BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEIGHBORS FOR SENSIBLE DEVELOPMENT, INC., and REX ROSE,
Petitioners,

vs.

CITY OF SWEET HOME,
Respondent,

and

LINN COUNTY AFFORDABLE HOUSING, INC.,
Intervenor-Respondent.

LUBA No. 2000-154

ORDER

Before us are a motion to dismiss petitioners' appeal of a decision of the Sweet Home Planning Commission granting preliminary approval of a proposed planned unit development (PUD), a motion to intervene, motions to take evidence not in the record, and objections to the record.

MOTION TO INTERVENE

Linn County Affordable Housing, Inc. (intervenor), the applicant below, moves to intervene in this appeal on the side of respondent. There is no opposition to the motion, and it is allowed.

INTRODUCTION

The City of Sweet Home has an unusual three-step process for obtaining approval of a PUD. The first step involves obtaining preliminary approval of a "preliminary development plan," which requires submission of schematic drawings and a written program that contains the elements of the proposed development, including proposed land uses, building densities, building type, ownership pattern, and numerous other elements. Sweet

Home Municipal Code (SHMC) 17.48.030(A) and (B). The planning commission reviews the preliminary development plan pursuant to SHMC 17.48.030(C), which provides:

> "1. The planning commission shall informally review the preliminary development plan and program and may act to grant either preliminary approval, approval with recommended modifications or denial. Such action shall be based upon the city comprehensive plan, the standards of this title and other regulations, and the suitability of the proposed development in relation to the character of the area;
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> "2. Informal review of the preliminary development plan and program shall be held at a regular planning commission meeting, but does not require a public hearing;
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> "3. Approval in principle of the preliminary development plan and program shall be limited to the preliminary acceptability of the land uses proposed and their interrelationships, and shall not be construed to endorse precise location of uses nor engineering feasibility. The planning commission may require the submission of other information than that specified for submittal as part of the general development plan and program;
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> "4. The planning commission shall review and may recommend expansion, additions or modifications in the qualifications of the proposed design team for the preparation of the general development plan and program;
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> "5. The planning commission shall determine the extent of any additional market analysis to be included in the general development plan and program."

The SHMC does not require that the planning commission's preliminary approval include notice and the opportunity for a hearing, only that review be conducted during a regular planning commission meeting. SHMC 17.48.030(C)(2). Once preliminary approval has been obtained, the second step requires an applicant to prepare a general development plan. A required element of the general development plan is that it be in conformance with the preliminary approval. SHMC 17.48.040(D)(1)(a). The third step consists of approval of the final development plan, which requires that the final recordable document comply with the general development plan approval obtained during step two. SHMC 17.48.060. The present case involves petitioners' appeal of the preliminary approval.

FACTS

The planning commission granted preliminary approval of intervenor's proposed PUD at the June 5, 2000 regular planning commission meeting. Petitioners were not present at this meeting, nor were they given notice of the meeting or the decision.[1] Intervenor proceeded to step two of the SHMC PUD approval process, which involved an August 7, 2000 public hearing. The staff report dated July 31, 2000, prepared for this hearing states:

> "The Planning Commission held an informal review of the preliminary PUD on June 5, 2000.
>
> "a. The Commission approved in principle the concept of a PUD on this property." Motion to Dismiss Exhibit 3, page 9.

Intervenor contends that the staff report was available to the public and was read out loud during the public hearing, at which petitioners were in attendance. Petitioners contend that they did not receive a copy of the staff report at the August 7, 2000 hearing, and also that they did not hear that portion of the staff report read out loud. The public hearing was continued to August 9, 2000, at which the planning commission recommended approval of the PUD to the city council.[2] The city conducted a public hearing on September 12, 2000, regarding general development plan approval for the proposed PUD. The public hearing was subsequently continued until September 26, 2000, and then to October 10, 2000. Petitioners contend that they did not learn about the planning commission's June 5, 2000 preliminary approval of the proposed PUD until they received a copy of the August 25, 2000 staff report in preparation for the September 12, 2000 public hearing. Petitioners appealed the planning commission's preliminary approval directly to LUBA on September 15, 2000.

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[1] One of the named petitioners is an organization that represents several neighbors owning property adjacent to or near the subject property. The other named petitioner is an individual who resides next to the subject property. No party challenges the standing of the organization in this case.

[2] The planning commission also approved the subdivision proposed in conjunction with the PUD application.

