

K. Procedural Issues

Several objections raise issues related to whether the city and county have complied with certain procedural requirements in adopting the five ordinances at issue in this review. The legal criteria for this portion of the submittal are primarily found in ORS 197.610, OAR 660-025-0175 and OAR 660-018-0020, and Goals 1 and 2. This section addresses objections relating to local procedure and coordination for both the four ordinances initially submitted to the department (the two county ordinances, and city ordinances NS 2112 (UGB) and NS 2113 (code amendments), and the city's public facilities plan, adopted as ordinance NS 2111.

1. Did the city properly notice its submittal of the ordinances and plan amendments to the department?

Swalley Irrigation District (Swalley) alleges that the City of Bend's April 16, 2009 notice of its submittal to the department is inadequate to meet ORS 197.626, 197.633(2)(b), OAR 660-025-0175(3), and OAR 660-025-0100 (as well as Goal 1) in that the notice does not identify with clarity what decisions were submitted to the department for review. Swalley Objection 2(A), at 17-18.

a. Legal Standard

OAR 660-025-0175 sets forth how local governments must provide notice of UGB amendments, and the requirements for submittal of their final decision:

- (3) The local government must provide notice of the proposed amendment according to the procedures and requirements for post-acknowledgement plan amendments in ORS 197.610 and OAR 660-018-0020.
- (4) The local government must submit its final decision amending its urban growth boundary, or designating urban reserve areas, to the department according to all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140.

In turn, OAR 660-025-0130 governs what must be submitted to the department and when, and OAR 660-025-0140 governs notice of the submittal and objections.

b. Summary of Local Actions

The city submitted notice of the city's and county's adoption of four ordinances to the department on April 16, 2009. Those four ordinances were the city's ordinances adopting the amended UGB and amending the city's development code in certain respects (Ordinances NS-2112 and NS-2113), and the county's ordinances co-adopting the amended UGB and making certain amendments to the county's comprehensive plan map and text for the lands within the UGB expansion area. [R. at 1050-1051 (city ordinance NS 2112 - UGB); R. at 1836-1844 (city ordinance NS 2113 – development code);

[county ordinance 2009-1 – UGB map and DCC and TSP map]; [county ordinance 2009-2 – zoning map and certain DCC amendments].

The city did *not* submit ordinance NS 2111, amending the city’s Public Facilities Plan element of its General Plan, to the department on April 16, 2009 (although a copy of this ordinance, which was adopted immediately before the UGB amendment ordinance, was included in the record for the submittal of the UGB ordinance (NS 2112), and the city submitted a separate notice of adoption of the Public Facilities Plan on January 9, 2009). However, on June 12, 2009, following LUBA’s decision and May 8, 2009 order in LUBA Nos. 2009-010, 2009-011 and 2009-020, the city did separately submit ordinance No. NS-2111 to the department, and provided notice to the objectors, as required by OAR 660-025-0175(3) and (4) and OAR 660-025-0130 and -0140.

c. Analysis

Although the city’s action in adopting the Public Facility Plan elements of its General Plan as a separate ordinance from its UGB amendment may have caused confusion, there is no legal prohibition on what the city did. The city’s 45-day notice covered both the UGB amendment and amendments to elements of the city’s comprehensive plan, including the Public Facilities Plan. The city properly gave post-adoption notice of its submittals to the department and those entitled to notice.

d. Conclusion

The director denies this objection. The city properly gave pre- and post-adoption notice of its submittals to those entitled to notice, include Swalley.

2. Did the city provide required notice and hearings for its ordinances?

Swalley, Bayard, Hillary Garrett, and Central Oregon LandWatch allege that the local processes leading to the submittals were unreasonably confusing and provided inadequate notice. Swalley Objection 2(B), at 18-28; Bayard Objection 1, at 23-25; Central Oregon LandWatch Objection at 6-8; Hillary Garrett, at 3-4.

a. Legal Standard

OAR 660-018-0020 sets forth how local governments must provide notice to the department 45 days in advance of the first evidentiary hearing on a proposed comprehensive plan amendment:

- (1) A proposal to amend a local government acknowledged comprehensive plan * * * must:
 - (a) Be submitted to the director at least 45 days before the first evidentiary hearing on adoption. * * *
 - (c) Contain two copies of the text and any supplemental information the local government believes is necessary to inform the director as to the effect of the proposal. One of the required copies may be an electronic copy;

* * *

(e) In the case of a map change, include a map showing the area to be changed as well as the existing and proposed designations. Wherever possible, this map should be on 8-1/2 by 11-inch paper;

* * *

(2) The text submitted to comply with subsection (1)(c) of this rule must include the specific language being proposed as an addition to or deletion from the acknowledged plan or land use regulations. A general description of the proposal or its purpose is not sufficient. In the case of map changes, the text must include a graphic depiction of the change, and not just a legal description, tax account number, address or other similar general description.

