BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOME DEPOT U.S.A., INC.,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent.

LUBA No. 99-180

ORDER

Before the Board are the city's motion to dismiss and petitioner's record objections.

MOTION TO DISMISS

The city moves to dismiss this case on the grounds that petitioner lacks standing to appeal the challenged decision, and that petitioner failed to exhaust local administrative remedies.

A. Background

The challenged decision in this case is the city's legislative decision to amend the acknowledged Beaverton Development Code (BDC) pursuant to ORS 197.610 to 197.625. In relevant part, the amendments (1) establish maximum and minimum parking standards, consistent with Title 2 of Metro's Urban Growth Management Functional Plan (UGMFP); and (2) limit the total allowed floor area for retail uses in the city's Campus Industrial (CI) zones, consistent with Title 4 of the UGMFP.

City planning staff filed an application for the proposed amendments on June 8, 1999. On August 13, 1999, the city sent notice of the proposed amendments to the Department of Land Conservation and Development (DLCD), pursuant to ORS 197.610. The Planning Commission conducted a public hearing on September 8, 1999, and, on September 30, 1999, approved the proposed amendments. The notice of the planning commission's decision stated that the decision could be appealed to the city council by filing an appeal within 10

days of the date the decision was signed. After the appeal period expired, the planning commission's decision was placed on the city council's consent agenda for October 25, 1999. The city council approved the planning commission's decision, and on November 9, 1999, adopted Ordinance 4079, which amends the BDC to incorporate the amendments.

Petitioner contemplates but has not yet applied for development of a store in excess of 60,000 square feet on property within one of the city's CI zones, on property known as the Kemeny Holdings site. The challenged amendments prohibit a retail store of the size contemplated by petitioner. On November 26, 1999, petitioner appealed the city's adoption of Ordinance 4079 to LUBA.

B. Standing

The city argues that petitioner lacks standing to bring the present appeal because petitioner never "participated orally or in writing" in any of the local government proceedings leading to adoption of the challenged amendments. ORS 197.620(1);[1] *see also* ORS 197.830(2).[2] The city contends that it published and posted notice of the proceeding before the planning commission, but petitioner did not attend or offer written testimony at that proceeding. Consequently, the city argues, petitioner lacks standing and its appeal must be dismissed.

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[1]ORS 197.620(1) provides:

> "Notwithstanding the requirements of ORS 197.830(2), persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. * * *"

[2]ORS 197.830(2) provides:

> "Except as provided in ORS 197.620(1) and (2), a person may petition the board 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."

Petitioner responds that it has standing or that the appearance requirement has been obviated, for a number of reasons.[3] However, the dispositive reason is petitioner's argument that the city failed to provide timely notice to DLCD as required by ORS 197.610.[4] Petitioner argues that ORS 197.610(1) requires the city to provide notice to DLCD at least 45 days before the "final hearing on adoption." Petitioner argues that the city did not mail pre-hearing notice to DLDC until August 13, 1999, considerably less than 45 days before the final, and only, hearing in this case, which occurred on September 8, 1999. Under these circumstances, petitioner argues, it has standing to appear under ORS 197.610(2)(b), notwithstanding the ORS 197.830(2)(b) appearance requirement.

The city responds that ORS 197.610(2)(b) does not assist petitioner, because the city was not required to send notice to DLCD under ORS 197.610(1), and thus the exception at

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[3]In addition to the arguments discussed in text, petitioner argues that the appearance requirement is obviated because (1) petitioner's representative sent a letter to the city requesting that the city send notice of any Title 4-related zoning amendments, such as the challenged decision, but the city did not send any such notice; (2) the description of the proposed amendment in the notice sent to DLCD differed so significantly from the city's final action that, pursuant to ORS 197.830(3), petitioner may appeal to LUBA without appearing before the city; and (3) the city's notice to DLCD was inadequate under the terms of Ballot Measure 56. Our disposition of the challenge to standing on other grounds makes it unnecessary to address these arguments.