MOTION TO TAKE EVIDENCE OUTSIDE THE RECORD AND MOTION TO STRIKE

Intervenor attached a number of documents not contained in the record to its motion to dismiss.[3] Petitioners' response to the motion to dismiss also includes a motion to strike the additional documents and a motion to allow petitioners to submit additional documents pursuant to OAR 661-010-0045. In the alternative, petitioners request that if we consider intervenor's additional documents without requiring a motion to take additional evidence, we also consider petitioner's additional submissions. Finally, intervenor filed a response to petitioners' motion to strike and also a precautionary motion to take evidence not in the record.

Our review in this case would normally be limited to the record submitted in this matter and would not include the additional documents submitted by the parties. ORS 197.835(2)(a). In considering motions to take evidence not in the record pursuant to OAR 661-010-0045, we generally prefer that the parties make such motions after the briefs have been submitted in order to enable the Board to determine whether such evidence, if accepted, would warrant reversal or remand of the decision. *See* ORS 197.835(2)(b); OAR 661-010-0045(1). However, in determining whether we have jurisdiction, we have considered materials not in the record for that limited purpose without the necessity of accompanying motions. *Leonard v. Union County*, 24 Or LUBA 362, 377 (1992); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 630, 631-33 (1988).

We will consider all the documents that have been submitted by the parties for the limited purpose of deciding intervenor's motion to dismiss. Because our consideration of these documents does not require that we grant the motions to take evidence not in the record, those motions are denied. Petitioners' motion to strike is, for the same reason, denied.

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[3] The record has yet to be settled pending objections to the record but most, if not all, of the additional documents will not be part of the record.

MOTION TO DISMISS

Intervenor argues that we lack jurisdiction in this appeal and that the appeal should be dismissed. Intervenor argues that preliminary PUD approval is not a "final" land use decision because it is only an informal, preliminary first step in the process. Intervenor also argues that the appeal was not timely filed because petitioners had actual notice or knew or should have known about the challenged decision more than 21 days before the decision was appealed to the Board. Next, intervenor argues that the appeal should be dismissed for failure to exhaust all local remedies because petitioners did not attempt to appeal the decision to the city council. Finally, intervenor argues that the appeal should be dismissed because it is an impermissible collateral attack on the ordinance.

A. Challenged Decision Is a Final Land Use Decision

Our jurisdiction is limited to land use decisions. ORS 197.825. Land use decisions must be "final decisions." ORS 197.015(10)(a)(A). Intervenor argues that because preliminary approval is only an informal, preliminary process, it is not a final land use decision. Intervenor relies on *Sensible Transportation v. Metro. Service Dist.*, 100 Or App 564, 787 P2d 498 (1990) and *1000 Friends of Oregon v. Metro*, 35 Or LUBA 720 (1999), for the proposition that a decision is not final for purposes of our jurisdiction unless the decision could lead to land use effects without further appealable land use decisions. According to intervenor, because preliminary approval is, by definition, preliminary and only the first step in a three-step process, preliminary approval could not lead to land use effects without further appealable land use decisions. However, as intervenor acknowledges, different stages of a multi-stage decision making process can be final, appealable decisions. *See Carlsen v. City of Portland*, 169 Or App 1, 16, ___ P3d ___ (2000) (rejecting an argument that only the last stage of a multi-stage decision making process can be a final, appealable decision); *Bauer v. City of Portland*, 38 Or LUBA 715, 719-20 (2000) (both preliminary and final approvals of multi-stage developments may constitute final, appealable decisions).

The cases cited by intervenor concern the initial step of actions that involve multiple jurisdictions and each requires further action by another jurisdiction before the development contemplated by the challenged decision may occur. Those decisions are more similar to advisory recommendations to other jurisdictions than to final land use decisions. A recommendation from one local government to another governing body regarding an action requiring the other governing body's approval is not a "final" land use decision subject to our jurisdiction. *Goose Hollow Foothills League Assoc. v. City of Portland*, 21 Or LUBA 358, 360 (1991).

The present case does not involve a recommendation to another local governing body. A preliminary approval under SHMC 17.48.030(C) appears to yield a decision that is final and binding in certain respects on both the city and the applicant. Preliminary approval requires compliance with specific approval criteria. One of the requirements for step-two general development plan approval is compliance with the preliminary approval. SHMC 17.48.040(D)(1)(a). Once preliminary approval has been obtained, the decision that the proposed PUD satisfies these approval criteria cannot be challenged at step two. Opponents such as petitioners who appear at the step-two proceedings cannot challenge compliance with the criteria applicable to preliminary approval. Under the city's scheme, compliance with preliminary approval criteria is unreviewable, and leads to land use effects without further appealable decisions.

