which simply requires the city to provide notice of a legislative hearing "as required by state law." No party identifies an applicable state law that requires any particular form of public notice for a legislative land use hearing conducted by the city.[5] Goal 1 requires local governments to develop a citizen

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[5] However, we note that ORS 215.223(1), applicable to counties, provides:

> "No zoning ordinance enacted by the county governing body may have legal effect unless prior to its enactment the governing body or the planning commission conducts one or more public hearings on the ordinance and unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation in the county or, in case the ordinance applies to only a part of the county, is so published in that part of the county."]

involvement program, which the city has done, but the goal does not include specific requirements for communicating with the public, and does not require that notices be published in a newspaper or comparable media outlet. The only case petitioner cites in support of that argument, *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994), does not mention Goal 1, or notice to the public, much less publication in a newspaper.

Finally, as the city argues, LUBA may remand for procedural error under ORS 197.835(9)(a)(B) only if the error prejudices the substantial rights of the *petitioner*, not the rights of other persons. *Bauer v. City of Portland*, 38 Or LUBA 432, 436 (2000). Petitioner's claims of prejudice to the general public do not state grounds for remand under ORS 197.835(9)(a)(B).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Ballot Measure 56, codified as applicable to cities at ORS 227.186, requires in relevant part that prior to the first hearing on a proposal to rezone property, a city must provide written individual notice of the rezoning to the owner of each lot or parcel to be rezoned.[6] ORS 227.186(1) defines "owner" as

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[6] ORS 227.186(4) provides:

> "At least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, a city shall cause a written individual notice of a land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone."

"the owner of the title to real property or the contract purchaser of real property[.]" ORS 227.186(9) provides that property is rezoned when the city either (a) changes the base zoning classification or (b) "amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone."

Petitioner contends that in adopting Ordinance 25-01, the city "rezoned" property within the meaning of ORS 227.186(9)(b) by adopting new restrictions and limits on food carts and food cart pods in many areas of the city. Accordingly, petitioner argues, the city was required to provide written individual notice of the hearing to the owners of property thus "rezoned." Petitioner argues that the city's failure to provide Ballot Measure 56 notice was procedural error that prejudiced petitioner's substantial rights, and thus warrants reversal or remand under ORS 197.835(9)(a)(B). Petitioner contends that, although he does not own or have a contract purchaser's interest in any real estate thus rezoned, petitioner has a contractual interest in leasing such real estate, and thus was entitled to notice under ORS 227.186.

In *Murray v. Multnomah County*, 56 Or LUBA 370 (2008), we agreed with an Oregon Department of Justice letter of advice that

> "whether an ordinance 'rezones' property within the meaning of Ballot Measure 56 depends on whether the ordinance, on its face, restricts the range or extent of permissible uses of the property, compared to existing law. Consequently, the first inquiry is what uses does the existing zoning ordinance allow. The second inquiry

> is whether the challenged ordinance restricts the range or extent of those existing, permissible uses." *Id.* at 383 (footnote omitted).

As noted, immediately prior to adoption of Ordinance 25-01, the city regulated food carts and food cart pods as temporary uses under *former* TDC 18.440. Petitioner argues generally that Ordinance 25-01 imposes additional restrictions and limitations on food carts and food cart pods, both those allowed under *former* TDC 18.440, and nonconforming carts and pods that had been allowed under an earlier code interpretation as accessory uses. The only specific limitation petitioner identifies is the number of food carts allowed on a single property. Ordinance 25-01 imposes a limit of three carts per property. TDC 18.750.060(A). That appears to be consistent with *former* TDC 18.440, which also allowed three carts per property. Record 21, 25. However, we understand petitioner to argue that under the predecessor code to *former* TDC 18.440, the city interpreted its "accessory use" provisions to allow food cart pods with up to 20 carts. Such large food cart pods apparently became nonconforming when the city adopted TDC 18.440, which we understand occurred in April 2024. *Former* TDC 18.440, at least the strikethrough version in the record, included no provisions at all for food cart pods. Ordinance 25-01 thus appears to restore the former ability to gain approval for food cart pods, as TDC 18.750.070 expressly authorizes pods of up to 20 carts.