These provisions concern the required notice to the department. They do not prohibit changes to a proposed action. If a local government substantially amends a proposed plan amendment, then it must describe the changes in its notice of adoption. [OAR 660-018-0045]

Statewide Planning Goal 1 sets forth what must be contained in a local government's citizen involvement program. The city's citizen involvement program is acknowledged for compliance with Goal 1. The city's hearings procedures for legislative amendments do include a local code requirement for 20-day advance local notice of public hearings on legislative plan amendments, which is cited by Bayard and Garrett. BDC Section 4.1.315.

b. Summary of Local Actions

The city provided an amended 45-day notice to the department of its revised proposal to amend the UGB and certain provisions of its comprehensive plan, including the Public Facilities element of its plan, and including its development code, on October 8, 2008. [R. at 4820] Swalley, Garrett and Bayard identify several respects in which they and other local participants were frustrated or confused about what was proposed, and allege that the proposed Public Facilities Plan was not submitted to the department until October 20, 2008, and that the local newspaper notice did not separately identify that amendments to the Public Facilities Plan were to be heard.

The record indicates that the proposed amendments to Chapter 8 (Public Facilities) of the General Plan were first presented to the city's planning commission on or about August 15, 2008. [R. at 6150, 6250] The record also indicates that the location and, to some extent, size of the proposed UGB amendment was changed significantly on or about October 3, 2008, and that the city and county planning commissions met to consider the submittals on October 27, 2008. [R. at 1211] The city gave public notice of the planning commissions' hearing on October 7, 2008; [R. at 4756] and public notice of the city council hearing on November 7, 2008. [R. at 3954-55] It is not clear when the city provided the text of the proposed changes to Chapter 8 of its General Plan (Public Facilities); it appears that the text was sent on or about October 20th.

c. Analysis

Swalley, Garrett and Bayard are correct that the city's notices failed to comply with OAR 660-018-0020 and ORS 197.610, in that the submittal was late (in relation to the first evidentiary hearing) and may not have initially been complete. It also appears that the city's notice of the planning commissions' joint hearing and the city council hearing violated BDC section 4.1.315 by failing to provide notice 20 days in advance of the hearings. However, Swalley, Garrett and Bayard also note that they were allowed to and did provide written testimony to the planning commissions (and city council) at public hearings on the proposals.

Whether a violation of the notice requirements of ORS 197.610 requires a remand depends on whether the objector(s) were prejudiced by the late or inadequate notice. See, *No Tram to OHSU, Inc. v. City of Portland*, 44 Or LUBA 647, 658 (2003). In this case, Swalley and other objectors allege that they were prejudiced by the lack of time to review the extensive submittal, which was changed substantially by the city in early October. The objectors have identified substantial prejudice in the sense of not having been able to present their concerns to the local decision-makers.

d. Conclusion

Goal 1 is violated in the context of a legislative comprehensive plan amendment only if the local government does not follow its citizen involvement program. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998); *Wade v. Lane County*, 20 Or LUBA 369 (1990). Swalley and Bayard have not identified a violation of Goal 1.

However, as set forth above, the record shows that the city did violate ORS 197.610 by failing to provide timely and adequate notice of its proposed amendment to its General Plan. As a result, the director concludes that remand is required in this case.

3. Did the city otherwise violate Goal 1?

Toby Bayard (and to some degree Swalley and Central Oregon LandWatch) alleges that the city failed to provide critical information to the public in a timely fashion, and made substantial last-minute changes in its proposal that had the effect of not allowing the public adequate time to comment. [Bayard Objection 1 at 1-26; Central Oregon LandWatch Objection at 6-8]

a. Legal Standard

Goal 1 is to "develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." [OAR 660-015-0000(1)] Goal 1 establishes requirements for local citizen involvement programs. Its provisions do not apply to comprehensive plan amendments unless those amendments include the government's citizen involvement program. The city and county submittals do not amend or affect either the city's or county's citizen involvement program. Under those circumstances, the submittals are in violation of Goal 1 only if the submittals include provisions that are inconsistent with the city or county citizen involvement programs.

Homebuilders Assoc. v. Metro, 42 Or LUBA 176, 196-197 *aff'd Homebuilders Assn. of Metropolitan Portland*, 184 Or App at 669. No objector attempts to establish that the submittals include provisions that are inconsistent with either citizen involvement. In addition, the objectors do not identify any specific provision of the city's citizen involvement program that has been violated. See, General Plan, Chapter 1.

b. Summary of Local Actions

The city is not amending its citizen involvement program.

c. Analysis

Because the city is not amending its citizen involvement program, Goal 1 does not establish requirements for the local government actions before the director.

d. Conclusion

The director denies the Bayard, Central Oregon LandWatch and Swalley objections concerning Goal 1, because the goal does not establish legal requirements for the actions that are before the director for review.