The challenged decision is a "final" land use decision.

B. Notice of Intent to Appeal Was Timely Filed

The parties dispute what statutory provision determines the filing deadline that applies to petitioners in this appeal. Petitioners argue that under ORS 197.830(3)(a) the appeal must have been filed within 21 days after petitioners received "actual notice" of the decision. Intervenor argues that under ORS 197.830(3)(b) the appeal must have been filed within 21 days after petitioners "knew or should have known" of the decision. The parties

also dispute whether the appeal was timely filed under either standard. For the reasons that follow, we do not agree with either party and conclude that ORS 197.830(4)(a) provides the statutory filing deadline.

In *Leonard*, we held that a local government makes a land use decision "without providing a hearing" in at least the following circumstances:[4]

> "(1) The local government was required to hold a hearing, and did not do so.
>
> "(2) The local government held a hearing, but failed to give one or more persons the notice of hearing they were entitled to receive under applicable provisions of state or local law.
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> "(3) The local government held a hearing and gave the required notice of that hearing, but the action taken in the decision is significantly different from the proposal described in the hearing notice." 24 Or LUBA at 375.[5]

Leonard involved the second circumstance described above. The county conducted a public hearing but failed to give the petitioners the notice to which they were entitled. 24 Or LUBA at 374. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000) involved the first circumstance described in *Leonard* where the local government was required to hold a hearing but failed to do so. In *Willhoft*, we held that because the challenged decision was a permit, the city was required to provide a hearing before making its decision or, alternatively, provide notice of the decision and an opportunity for a local appeal with a *de novo* hearing pursuant to ORS 227.175(3) and (10). 38 Or LUBA at 384.

In *Willhoft*, the local ordinance did not require a public hearing and the city was not purporting to act pursuant to the notice and opportunity for local appeal provision of ORS 227.175(10). Nevertheless, we held that the requirements of ORS 227.175(10) applied. 38

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[4] *Leonard* does not limit the universe of decisions made "without providing a hearing" to these three circumstances, but rather expands the scope of the phrase "without providing a hearing." *Bowlin v. Grant County*, 35 Or LUBA 776, 781-82 (1998).

[5] In *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995), the Court of Appeals overturned our holding in *Leonard* that *local* notice requirements can toll the 21-day appeal period.

Or LUBA at386. Where a city renders a permit decision without providing a hearing, as the cities did in *Willhoft* and the present case, ORS 227.175(10)(a) requires that the city provide notice of its decision and an opportunity for a local appeal. The fact that the city may have mistakenly believed that the decision granting preliminary approval on June 5, 2000, did not require notice and the opportunity for a hearing is legally irrelevant. *Willhoft*, 38 Or LUBA 386-87.

Another issue in *Willhoft* was whether the 1999 amendments to ORS 197.830(3) and (4) were applicable. We held that they were not applicable because the challenged decision was made before the effective date of the amendments. 38 Or LUBA at 382. The 1999 amendments to ORS 197.830(3) specifically excluded permit decisions that are rendered without a hearing pursuant to ORS 227.175(10) and 215.416(11).[6] The 1999 amendments added a new section, ORS 197.830(4), which sets out separate deadlines for appealing decisions that are rendered pursuant to ORS 227.175(10) and 215.416(11).

ORS 197.830(4) provides several exceptions to the ORS 197.830(3) filing deadlines, with respect to local government decisions made without a hearing pursuant to ORS 227.175(10)(c) and 215.416(11)(c).[7] Neither ORS 197.830(3) nor (4) specifically addresses

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[6] ORS 197.830(3) provides in part:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175(10), * * * a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

[7] Or Laws 1999, ch 621, § 3, codified at ORS 197.830(4), provides:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416(11) or 227.175(10):
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> "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416(11)(c) or 227.175(10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.

a situation where a local government fails to recognize that it is rendering a permit decision and thus, must either provide a hearing or make a decision without a hearing and provide an opportunity for local appeal pursuant to ORS 227.175(10) or 215.416(11). In *Willhoft*, however, we held that the requirements of ORS 227.175(10)(a) applied even though the city did not purport to act pursuant to ORS 227.175(10). 38 Or LUBA at 386-87. For the same reasons, we now hold that under the current statutory framework, ORS 197.830(4) provides the applicable filing deadline when a city makes a permit decision without a hearing and without complying with the notice requirements of ORS 227.175(10).