[4]ORS 197.610 (1997) provides in relevant part:

> "(1) A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of the Department of Land Conservation and Development at least 45 days before the final hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The director shall notify persons who have requested notice that the proposal is pending.
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> "(2) When a local government determines that the goals do not apply to a particular proposed amendment or new regulation, notice under subsection (1) of this section is not required. In addition, a local government may submit an amendment or new regulation with less than 45 days' notice if the local government determines that there are emergency circumstances requiring expedited review. In both cases:
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> "(a) The amendment or new regulation shall be submitted after adoption as provided in ORS 197.615 (1) and (2); and
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> "(b) *Notwithstanding the requirements of ORS 197.830 (2), the director or any other person may appeal the decision to the board under ORS 197.830 to 197.845*." (Emphasis added.)

ORS 197.610(2)(b) to the ORS 197.830(2)(b) appearance requirement does not apply. The city points out that notice is not required under ORS 197.610(1) "[w]hen a local government determines that the [statewide planning] goals do not apply to a particular proposed amendment or new regulation[.]" ORS 197.610(2). The city argues that the challenged decision does not make any findings with respect to the goals, and that in fact the goals do not apply to the challenged amendments. Petitioner responds, and we agree, that ORS 197.610(2) eliminates the notice requirement only when the local government determines that the goals do not apply. Because the city made no such determination, the city was required to send notice to DLCD pursuant to ORS 197.610(1).[5]

The city argues next that it complied with ORS 197.610(1) because the notice sent on August 13, 1999, was at least 45 days before the "final hearing on adoption." The city contends the final hearing was not the evidentiary hearing on September 8, 1999, but rather the date Ordinance 4079 was passed by the city council, on November 8, 1999.[6] However, petitioner argues, and again we agree, that the "final hearing on adoption" described in ORS 197.610(1) is the final *evidentiary* hearing on adoption of amendments, not subsequent nonevidentiary public meetings to formally adopt those amendments. OAR chapter 660, division 18 implements ORS 197.610 through 197.625. OAR 660-018-0020 specifically implements ORS 197.610(1), by requiring that local governments send DLDC notice of a proposed amendment at least 45 days before the "final hearing on adoption." OAR 660-018-0010(9) defines "final hearing on adoption" for purposes of OAR 660-018-0020 as

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[5]As petitioner points out, the city's position that no statewide planning goals apply to the challenged amendments is at odds with the pre-hearing notice it provided to DLCD, which states that Statewide Planning Goals 2 (Land Use Planning) and 12 (Transportation) apply to the amendments. Record 169.

[6]ORS 197.610(1) was amended in 1999, effective June 30, 1999. Those amendments required local governments to provide notice to DLCD at least 45 days "before the first evidentiary hearing on adoption," rather than the *final* hearing on adoption. Oregon Laws 1999, chapter 622, section 1. The parties dispute whether the 1999 amendments apply to the decision challenged in this case, because the city's application was filed prior to the effective date of those amendments, but the evidentiary hearing and almost all other events in the proceedings below occurred after that effective date. We need not resolve whether the 1999 amendments apply to this case, because we agree with petitioner that even under the prior version of ORS 197.610(1) the city's notice to DLCD was untimely.

> "* * * the last hearing where all interested persons are allowed to present evidence and rebut testimony on the proposal to adopt or amend a comprehensive plan or land use regulation. 'Final Hearing on Adoption' shall not include a hearing held solely on the record of a previous hearing held by the governing body or its designated hearing body. * * *"

In the present case, the final and only evidentiary hearing was held on September 8, 1999, less than 45 days from the date notice was sent. It follows that the city's notice to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020 was untimely. One consequence of that untimely notice is that DLCD or any other person may appeal the city's decision to LUBA, "[n]otwithstanding the requirements of ORS 197.830(2)." ORS 197.610(2)(b). Consequently, we agree with petitioner that it need not satisfy the appearance requirement at ORS 197.830(2)(b), and that petitioner has standing to appeal the city's decision.

C. Exhaustion of Remedies

The city argues that this appeal should be dismissed, because petitioner failed to exhaust local administrative remedies available by right before appealing to LUBA, as required by ORS 197.825(2)(a).[7] The city explains that pursuant to BDC 50.40.2.A, an aggrieved person can appeal an order of the planning commission within 10 days of the date the order is signed.[8] Consistent with BDC 50.40.2.A, the notice of the planning commission's decision in the present case states that the decision can be appealed to the city council. Had petitioner done so, the city argues, the city council would have conducted a hearing on the merits of the appeal. Because petitioner did not exhaust the local appeal available to it by right, the city contends, petitioner's appeal to LUBA must be dismissed.

