

1 2003, the planning commission recommended that the city council adopt the proposed ordinance.
2 The city council held a public hearing on the proposal on August 18, 2003. The first reading of
3 Ordinance 1865 occurred on November 17, 2003. The second reading of the ordinance occurred
4 on December 1, 2003. Ordinance 1865 was signed by the city recorder and the mayor on
5 December 1, 2003. On December 5, 2003, the city sent notice of its adoption of Ordinance 1865
6 to DLCD. On December 10, 2003, the city sent notice of its decision to petitioner and 122 other
7 persons who participated in the local proceedings. Petitioner’s notice of intent to appeal was filed
8 with LUBA on December 31, 2003.¹

9 Under the relevant statutes, petitioner had 21 days to file her notice of intent to appeal. If
10 those 21 days are measured from the date the city sent notice of its adoption of Ordinance 1865 to
11 petitioner, December 10, 2003, petitioner’s December 31, 2003 notice of intent to appeal was
12 timely filed. If those 21 days are measured from the date Ordinance 1865 became final, December
13 1, 2003, petitioner’s December 31, 2003 notice of intent to appeal was not timely filed, and this
14 appeal must be dismissed.

15 **MOTION TO DISMISS**

16 The city contends that no *local* law requires that it provide individual mailed, written notice
17 of a legislative post-acknowledgment land use regulation amendment like Ordinance 1865.
18 Petitioner does not dispute that contention. As far as we can tell from the parties’ arguments, if the
19 city was obligated to mail petitioner individual written notice of Ordinance 1865, that obligation was
20 imposed by ORS 197.615. We briefly describe the notice requirements set out at ORS 197.615
21 and relevant portion of ORS 197.830, which sets out how the deadline for filing an appeal to
22 LUBA is computed in various contexts, before turning to the city’s and petitioner’s arguments.

¹ The notice of the city’s decision that appears at page 75 was mailed to the 123 persons identified on Exhibit A, which appears at Record 76-80. Mailing addresses follow most of the 123 names on Exhibit A, but the words “[n]o address given” appears following some names.

1 **A. The Relevant Statutes**

2 ORS 197.615 is set out in full in the margin.² Under ORS 197.615(1), the city was
3 required to give DLCD a copy of the text of Ordinance 1865, and its supporting findings, within five

² ORS 197.615 provides:

“(1) A local government that amends an acknowledged comprehensive plan or land use regulation or adopts a new land use regulation shall mail or otherwise submit to the Director of [DLCD] a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise submitted not later than five working days after the final decision by the governing body. If the proposed amendment or new regulation that the director received under ORS 197.610 has been substantially amended, the local government shall specify the changes that have been made in the notice provided to the director. If the text and findings are mailed, they shall include a signed statement by the person mailing them indicating the date of deposit in the mail.

“(2)

“(a) On the same day that the text and findings are mailed or delivered, the local government also shall mail or otherwise submit notice to persons who:

“(A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation or the new land use regulation; and

“(B) Requested of the local government in writing that they be given such notice.

“(b) The notice required by this subsection shall:

“(A) Describe briefly the action taken by the local government;

“(B) State the date of the decision;

“(C) If delivered by mail, include a certificate of mailing containing a statement signed by the person mailing it indicating the date the notice was deposited in the mail;

“(D) List the place where and the time when the amendment to the acknowledged comprehensive plan or land use regulation or the new land use regulation, and findings, may be reviewed; and

“(E) Explain the requirements for appealing the action of the local government under ORS 197.830 to 197.845.

“(3) Not later than five working days after receipt of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation submitted

1 days after the ordinance was adopted. As noted earlier, the city sent a copy of Ordinance 1865 to
2 DLCD on December 5, 2003. Under ORS 197.615(2)(a), at the same time the city provides a
3 copy of its post-acknowledgment land use regulation amendments to DLCD, the city must “mail or
4 otherwise submit” written notice of its post-acknowledgment land use regulation amendments to
5 persons who (1) participate locally in the proceedings that lead to adoption of the amendment, and
6 (2) request in writing that they be given notice of the decision. Any written notice required under
7 ORS 197.615(2)(a) must comply with the substantive requirements of ORS 197.615(2)(b). The
8 parties dispute whether the mailed written notice the city sent petitioner on December 10, 2003 was
9 notice that the city was required to mail to petitioner under ORS 197.615(2)(a).