We held in *Murray* that an ordinance that allows a new land use in a zone does not restrict or limit land uses formerly allowed in the zone, and therefore does not "rezone" property within the meaning of ORS 215.223, the cognate to

ORS 227.186 applicable to counties. 56 Or LUBA at 382-83. In the present case, the only specific limitation petitioner identifies is the 20-cart limit on food cart pods. Based on a simple comparison between *former* TDC 18.440 and TDC 18.750, it appears that Ordinance 25-01 actually expands the food cart uses allowed, by allowing food cart pods, compared to the former ordinance. If that is all Ordinance 25-01 accomplished, then under the reasoning in *Murray*, no "rezoning" was proposed for purposes of Ballot Measure 56, and therefore no Ballot Measure 56 notices were required.

Ordinance 25-01 does impose a number of standards on food carts and food cart pods, and it may be the case that some of those standards are new, more restrictive standards that would qualify as "limits" within the meaning of ORS 227.186(9). Petitioner, however, does not develop arguments on that point, or identify any particular alleged limits other than the 20-cart limit on food pods, which, as explained, is actually an expansion of uses previously allowed, not a limitation. We agree with the city that Ordinance 25-01 does not amend the TDC "in a manner that limits or prohibits land uses previously allowed in the affected zone" and, thus, the ordinance has not "rezoned" any property. ORS 227.186(9). Accordingly, the city was not required to provide Measure 56 notice to property owners, and the failure to provide such notice provides no basis to reverse or remand the ordinance.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural error by not adding his name to a list of interested persons who, by virtue of inclusion on the list, are entitled to receive written notice of proceedings on code amendments, such as the proceedings leading to the adoption of Ordinance 25-01.

The city does not dispute that it maintains a list or lists of interested persons who have requested notice of pending code amendments. However, the city argues that petitioner does not claim that he has ever requested that the city add his name to any list of persons requesting written notice.

Petitioner contends that he had participated in proceedings before the planning commission on an earlier version of legislation regulating food carts. Petitioner does not identify the proceeding or the legislation, but petitioner does not claim that it involved the proceedings leading to the adoption of Ordinance 25-01.[7] Based on participation in that earlier planning commission proceeding, petitioner argues that the city should have recognized his interest and automatically added his name to the list of persons receiving notice of future code amendment proceedings, at least those involving food carts.

We agree with the city that if petitioner wished to add his name to the list of persons receiving written notice of future code amendment proceedings, it was

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[7] Presumably, the proceedings petitioner refers to were those leading to the adoption of TDC 18.440 in 2024.

incumbent on petitioner to make a timely request to the city. Nothing cited to us in the city's code obligates the city to assume that because a person participated in one code amendment proceeding that the person wishes to receive notice of future code amendment proceedings on the same subject.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

TDC 18.710.120(F) requires the city to mail notice of the final decision within seven days after the date the decision is filed with the planning director, to all persons who "testified orally or in writing" in the proceedings leading to the decision. TDC 18.710.120(F) implements ORS 197.615(4), which requires that the local government mail notice of the decision to persons who participated in the proceedings that led to adoption of the decision and who requested in writing that the local government provide such notice.

Petitioner argues that he participated in the city council's January 28, 2025 hearing on Ordinance 25-01, but the city failed to provide him with written notice of the decision, as required by TDC 18.710.120(F). According to petitioner, the city's failure to provide him with notice of the decision prejudiced his substantial rights, in that it delayed and complicated his efforts to file the present appeal to LUBA.

As explained above, we held that, due to a lack of clarity in the instructions regarding how to appear in the city council hearing on Ordinance 25-01, petitioner's statements during the public comment portion of the January 28,

2025 city council meeting were sufficient, for purposes of ORS 197.830(2), to establish his standing to appeal Ordinance 25-01 to LUBA. However, it does not necessarily follow that petitioner's statements during the public comment portion were sufficient to entitle him to receive written notice of the decision under TDC 18.710.120(F).

We understand the city to contend that to qualify for written notice under TDC 18.710.120(F), the participant must not only provide testimony during the hearing *on the ordinance*, but also must in some manner request written notice of the decision by, for example, listing contact information on the sign-up sheet for the hearing on the ordinance. Petitioner does not argue that he provided testimony during the hearing on the ordinance, or that he provided the city with contact information necessary to mail notice of the decision. *See* Record 50 (sign-up sheet for the January 28, 2025 hearing, with space to write down name, address, and phone number, but no entry from petitioner). We agree with the city that petitioner has not demonstrated that the city erred in failing to mail him notice of the decision.