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[7]ORS 197.825(2)(a) provides that LUBA's jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

[8]BDC 50.40.2.A provides:

> "An applicant, aggrieved person or staff acting through the Mayor may appeal the order of the Planning Commission by delivering written notice to the City Recorder within 10 calendar days from the date the written order is signed by the Planning Commission chairman or his/her designate."

Petitioner responds that the exhaustion requirement does not apply in this case, because petitioner appealed the decision of the highest-level local decision making body, the city council's adoption of Ordinance 4079. Petitioner argues that, pursuant to BDC 50.35.1.A.1, the city council is required to consider and adopt Ordinance 4079 before it can be a final land use decision. Petitioner cites *Standard Insurance Co. v. City of Hillsboro*, 17 Or LUBA 886 (1989), for the proposition that, where a statute or local code requires the city council to review and act on the planning commission's decision, petitioner is not obliged to exercise the redundant task of appealing the planning commission's decision to the city council. In the alternative, petitioner argues that the exhaustion requirement does not apply where the appearance requirement does not apply. As discussed above, petitioner argues that the city's defective notice waives the appearance requirement imposed by ORS 197.830(2)(b). Because an appeal to the city council is predicated on appearance before the planning commission, petitioner contends, where the appearance requirement is waived, the exhaustion requirement should also be waived.

In *Standard Insurance Co.*, the planning commission adopted a resolution recommending approval of a quasi-judicial plan amendment. The city issued notice of the resolution stating that any appeal of that decision must be filed within 15 days. After the appeal period had expired, the city council considered the planning commission's recommendation without a public hearing, and adopted the proposed amendment. Before LUBA, the city argued that the petitioner's appeal of the city council's decision should be dismissed for failure to exhaust local remedies. LUBA disagreed, reasoning that requiring the petitioner to pursue an appeal to the city council under those circumstances could achieve nothing:

> "[W]hile the issue is not without doubt, we do not believe that in this case an appeal of the proposed plan amendment to the city council is one of the 'remedies available by right' required to be exhausted by ORS 197.825(2)(a). The city council is *required* by statute and its own plan and land use regulations to consider and act upon proposed plan amendments, and may

> hold a hearing on a proposed amendment, regardless of whether an appeal is filed. Furthermore, in this case, the propriety of the proposed plan amendment is dependent upon a single legal issue concerning which petitioner's position is known to the city council. Therefore, no purpose would be served by requiring petitioner to have repeated this position at a hearing before the city council." 17 Or LUBA at 895 (emphasis in original; footnote omitted).

See also Colwell v. Washington County, 79 Or App 82, 91, 718 P2d 747 (1986) (petitioners need not exhaust administrative remedies by appealing a planning commission recommendation to the county governing body, where relevant statutes require that such recommendations can only be adopted by the governing body, and thus requiring the petitioners to exhaust a local appeal could have achieved nothing except convincing the governing body to do what the statutes already require it to do).

The challenged decision in the present case involves amendments to the city's land use regulations. ORS 197.015(11) defines "land use regulation" to mean "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan." The city does not dispute that, like the local governments in *Standard Insurance Co.* and in *Colwell*, only the city governing body has authority to adopt an ordinance, and therefore only the city council has the authority to adopt the amendments challenged in this decision. Nonetheless, the city argues, *Standard Insurance Co.* is distinguishable for two reasons.

First, the city focuses on LUBA's partial reliance in the above-quoted passage on the fact that the petitioner had made its views known to the planning commission and therefore the city council, when it reviewed the planning commission's recommendation. In the present case, the city argues, petitioner did not appear and make its views known to the planning commission, and the city council thus never had the benefit of those views. Unlike the circumstances in *Standard Insurance*, the city argues, in the present case the fundamental policy purposes of the exhaustion requirement can only be served by requiring petitioner to make its views known to the city council, before appealing to LUBA.

Our conclusion in *Standard Insurance Co.* rested on two rationales. The primary rationale was that the exhaustion requirement does not apply where the city council is legally obligated to review and act on the planning commission's recommendations. In our view, the additional rationale stated in that case is simply that, an additional basis that does not disturb the sufficiency of the primary basis. Accordingly, we disagree with the city that petitioner's failure to make its views known to the city during the proceedings below distinguishes the present case from *Standard Insurance Co.*.