10 Among other things, ORS 197.830 establishes a 21-day deadline for filing appeals of land
11 use decisions with LUBA. Under that statute, the 21-day deadline begins to run at different times in
12 different circumstances.³ Under the first sentence of ORS 197.830(9), a notice of intent to appeal a
13 land use decision must be filed with LUBA within 21 days after the land use decision becomes final.
14 A different rule is applied under the second sentence of ORS 197.830(9) to post-acknowledgment
15 amendments adopted under ORS 197.610 to 197.625. For post-acknowledgment amendments,
16 the 21-day deadline to appeal to LUBA does not commence until notice is “mailed or otherwise
17 submitted to parties entitled to notice under ORS 197.615.”

under subsection (1) of this section, the director shall notify by mail or other
submission any persons who have requested notification. The notice shall:

- “(a) Explain the requirements for appealing the action of the local government
under ORS 197.830 to 197.845; and
- “(b) List the locations where the comprehensive plan or land use regulation
amendment or new land use regulation may be reviewed.”

³ As relevant, ORS 197.830(9) provides:

“A notice of intent to appeal a land use decision or limited land use decision shall be filed not
later than 21 days after the date the decision sought to be reviewed becomes final. 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.
Failure to include a certificate of mailing with the notice mailed under ORS 197.615 shall not
render the notice defective.”

1 **B. The City’s Argument**

2 The city argues that petitioner never requested that she be provided with written notice of
3 the city’s decision to adopt Ordinance 1865. According to the city, it sometimes sends notice of its
4 post-acknowledgment decisions to persons who participate in the local proceedings that lead to
5 adoption of those decisions, as a courtesy, even though no written request for such notice is
6 submitted to the city. The city contends that the December 10, 2003 notice that it sent petitioner is
7 such a courtesy notice. However, the city contends that because petitioner submitted no written
8 request for notice of the city’s final decision adopting Ordinance 1865, the notice it sent petitioner
9 on December 10, 2003 was not notice that petitioner was “entitled to * * * under ORS 197.615.”
10 According to the city, the deadline for petitioner to file her notice of intent to appeal with LUBA is
11 therefore governed by the first sentence of ORS 197.830(9) rather than the second sentence. *See n*
12 3. If the city is correct in that contention, the deadline for filing the notice of intent to appeal expired
13 on December 22, 2003, and petitioner’s notice of intent to appeal was not timely filed.

14 **C. Petitioner’s Response**

15 Petitioner responds with a number of arguments. Petitioner first complains that the city
16 should not be allowed to wait several months into this appeal before filing its motion to dismiss.
17 However, the city’s motion to dismiss challenges our jurisdiction over this appeal. The city’s delay
18 in filing its jurisdictional challenge provides no basis for LUBA to refuse to consider the motion.
19 OAR 661-010-0065(2); *Elliott v. Lane County*, 18 Or LUBA 871, 874 (1990); *Osborne v.*
20 *Lane County*, 4 Or LUBA 368, 369 (1981).

21 Petitioner next speculates that, following the city’s reasoning, cities could delay giving
22 courtesy notice of their post-acknowledgment amendments or simply give no courtesy notice at all
23 and thereby effectively insulate such decisions from review by LUBA. The short answer to this
24 concern is that the legislature decided when it adopted ORS 197.615(2)(a) that simply appearing in
25 a post-acknowledgment proceeding is not sufficient to establish a right to receive individual written
26 notice of the ultimate decision. For whatever reason, the legislature requires that persons appearing

1 during local post-acknowledgment proceedings also make a written request for notice of the
2 decision. Assuming a local participant makes that request, he or she will be given written notice and
3 presumably will have no difficulty learning that the deadline for appealing that decision to LUBA has
4 begun to run. The legislature's choice may make it more likely that a post-acknowledgment
5 amendment will go unchallenged, but it does not necessarily lead to that result. It simply means the
6 legislature places the burden of requesting notice of the decision, or otherwise learning of the
7 decision in time to file an appeal, on local participants.

8 Petitioner also faults city staff and LUBA staff for making statements in response to her
9 questions that she suggests led her to believe that the 21-day deadline under ORS 197.830(9)
10 should be measured from December 10, 2003 rather than December 1, 2003. Those arguments
11 provide no basis for denying the city's motion to dismiss. In this case, both LUBA and city staff
12 appear to have gone to great lengths to answer petitioner's many questions. Petitioner's first
13 questions appear to have been directed to the city and LUBA on December 30, 2003, the day
14 before the notice of intent to appeal was due under petitioner's theory and nine days *after* the
15 deadline had already expired under the city's theory. Anything city or LUBA staff may have said to
16 petitioner could have no bearing on whether petitioner's notice of intent to appeal was timely filed.

