

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4 KEVEDY, INC., an Oregon                    )  
5 corporation,                                )  
6    )  
7                    Petitioner,                )

8    )  
9                    vs.                                )

10    ) LUBA Nos. 94-157 and 94-168

11 CITY OF PORTLAND,                            )  
12    )  
13                    Respondent,                )

  )                    FINAL OPINION  
  )                    AND ORDER

14    )  
15                    and                                )  
16    )

17 COSTCO WHOLESALE CORPORATION,            )  
18 a Washington corporation, and            )  
19 SIDNEY F. WOODBURY,                        )  
20    )  
21                    Intervenors-Respondent.                                )

22  
23  
24                    Appeal from City of Portland.

25  
26                    Paul Norr, Portland, represented petitioner.

27  
28                    Kathryn Beaumont Imperati, Senior Deputy City Attorney,  
29 Portland, represented respondent.

30  
31                    Joseph S. Voboril and Jeffrey H. Keeney, Portland,  
32 represented            intervenor-respondent            Costco            Wholesale  
33 Corporation.

34  
35                    Jack L. Orchard, Portland, represented intervenor-  
36 respondent Sidney F. Woodbury.

37  
38                    HOLSTUN, Chief Referee; SHERTON Referee; KELLINGTON,  
39 Referee, participated in the decision.

40  
41                    DISMISSED (LUBA No. 94-157)                                11/04/94  
42                    AFFIRMED (LUBA NO. 94-168)

1           You are entitled to judicial review of this Order.  
2   Judicial review is governed by the provisions of ORS  
3   197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISIONS**

3 In LUBA No. 94-157, petitioner challenges a decision by  
4 the City of Portland Historical Landmarks Commission  
5 (hereafter landmarks commission) approving a historic  
6 landmark designation for property owned by intervenor-  
7 respondent Woodbury. In LUBA No. 94-168, petitioner  
8 challenges a decision by the city planning director denying  
9 petitioner's attempted local appeal of the landmarks  
10 commission decision.

11 **MOTIONS TO INTERVENE**

12 COSTCO Wholesale Corporation moves to intervene in this  
13 appeal on the side of respondent. There is no opposition to  
14 the motion, and it is allowed.

15 Sidney F. Woodbury, the applicant below, moves to  
16 intervene in this appeal on the side of respondent. There  
17 is no opposition to the motion, and it is allowed.

18 **FACTS**

19 On December 21, 1993, the city provided notice of a  
20 January 10, 1994 public hearing by the landmarks commission  
21 to consider a request for historic landmark designation for  
22 intervenor-respondent Woodbury's property. A copy of the  
23 December 21, 1993 notice of public hearing was sent to and  
24 received by petitioner. Petitioner did not appear at the  
25 January 10, 1994 public hearing. At the conclusion of the  
26 January 10, 1994 public hearing, the landmarks commission

1 approved the requested historic landmark designation. The  
2 landmark commission's written decision is dated January 12,  
3 1994.

4 On August 22, 1994, petitioner filed the notice of  
5 intent to appeal in LUBA No. 94-157. Although the notice of  
6 intent to appeal was filed over seven months after the  
7 landmarks commission decision was adopted, petitioner  
8 contends the appeal nevertheless is timely filed because the  
9 December 21, 1993 notice of public hearing was inadequate to  
10 describe the action taken by the landmarks commission in its  
11 January 12, 1994 decision. Respondent and intervenors-  
12 respondent (hereafter respondents) contend the December 21,  
13 1993 notice was adequate, and move to dismiss LUBA No. 94-  
14 157.

15 On August 22, 1994, petitioner also attempted to file a  
16 local appeal of the January 12, 1994 landmarks commission  
17 decision. On August 23, 1994, the planning director denied  
18 petitioner's request for a local appeal, on the basis that  
19 the attempted local appeal was untimely filed. On September  
20 13, 1994, petitioner filed the notice of intent to appeal in  
21 LUBA No. 94-168 challenging the planning director's  
22 decision. Respondents move to dismiss LUBA No. 94-168.

### 23 **MOTIONS FOR EVIDENTIARY HEARING**

24 All parties have moved for an evidentiary hearing to  
25 present evidence concerning when petitioner obtained actual  
26 knowledge of the subject matter of the landmark commission's

1 public hearing and decision in this matter. In view of our  
2 disposition of respondents' motions to dismiss, infra, an  
3 evidentiary hearing in this matter is not warranted. The  
4 motions for evidentiary hearing are denied.

5 **LUBA NO. 94-157**

6 We briefly discuss the competing public policies at  
7 issue in this appeal, as reflected in state statutes, before  
8 turning to the parties' arguments.