4. Did the local governments fail to coordinate with Swalley Irrigation District, Central Oregon Irrigation District, or ODOT in violation of Goal 2?

Swalley Irrigation District (Swalley) and Toby Bayard allege that the city and county failed to coordinate with the Swalley and other governmental entities, as required by Goal 2. In particular, Swalley alleges that the submittals were not coordinated with the district in the sense that the district's needs were considered and accommodated as much as possible. Goal 2; ORS 197.015(5). [Swalley Objection 2(A), at 28-34. Bayard Objection 2, at 27-33]

a. Legal Standard

The coordination elements of Goal 2 require local governments to exchange information with affected governmental units. In addition, information received from affected governmental units must be used by the adopting local government. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 553, 558-559 (2007); *DLCD v. Douglas County*, 33 Or LUBA 216, 221 (1997); *Brown v. Coos County*, 31 Or LUBA 142, 145 (1996). The adopting government must provide "notice clearly explaining the nature of the proposal and soliciting comments concerning the proposal." *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 394, *aff'd* 130 Or App 406 (1994). A local government's 45-day notice to DLCD is not sufficient for this purpose. *Id.*

Similarly, newspaper notice is not sufficient. *Adkins v. Heceta Water District*, 23 Or LUBA 207, 218 (1992). Finally, the local government's findings must address the concerns raised; simply rejecting the concerns or deferring addressing them to a later time is not sufficient. *Cox v. Polk County*, 49 Or LUBA 78, 89 (2005). *DLCD v. Douglas County*, *supra*. Goal 2 and ORS 197.015(5) do not mandate success in accommodating

the needs or legitimate interests of all affected governmental agencies, but they do mandate a reasonable effort to accommodate those needs and legitimate interests “as much as possible.” *Turner Community Association v. Marion County*, 37 Or LUBA 324, 353-354 (1999). From the foregoing, the coordination requirement is satisfied where the local government has engaged in an exchange of information regarding an affected governmental unit’s concerns, put forth a reasonable effort to accommodate those concerns and legitimate interests as much as possible, and made findings responding to legitimate concerns.

b. Summary of Local Actions

The city adopted findings summarizing its coordination with irrigation districts, including Swalley. [R. at 1214-1215] Those findings describe how the city and the district communicated, and the city’s consideration of the concerns raised by the district. According to the city’s findings, it removed a 332-acre area entirely within the district. Also according to the city it “cannot balance SID’s opposition to urbanization with the need for urbanization of the identified lands, for all of the reasons explained in the city’s findings.” [R. at 1215]

c. Analysis.

The director concludes that the city has complied with the coordination elements of Goal 2. The city met repeatedly with the district; conducted an analysis of the acreage of irrigated lands affected by the proposal; removed some irrigated lands from the proposal; and adopted findings describing the district’s concerns and how they were accommodated. Although the notice provided by the city was confusing, it appears to have met legal requirements, and the district itself has indicated that it was able to make its concerns known in writing.

d. Conclusion

The director concludes that the city’s and county’s actions (the three city ordinances, and the two county ordinances) were adopted in compliance with the coordination requirements of Goal 2. The objection is denied.

5. Did the city improperly adopt the Public Facilities Plan?

Toby Bayard and Hillary Garrett and Central Oregon LandWatch, and Hunnel United Neighbors and Anderson Ranch all allege that the city improperly adopted the Public Facilities Plan in NS 2111. Specifically, they allege there was no public hearing on the ordinance, and that the city’s public notice only referenced the UGB amendment. Bayard Objection 2, at 25; Garret Objection, at 3.

a. Legal Standard

BDC section 4.1.310 requires a public hearing before the city’s planning commission and its city council on any legislative change to the city’s plan or land use regulations. BDC 4.1.315 requires public notice of the hearing 20 days prior to the date of the hearing.

b. Summary of Local Actions

The city held a public hearing on the proposed Public Facilities Plan. The planning commission held a hearing on October 27, 2008 and the city council held a hearing on November 24, 2008. The city provided public notice of the proposed UGB amendment, which included the proposed adoption of Chapter 8 of the General Plan (Public Facilities).

c. Analysis

BDC section 4.1.310 requires a public hearing on the legislative change to the city's General Plan. The code does not prevent the city from splitting proposed changes to its comprehensive plan into two ordinances, so long as a public hearing was held that covers all of the changes. The city's hearings appear to have met the code requirement. The objectors have not identified a legal requirement concerning the level of detail required in the city's public notice.

d. Conclusion

Based on the reasoning above, the director denies these objections.