17 Finally, petitioner argues the notice that the city sent on December 10, 2003 should be
18 treated as though it were provided pursuant to ORS 197.615(2). We set that argument out below:

19 "If there was no legal requirement in ORS 197.615 for the City to mail Notices to
20 us of the Final Decision (which I am not conceding), any lack of duty or legal
21 requirement was waived when the City apparently complied with the law by sending
22 out a notice on December 10, [2003] that looks for all the world like it was meant
23 to comply with ORS 197.615, and on which we as citizens relied as that notice. If
24 the City was to send out a clearly labeled/designated 'COURTESY NOTICE OF
25 FINAL DECISION NOT MEANT TO COMPLY WITH ORS 197.615' or
26 even state in the notice that 'the 21 day appeal period began to run on December 1,
27 2003 under our interpretation of the law', the goal of the required citizen
28 involvement might still be meaningful. * * * I may have been able to file the appeal
29 in the seven days I would have been allowed under the City's interpretation of the
30 law. But they kept it a secret. This begs the question [LUBA] faces in this motion

1 [to dismiss], because the City did not clearly state its position at any time until filing
2 the Motion to Dismiss two weeks ago.” Petitioner’s Affidavit 4.

3 We set out the December 10, 2003 notice in its entirety in the margin.⁴ As the city points
4 out, the city’s December 10, 2003 notice attempts to explain to the notice recipient that the 21-day
5 deadline for filing an appeal with LUBA may run from December 1, 2003, if the notice recipient did
6 *not* request written notice of the decision or it may run from the date the notice was mailed
7 (December 10, 2003), if the notice recipient did make a written request for notice of the decision.

8 As an initial point, the city’s notice incorrectly suggests that the 21-day period for filing an
9 appeal began to run on December 1, 2003 for any persons who did not submit a written request for
10 notice of the city’s decision. Since the challenged decision is a post-acknowledgment land use

⁴ The city’s December 10, 2003 notice, which appears at Record 75, follows:

“NOTICE OF DECISION

December 10, 2003

“The Newport City Council, by Ordinance No. 1865, adopted amendments to the Newport Zoning Ordinance (No. 1308, as amended) regarding design review and the Historic Nye Beach Overlay District (reference local file # 3-Z-03). Ordinance No. 1865 was passed on first reading on November 17, 2003, passed on the second reading and adopted on December 1, 2003, and signed by the Mayor on December 1, 2003. A copy of the adopted ordinance may be reviewed or obtained at the Community Development Department located in the Newport City Hall (169 SW Coast Highway, Newport OR 97365).

“Please note that this decision may be appealed to the Oregon Land Use Board of Appeals. The following general appeal information is provided as a courtesy and it is recommended that you contact the Oregon Land Use Board of Appeals, or an attorney with land use experience, for a further explanation of the appeal process or if you have questions about the appeal process:

“Oregon law allows a land use decision made by the City Council to be appealed to the Oregon Land Use Board of Appeals (LUBA). For this type of application, the time allowed to file a notice of intent to appeal with LUBA is generally 21 days from the date the notice of the decision was mailed (if notification of the decision is requested in writing by a party that participated in the hearing) or 21 days after the decision is final. An applicant or an aggrieved person may appeal the decision of the City Council by submitting the appropriate application and the required filing fee to LUBA (306 State Library Building, 250 Winter Street N.E., Salem, Oregon 97310).

CONTACT INFORMATION: James Bassingthwaite, Community Development Director, City of Newport, 169 SW Coast Highway, Newport, OR 97365. Phone: (541) 574-0626.”

1 regulation amendment, the second sentence of ORS 197.830(9) applies, not the first sentence.
2 Even if DLCD is the only person entitled to written notice of the city's decision, all other persons
3 with standing to appeal to LUBA would have 21 days from the day the city provided notice to
4 DLCD to file an appeal with LUBA. *ODOT v. City of Oregon City*, 153 Or App 705, 708, 959
5 P2d 615 (1998). The earliest the 21-day deadline could have begun to run was on December 5,
6 2003, when the city provided notice of its decision to DLCD. However, that error on the city's
7 part would not assist petitioner in this case, since the notice of intent to appeal was not filed within
8 21 days after December 5, 2003. The question therefore becomes whether the city's delay in
9 sending notice to petitioner, and the 122 other people who were sent written notice by mail on
10 December 10, 2003, extended the commencement of the 21-day appeal deadline to December 10,
11 2003.