9 **A. ORS 197.805 and 197.830(3)**

10 **1. Speedy, Final Land Use Decision Making**

11 The legislature has declared the following policy:

12 "It is the policy of the Legislative Assembly that  
13 time is of the essence in reaching final decisions  
14 in matters involving land use and that those  
15 decisions be made consistently with sound  
16 principles governing judicial review. \* \* \*" ORS  
17 197.805.

18 The legislative policy in favor of speedy land use  
19 proceedings and finality is reflected in LUBA's rules, which  
20 provide that failure to file a timely notice of intent to  
21 appeal will result in dismissal of the appeal.<sup>1</sup>

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<sup>1</sup>With the exceptions provided by ORS 197.830(3) (for land use decisions) and ORS 197.830(4) (for limited land use decisions), a notice of intent to appeal must be filed within 21 days after the challenged decision becomes final or within 21 days after the notice of decision required by ORS 215.416(10), 227.173(3), 197.195(3)(c)(H) or 197.615(1) is provided. ORS 197.830(8); see League of Women Voters v. Coos County, 82 Or App 673, 680-81, 729 P2d 588 (1986); Ludwick v. Yamhill County, 72 Or App 224, 229-30, 696 P2d 536, rev den 299 Or 443 (1985); Forest Park Neigh. Assoc. v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-155, May 16, 1994), slip op 13, aff'd 129 Or App 641 (1994); Tournier v. City of Portland, 16 Or LUBA 546, 550 (1988).

1 OAR 661-10-015(1). LUBA's rules provide that technical  
2 violations of its rules will not provide a basis for  
3 dismissing an appeal unless the substantial rights of one or  
4 more parties is affected by the technical violation.  
5 OAR 661-10-005. However, OAR 661-10-005 provides that  
6 failure to file a timely notice of intent to appeal is not  
7 viewed as a potentially excusable technical violation.<sup>2</sup>

8 **2. Right to Notice and an Opportunity to**  
9 **Participate in Local Land Use Proceedings**

10 The legislature has also adopted a number of statutory  
11 provisions which reflect a legislative policy favoring open  
12 land use decision making, and a right to meaningful access  
13 and participation in the decision making process for those  
14 potentially affected by land use decision making.<sup>3</sup>

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<sup>2</sup>ORS 215.428(1) and 227.178(1) also reflect this legislative policy by requiring that a local land use decision on an application for permit approval be rendered within 120 days after a complete application for permit approval is filed.

<sup>3</sup>For example, following the Oregon Supreme Court's decision in Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973), the legislature adopted the provisions governing city and county land use permit decisions now codified, as amended, at ORS 215.402 to 215.428 and ORS 227.160 to 180. Those statutes impose requirements for notice, hearings, and local appeals. ORS 197.763 imposes even more detailed notice and hearing requirements for quasi-judicial land use decision making. The two primary purposes of ORS 197.763 are: (1) providing more detailed notice so that parties may be more informed and participate more fully in local proceedings, and (2) requiring that all issues be raised during those local proceedings so that such issues may be addressed by the local decision maker. 1000 Friends of Oregon v. Benton County, 20 Or LUBA 7, 9-10 (1990).

Although it is not directly relevant in this appeal, we also note that the first of the Statewide Planning Goals adopted by the Land Conservation and Development Commission requires that local governments "develop a

1 ORS 197.830(3) reflects this legislative policy, and  
2 provides a right that can be at odds with the above  
3 described legislative policy favoring speedy, final land use  
4 decisions.

5 "If a local government \* \* \* makes a land use  
6 decision which is different from the proposal  
7 described in the notice to such a degree that the  
8 notice of the proposed action did not reasonably  
9 describe the local government's final actions, a  
10 person adversely affected by the decision may  
11 appeal the decision to [LUBA] under this section:

12 "(a) Within 21 days of actual notice where notice  
13 is required; or

14 "(b) Within 21 days of the date a person knew or  
15 should have known of the decision where no  
16 notice is required."

17 Where the notice of public hearing given by the local  
18 government is inadequate, such that it does not "reasonably  
19 describe the local government's final [decision],"  
20 ORS 197.830(3) potentially provides a person adversely  
21 affected by the inadequate notice a right to file an appeal  
22 at LUBA long after the local decision is reduced to writing,  
23 notice of the decision is given, and the decision otherwise  
24 becomes final. In that circumstance, the statutory rights  
25 of the individual to receive adequate notice of the public  
26 hearing, participate fully in the public hearing and  
27 challenge the local decision prevail over the right of other

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citizen involvement program to insure the opportunity for citizens to be involved in all phases of the planning process."

1 parties to a speedy, final decision.<sup>4</sup> This makes the notice  
2 of public hearing an extremely important document, from the  
3 standpoint of all parties.