Further, as the city argues, petitioner has not demonstrated that any procedural error with respect to providing notice of the decision prejudiced his substantial rights. ORS 197.835(9)(a)(B). Notwithstanding lack of written notice, petitioner filed a timely appeal of the city's decision to LUBA, and has identified no other adverse consequences to his substantial rights in this proceeding from not receiving notice of the decision.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Citing to alleged procedural errors detailed in the third, fourth, fifth, and sixth assignments of error, petitioner argues that the city has throughout this proceeding engaged in "bad faith" attempts to deny petitioner notice of the hearing or notice of the decision. Petitioner contends that the city's collective conduct violates petitioner's rights under both the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article I, section 10, of the Oregon Constitution. Petitioner argues that the city's bad faith violations of petitioner's constitutional rights warrant reversal of the decision, rather than remand to correct the alleged procedural errors.

We concluded under the third, fourth, fifth, and sixth assignments of error that the city did not commit any procedural error with respect to petitioner, or that any procedural error did not prejudice petitioner's substantial rights, and denied those assignments of error. Because petitioner's constitutional claims are premised on establishing prejudicial procedural errors as alleged in those assignments of error, petitioner's constitutional claims under the seventh assignment of error do not provide a basis for reversal or remand.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

ORS 197.615(1) provides that when a local government adopts a proposed change to an acknowledged comprehensive plan or land use regulation, as in the

present case, the local government must submit a copy of the decision to the Department of Land Conservation and Development (DLCD) within 20 days of making the decision. Based on that submittal, DLCD will then provide notice of the decision to any persons who have requested notice of such decisions and, more generally, post notice of the decision online. ORS 197.615(3)(a) and (b).

Petitioner argues that the city committed procedural error by failing to submit Ordinance 25-01 to DLCD within 20 days following its January 28, 2025 adoption. The city concedes that it did not submit Ordinance 25-01 to DLCD within the 20-day period, but argues that it substantially complied with ORS 197.615(1) when it submitted the ordinance on February 20, 2025, which is 23 days after the January 28, 2025 adoption date. The city argues that the three-day delay in submitting Ordinance 25-01 to DLCD did not prejudice petitioner's substantial rights and thus was harmless error.

Petitioner does not contend that he ever requested that DLCD provide him with written notice of the challenged decision under ORS 197.615(3)(a). Petitioner states only that during the 21-day period to appeal the decision to LUBA he checked DLCD's online resources and saw no posting regarding Ordinance 25-01 during that period. We agree with the city that as far as prejudice to petitioner's substantial rights are concerned, petitioner has not established that the three-day delay in submitting Ordinance 25-01 to DLCD is a basis to remand the decision under ORS 197.835(9)(a)(B). As noted, petitioner filed a timely appeal of Ordinance 25-01 with LUBA and, as far as petitioner has demonstrated,

the city's three-day delay in submitting the ordinance to DLCD caused no prejudice to petitioner's substantial rights.

Nonetheless, petitioner argues that, given the important role submittal of the decision to DLCD plays under ORS 197.615 and the process of acknowledging that plan and code amendments are consistent with the statewide planning goals, the city's failure to comply with ORS 197.615(1) is more than a procedural error. However, petitioner's arguments on this point are premised on the assumption that the city completely failed to submit the decision to DLCD at all, which according to petitioner has the consequence that the ordinance should be deemed unacknowledged and invalid. Failure to comply with the notice provisions of ORS 197.615(1) is not only a procedural error, but may also be a substantive matter. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 177, 854 P2d 495 (1993). However, petitioner does not attempt to establish that the three-day delay in submitting Ordinance 25-01 to DLCD is substantive error. Petitioner offers no basis to conclude that the three-day delay substantively interfered with DLCD's ability to process Ordinance 25-01 in the manner required by ORS 197.615.

In sum, petitioner's arguments under ORS 197.615 provide no basis to reverse or remand the challenged decision.

The eighth assignment of error is denied.

The city's decision is affirmed.