Second, the city argues that at the planning commission hearing the chairman read a statement that failure to raise issues before the commission precluded consideration of those issues before the city council or LUBA. The city cites to a footnote in *Standard Insurance Co.*, where we commented that a stronger argument would exist for requiring the petitioner to obtain a hearing before the city council if petitioners were required to raise particular issues in that hearing in order to raise them before LUBA, which was not the case. *Standard Insurance Co.*, 17 Or LUBA at 895 n 7. We understand the city to argue that the "raise it or waive it" principle reflected in the chairman's statement and embodied in ORS 197.763(1) applies in the present case, and thus petitioner should be required to seek a hearing before the city council in order to raise any issues prior to bringing those issues before LUBA.[9] However, ORS 197.763(1) applies only to quasi-judicial proceedings, not to legislative proceedings. Petitioner asserts that the decision challenged in this case is a legislative

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[9]ORS 197.763 provides in relevant part:

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:
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> "(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

decision, not a quasi-judicial decision. The city does not contend otherwise. In other words, like *Standard Insurance Co.*, the present case is not one where petitioner's failure to raise issues below waives those issues. Accordingly, the planning commission chairman's recitation of the raise it or waive it principle during the hearing before the commission has no bearing on whether petitioner is required to exhaust administrative remedies.

We agree with petitioner that our holding in *Standard Insurance Co.* controls the present case, and that, given the city council's legal obligation to review the planning commission's legislative recommendation, petitioner is not required to perform the redundant task of appealing that recommendation to the city council. In addition, we agree with petitioner's alternative argument that the city's defective notice to DLCD not only obviates the appearance requirement at ORS 197.830(2)(b), but also the exhaustion requirement at ORS 197.825(2)(a). BDC 50.40.2A limits local appeal rights to the "applicant, aggrieved person or staff * * *." It is not clear under the city's code whether appearance before the planning commission is a legal prerequisite to appealing the commission's decision to the city council. However, the notice of hearing provided in this case stated that:

> "The Planning Commission recommendation may be appealed to the City Council *only* by the applicant, a person whose name appears on the application, *or any person who appeared before the Planning Commission either orally or in writing*. An appeal shall be made by filing a Notice of Intent to Appeal with the City Recorder within ten (10) calendar days of the date of the Planning Commission's land use order." Record 172 (emphasis added).

Because the city apparently limited nonapplicant appeal rights to persons who appeared before the Planning Commission, and ORS 197.610(2) obviated the appearance requirement for petitioner in this case, we conclude that a local appeal was not "available" to petitioner within the meaning of ORS 197.825(2)(a). *See Rebmann v. Linn County*, 21 Or LUBA 542, 545 (1991) (petitioners have no administrative remedies to exhaust when available remedies require that a person first appear and the local government rendered the challenged decision

without providing a public hearing at which petitioners could have appeared). Consequently, petitioner did not fail to exhaust administrative remedies.

The city's motion to dismiss is denied.

RECORD OBJECTIONS

Petitioner objects to the incompleteness of the record table of contents, and the omission of three items from the record. The city submitted a supplemental record that corrects the table of contents and that includes two of the three omitted items.[10] The city's response resolves three of petitioner's four record objections.

The fourth item is a letter and cover sheet dated November 13, 1998, from petitioner's attorney to the city Community Development Department. The letter was faxed to the city planning department on November 13, 1998, eight months before the city filed its application for the amendments challenged in this appeal. The city argues that the November 13, 1998 letter is not properly in the record, because it was never "incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker." OAR 661-010-0025(1)(b). We agree. The letter was not placed before the final decision maker during the course of proceedings below. Indeed, those proceedings had not even commenced when the city received the letter. Further, we note that the letter does not request that city staff place the letter into the record of any particular pending or future application, and we are aware of no obligation under relevant statutes or the city's code for the city to do so under these circumstances. Petitioner's objection to omission of the November 13, 1998 letter is denied.

[10]The two omitted items the city agrees to include are (1) the minutes of a November 8, 1999 city council meeting; and (2) the minutes of a September 8, 1999 planning commission meeting.

The record of this appeal is settled as of the date of this order. The petition for review is due 21 days, and the response brief is due 42 days, from the date of this order.

Dated this 17th day of February, 2000.

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Tod A. Bassham
Board Chair