4 In view of the above legislative policies, we believe  
5 ORS 197.830(3) imposes a requirement that a reasonable  
6 person be able to tell from the notice of public hearing  
7 that the local government might take the action that the  
8 local government ultimately takes. In this regard, a  
9 reasonable person recognizes that the detail with which a  
10 proposal is described in a notice of public hearing is  
11 related to the length of the notice. A reasonable person  
12 also recognizes that proposals for land use approval may  
13 change somewhat after the notice of public hearing is given,  
14 either because the applicant modifies the proposal or the  
15 local decision maker imposes conditions of approval that  
16 change the nature of the proposal in some respect. A  
17 reasonable person who recognizes that his or her interests  
18 may be affected by the proposal, participates in the local  
19 proceedings to protect his or her interests. While changes  
20 in the proposal described in a notice of public hearing can  
21 be of such a degree that the notice "did not reasonably

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<sup>4</sup>Identification of those property owners who are entitled to notice of a hearing on a quasi-judicial land use application is governed by ORS 197.763(2)(a). There is no dispute that petitioner is a property owner entitled to receive notice of the city hearing on the subject application or that the December 21, 1993 notice of hearing was given to petitioner. The only dispute concerns the adequacy of that notice to describe the final action taken by the landmarks commission.

1 describe the local government's final [decision]," it is  
2 clear that not every change in the proposal described in the  
3 notice of public hearing necessarily implicates ORS  
4 197.830(3).

5 **B. Timeliness of Appeal**

6 We first consider whether petitioner's notice of intent  
7 to appeal, seeking LUBA review of the landmarks commission's  
8 January 12, 1994 decision, was timely filed.

9 **1. Description of the Subject Property**

10 The subject property is composed of three tax lots, tax  
11 lots 39, 81, 55. Tax lot 39 includes approximately 5 acres  
12 and several buildings referred to as the U.S. Steel Complex.  
13 Tax lot 39 has frontage on both NW Nicolai Street and NW  
14 Yeon Street. The U.S. Steel Complex street address is 2345  
15 NW Nicolai Street. NW Yeon Street intersects NW Nicolai  
16 Street at the southeast corner of tax lot 39. NW Yeon  
17 extends north along the eastern property line of tax lot 39  
18 and passes along the eastern property lines of tax lots 81  
19 and 55. Tax lots 81 and 55 front only on NW Yeon, and  
20 together contain approximately 5 acres. Tax lot 55 is  
21 improved with two buildings which formerly were occupied by  
22 Pierce Auto (hereafter Pierce Auto property). Pierce Auto  
23 property's street address is 2825 NW Yeon.

1                   **2. Statutory and Portland City Code (PCC)**  
2                   **Notice Requirements**

3           In presenting arguments concerning the adequacy of the  
4 December 21, 1993 notice of public hearing, the parties cite  
5 and discuss statutory and PCC requirements governing notice  
6 of quasi-judicial public hearings. We believe it is  
7 appropriate to consider those statutory and PCC provisions  
8 in determining whether the city made "a land use decision  
9 which is different from the proposal described in the notice  
10 to such a degree that the notice of the proposed action did  
11 not reasonably describe the local government's final  
12 [decision]," so that the deadline for filing the notice of  
13 intent to appeal in this matter is governed by ORS  
14 197.830(3).

15           ORS 197.763(3)(c) requires that notices of public  
16 hearing concerning quasi-judicial land use applications  
17 shall "[s]et forth the street address or other easily  
18 understood geographical reference to the subject property."  
19 For proposals processed through Type III procedures, such at  
20 the one at issue in this appeal, Portland City Code (PCC)  
21 33.730.070(D) lists a number of requirements for the notice  
22 of public hearing, including the following:

- 23           "• The legal description and address of the  
24           site;
- 25           "• A map depicting the subject property in  
26           relation to surrounding properties;
- 27           "• A description of the proposal \* \* \* [.]"

1           Petitioner does not dispute that the December 21, 1993  
2 notice of public hearing was adequate, under ORS  
3 197.763(3)(c) and PCC 33.730.070(D), to provide notice of  
4 the city's proposed action with regard to the U.S. Steel  
5 Complex located on tax lot 39. However, petitioner disputes  
6 the adequacy of the notice with regard to tax lots 81 and  
7 55. Petitioner contends the December 21, 1993 notice does  
8 not include addresses for those tax lots or adequately  
9 explain that the proposal includes tax lots 81 and 55. Had  
10 the December 21, 1993 notice properly identified those  
11 properties by including their addresses, and explaining that  
12 those tax lots were included within the required  
13 "description of the proposal," petitioner contends it would  
14 have participated in the public hearing and opposed  
15 inclusion of tax lots 81 and 55 in the challenged historic  
16 landmark designation.