12 We assume for purposes of this order, that the city could send the notices it provides to
13 comply with ORS 197.615(2)(a) *only* to persons who make written requests for that notice and
14 that the city could send separate, later, "courtesy" notices to other persons who had not requested
15 notice of the decision in writing and are not entitled to notice under ORS 197.615(2). However, if
16 the city wishes to create two classes of notice recipients, it must make it clear to the parties who
17 receive the later courtesy notice that it is not notice that is required by ORS 197.615 and that the
18 deadline for filing an appeal with LUBA has already begun to run on the date the city earlier
19 provided the notice that was required by ORS 197.615(2). If the city's separate, later, courtesy
20 notice looks like a notice that the city is required to provide under ORS 197.615(2) the recipient is
21 entitled to treat that notice as though it is notice the city is required to provide under ORS
22 197.615(2) and to file a notice of intent to appeal with LUBA within 21 days of the date of that
23 later notice in accordance with the second sentence of ORS 197.830(9). Although we do not mean
24 to suggest that we believe the city intended to confuse the 123 notice recipients in this case, the
25 December 10, 2003 did not clearly communicate to petitioner or to the other 122 notice recipients
26 that the December 10, 2003 notice was not a notice that the city was required to provide under

1 ORS 197.615(2), and it does not clearly communicate a city position that the 21-day deadline for
2 filing an appeal with LUBA had begun to run earlier than December 10, 2003.⁵

3 The December 10, 2003 notice certainly appears to be the kind of notice that ORS
4 197.615(2) requires. That notice and the certificate of mailing at Record 74 appear to be designed
5 to meet each of the content requirements set out in ORS 197.615(2): (1) a description of the
6 ordinance, (2) identification of the date the decision became final, (3) a certificate of mailing, (4) a
7 listing of the place where a copy of the decision can be reviewed, and (5) an explanation of appeal
8 requirements. *See* n 2. The December 10, 2003 notice was sent to “persons who provided an
9 address and who presented testimony (oral or written), signed a submitted petition, or signed a sign-
10 in sheet for a work session * * *.” Record 74. There is nothing in the December 10, 2003 notice
11 that would give petitioner a reason to suspect that the city was taking the position that she was not
12 entitled to notice under ORS 197.615. Neither does the notice give petitioner any reason to
13 suspect that the city believed the other 122 persons who the city sent notice also were not entitled
14 to receive notice under ORS 197.615(2). If those 122 persons had made a written request for
15 notice of the decision, mailed written notice to those 122 persons would be required under ORS
16 197.615(2)(a)(B). In that circumstance, under the Court of Appeals’ reasoning in *ODOT v. City*
17 *of Oregon City*, petitioner and any other person who appeared during the local proceedings might
18 well have 21 days from December 10, 2003 to file an appeal with LUBA.

19 Assuming the city is correct that some or all of the 123 persons to whom it mailed notice of
20 its decision on December 10, 2003 did not expressly or impliedly make a written request for a copy
21 of the city’s decision in this matter, it is difficult to fault the city for sending notices that it was not
22 required to send.⁶ Nevertheless, if the city does wish to send courtesy notices that post-date the

⁵ To the contrary, the notice states that the time to appeal to “LUBA is generally 21 days from the date the notice of the decision was mailed * * *.” *See* n 4. It also erroneously suggests that the deadline for filing an appeal might have begun to run on December 1, 2003.

⁶ We note, however, that the informality of local land use proceedings and the difficulty of determining whether particular participants have taken steps that are sufficient to constitute a request “in writing” for notice

1 notices that the city is required to send under ORS 197.615, it must make it clear that the later
2 courtesy notice is not notice that the city is required to send under ORS 197.615. If the city fails to
3 do so, the persons who receive the later courtesy notice are entitled to treat that notice as though it
4 is notice that is required under ORS 197.615, and therefore notice that starts the 21-day period for
5 appealing to LUBA on the date the notice was mailed. That is the circumstance presented here.
6 We therefore treat the December 10, 2003 notice as notice that the city was required to send under
7 ORS 197.615. Accordingly, the deadline for filing the notice of intent to appeal in this appeal was
8 December 31, 2003, and petitioner's notice of intent to appeal was timely filed. The city's motion
9 to dismiss is denied.

10 The deadline for filing the petitions for review shall be 21 days from the date of this order.
11 The deadline for filing the response briefs shall be 42 days from the date of this order. The deadline
12 for issuing the Board's final opinion and order shall be 77 days from the date of this order.

13 Dated this 3rd day of May, 2004.

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Michael A. Holstun
Board Chair

of the post-acknowledgment may be good reasons against applying too rigid a test in deciding who has expressly or impliedly made a written request for notice of a post-acknowledgment decision. For example, it is at least arguable that persons who sign sign-up sheets and provide their addresses understand those actions to constitute a written request that the city mail them notice of the post-acknowledgment decision that they are supporting or opposing.