ORS 197.830(4)(a) provides that a person who was not provided mailed notice of a decision as required by ORS 227.175(10)(c) may appeal the decision within 21 days of receiving "actual notice" of the decision. ORS 227.175(10)(c)(A)(i) requires that a city give notice of a permit decision to property owners within 100 feet of the subject property when, as here, the subject property is within an urban growth boundary. The challenged decision is a "permit," as defined by ORS 227.160(2), because it constitutes discretionary approval of a proposed development of land under the SHMC.[8] Petitioner Rose and members of petitioner

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> "(b) A person who is not entitled to notice under ORS 215.416(11)(c) or 227.175(10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416(11)(a) or 227.175(10)(a).
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> "(c) A person who receives mailed notice of a decision made without a hearing under ORS 215.416(11) or 227.175(10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the mailed notice of the decision did not reasonably describe the nature of the decision.
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> "(d) Except as provided in paragraph (c) of this subsection, a person who receives mailed notice of a decision made without a hearing under ORS 215.416(11) or 227.175(10) may not appeal the decision to the board under this section."

[8] ORS 227.160(2) defines "permit" as follows:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. * * *"

Neighbors for Sensible Development, Inc. are property owners within 100 feet of the subject property. Therefore, the "actual notice" standard of ORS 197.830(4)(a) applies.

The "actual notice" standard of ORS 197.830(4)(a) is identical to the "actual notice" standard of ORS 197.830(3)(a). Unlike the "knew or should have known" standard of ORS 197.830(3)(b), the "actual notice" standard does not impose an affirmative discovery obligation on petitioners. A petitioner receives "actual notice" of a decision when the petitioner is: (1) provided a copy of the decision; (2) provided written notice of the decision; or (3) circumstances exist that are sufficient to inform the petitioner of both the existence and substance of the decision. *Willhoft*, 38 Or LUBA at 391; *Bowlin v. Grant County*, 35 Or LUBA at 785.

In the present case, intervenor argues that petitioners received "actual notice" of the planning commission's preliminary approval at the August 7, 2000 public hearing during step-two general development plan review. It appears to be undisputed that the July 31, 2000 staff report indicated that preliminary approval had been given and that the staff report was read out loud at the hearing. Petitioners respond that they did not obtain a copy of the staff report at the public hearing and that they did not hear the pertinent part of the staff report when it was read aloud. Furthermore, petitioners argue that even if they had read the staff report or had heard its reading, that would not be sufficient to constitute "actual notice" of the decision.

We agree with petitioners that even if they had read or heard the staff report, which they state they did not, it would not constitute "actual notice" under ORS 197.830(4)(a). The brief mention of preliminary approval in the staff report is obviously not a written copy of the decision. The staff report is not written notice of the decision in that it at most contains information regarding the decision buried in the report rather than specifically providing notice of the decision. While it is a closer question as to whether the staff report is sufficient to inform petitioners of both the existence and substance of the decision, we do not believe it

is sufficient to meet the exacting standard of ORS 197.830(4)(a). Although an actual reading or hearing of the staff report may have been sufficient to trigger the discovery obligation of ORS 197.830(3)(b), it was not sufficient to constitute "actual notice" under ORS 197.830(4)(a).

The notice of intent to appeal was timely filed.

C. Local Remedies Have Been Exhausted

Under ORS 197.825(2)(a), our jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]" *Lyke v. Lane County*, 70 Or App 82, 84, 688 P2d 411 (1984). According to intervenor, petitioners failed to exhaust local remedies by not appealing the challenged decision to the city council.

SHMC 17.48.030, the section regarding preliminary approval, does not provide for an appeal of the decision granting preliminary approval. In contrast, SHMC 17.48.050 specifically provides that a step-two general development plan recommendation of approval goes directly to the city council for final approval. Intervenor argues, however, that SHMC 17.12.090 provides a general right to appeal the planning commission decision to the city council.[9] Petitioners respond that the time period allowed for filing a local appeal had passed, and also that any appeal would have been futile because they raised the issue before the city council during the step-two general development plan review to no avail.

We need not address petitioners' futility argument because we agree that no local appeal was available. In *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995), the city approved an amended site plan application. The city provided notice and conducted a public hearing, but the city failed to provide the petitioner with its statutorily

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[9] SHMC 17.12.090(A) provides:

> "An appeal of an administrative decision concerning this Title will be made to the Planning Commission. Appeals of a Planning Commission decision will be made to the City Council."

entitled notice of the hearing. The petitioner did not learn about the decision until well after the time allowed for a local appeal had run, and the petitioner appealed directly to LUBA. *Id*. at 790-91. The city moved to dismiss the case due to failure to exhaust local remedies. We denied the city's motion, stating:

> "Where ORS 197.830(3) applies, as it does in this case, it provides a right to appeal directly to LUBA, within the time limits established by ORS 197.830(3)(a) and (b), notwithstanding that the deadline for filing a local appeal may have expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). Consequently, petitioner is not required to exhaust a local appeal to the city council." *Id*. at 795 (internal citations omitted).

As in *Beveled Edge Machines, Inc.*, the exceptions to the 21-day appeal requirement apply and the time for filing a local appeal, assuming one was available, has passed. Therefore, petitioners are not required to exhaust a local appeal to the city council before appealing the challenged decision to LUBA.[10]

Petitioners did not fail to exhaust all local remedies.

D. Appeal Is Not an Impermissible Collateral Attack on the Ordinance

Intervenor argues that because the city followed the procedures established by the acknowledged SHMC, petitioners' challenge of the decision is an impermissible collateral attack on the ordinance.

Acknowledgement of a land use ordinance establishes only that it is in compliance with the statewide planning goals. Acknowledgement does not protect a local government from complying with statutorily mandated requirements for notice and the opportunity for a hearing. The statutory requirements for notice and the opportunity for a hearing apply to

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[10] Although it is not entirely clear from the materials before us, it appears that petitioners raised the issue of failure to provide notice and opportunity for a hearing on preliminary approval before the city council during step-two general development plan review, and that the city rejected that argument or appeal. Had the city allowed petitioners to appeal the preliminary approval, then this appeal would be premature. *See Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995) (although county was not required to accept untimely local appeal, when local appeal was allowed then all local remedies had not been exhausted).

permit decisions, notwithstanding the failure of the local ordinance to require a public hearing. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515, 525-26 (1991).

The appeal is not an impermissible collateral attack on the ordinance.

Intervenor's motion to dismiss is denied.

RECORD OBJECTIONS

A. Objection 1

Petitioners object that the record does not contain an application. The city responds that an application was not required or filed and, therefore, no application exists to be included in the record. We agree with the city that if no application was placed before the final decision maker during the course of the proceedings, then no application must be included in the record. OAR 661-010-0025.

Objection one is denied.

B. Objections 2 and 6

The second and sixth objections have been resolved.

Objections two and six are denied.

C. Objection 3

Petitioners object that the record fails to contain a conceptual plan as required by the ordinance. The city responds that the referenced conceptual plan is actually what the applicant has referred to as the "site plan" and that the "site plan" is the only conceptual plan that was presented to the planning commission. The city indicates that the staff reviewed preliminary plans, but the only plan submitted to the planning commission is located at page 11 of the record. We agree with the city that if no other plans were placed before the final decision maker, then no other plans must be included in the record. OAR 661-010-0025.

Objection three is denied.

D. Objection 4

Petitioners object that the record does not contain findings of fact and conclusions of

law. The city responds that findings were not prepared because the city did not consider preliminary approval to be a final land use decision.

Objection four is denied.

E. Objection 5

Petitioners object that the record does not contain notice to the public of a hearing and minutes from a public hearing regarding preliminary approval. The city responds that neither notice of a hearing nor minutes from a hearing are contained in the record because a hearing was not held regarding preliminary approval.

Objection five is denied.

F. Objection 7

Petitioners object that the city's Goal 5 wetlands and riparian inventory and the city's housing needs analysis template are not included in the record. Petitioners do not contend that either document was ever placed before the final decision maker. OAR 661-010-0025(1). The documents may be part of the city's comprehensive plan and for that reason subject to official notice, however, they are not part of the record.

Objection seven is denied.

CONCLUSION

Intervenor's motion to intervene is granted. The motions to take evidence outside of the record and the motion to strike are denied, but the Board has considered the disputed documents in ruling on the motion to dismiss. Intervenor's motion to dismiss is denied. Petitioners' objections to the record are denied, and the record is settled. The petition for review is due 21 days from the date of this order, and the response briefs are due 42 days from the date of this order.

Dated this 8th day of January, 2001.

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Tod A. Bassham
Board Chair