17                           **3. December 21, 1993 Notice of Hearing**

18           The December 21, 1993 notice of hearing identifies the  
19 location of the subject property as "2345 N.W. Nicolai St."  
20 Record 21. The notice also provides a legal description of  
21 the property as follows: "Tax Lots 39, 55, 81; Section 28,  
22 T1N R1E." Id. The notice describes the proposal as a  
23 request for "Historical Landmark designation for the U.S.  
24 Steel Complex." Id. Attached to the notice is a diagram  
25 which shows what appears to be the southern portion of tax  
26 lot 39 fronting on NW Nicolai Street depicting a

1 "warehouse," "office," "hospital" and "lavatory." These  
2 buildings comprise the U.S. Steel Complex. Also attached to  
3 the notice is a zoning map with the subject property shaded.  
4 Looking at that map, it is reasonably apparent that three  
5 tax lots are included, although the tax lot numbers  
6 themselves are hard to read. The shaded property extends in  
7 a northwesterly direction along NW Yeon Avenue a distance  
8 equal to approximately four times the distance of the shaded  
9 property's frontage on NW Nicolai Street. The notice goes  
10 on to state the planning bureau will prepare a report. The  
11 notice provides phone numbers that may be called to obtain  
12 additional information concerning the proposal or a copy of  
13 the planning bureau staff report.

14 The planning bureau report referenced in the December  
15 21, 1993 notice is dated December 30, 1993. That report  
16 also identifies the location of the property as "2345 NW  
17 Nicolai Street" and provides as a legal description "Tax  
18 Lots 39, 55, 81 \* \* \*." Record 6. The report describes the  
19 U.S. Steel Complex as being located "at the intersection of  
20 NW Nicolai and Yeon Ave" and as including "a steel warehouse  
21 and three brick structures -- an office building, infirmary  
22 and lavatory." Under the "Analysis" section of the staff  
23 report, it states "[t]he applicant is proposing to designate  
24 the whole site (three lots) for Historical Landmark status,  
25 which includes buildings and exterior spaces." Record 7.

1 The report goes on to provide additional details about the  
2 U.S. Steel Complex buildings and then states:

3 "The existing complex also includes one building  
4 and one structure built later which are non-  
5 contributing." Record 8.

6 The above quoted reference apparently is the only explicit  
7 reference in the staff report to the Pierce Auto property.

#### 8 **4. Petitioner's Arguments**

9 According to petitioner, several defects in the  
10 December 21, 1993 notice make it inadequate to "reasonably  
11 describe the local government's final [decision]." As a  
12 result, petitioner contends, its notice of intent to appeal  
13 is timely filed under ORS 197.830(3).

14 Petitioner contends the legal description is inadequate  
15 to provide notice of the decision rendered by the landmarks  
16 commission. Although all three tax lots are identified in  
17 the legal description set out in the notice, petitioner  
18 contends the map attached to the notice showing the U.S.  
19 Steel Complex does not show tax lot 55 or the Pierce Auto  
20 property. Moreover, petitioner contends that although  
21 PCC 33.730.070(D) explicitly requires that the notice  
22 include "[t]he \* \* \* address of the site," the only address  
23 given is the U.S. Steel Complex address on NW Nicolai. The  
24 Pierce Auto property address on NW Yeon is not given.  
25 Finally, petitioner points out the only buildings explicitly  
26 referenced in the notice are the U.S. Steel Complex

1 buildings. The buildings that were formerly occupied by  
2 Pierce Auto are not specifically referenced.

3 **5. Conclusion**

4 It is not entirely clear to this Board whether the  
5 failure to include addresses other than the U.S. Steel  
6 Complex address is error. ORS 197.763(3)(c) does not impose  
7 an absolute requirement that an address be included in the  
8 notice.<sup>5</sup> PCC 33.730.070(D) does not clearly require that  
9 all addresses that may be associated with a property be  
10 included in the notice. The notice provides the address of  
11 the most significant buildings, i.e. the U.S. Steel Complex  
12 buildings upon which the applicant relied for the historic  
13 landmark designation. The failure to include the Pierce  
14 Auto property address does make it less clear that the  
15 Pierce Auto property is included as part of the proposal.  
16 Similarly, the lack of any specific reference to the Pierce  
17 Auto property in the brief description of buildings in the  
18 notice makes it unclear that tax lots 81 and 55 are  
19 included.<sup>6</sup> However, to the extent these failures constitute  
20 error, we conclude they are not so serious as to make the  
21 December 21, 1993 notice of public hearing insufficient to

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<sup>5</sup>ORS 197.763(3)(c) states an "easily understood geographical reference" may be provided instead.

<sup>6</sup>The brief reference to the Pierce Auto buildings in the planning bureau staff report at Record 8 as "non-contributing" does not add a great deal, and petitioner never requested or received a copy of the staff report in any event.

1 "reasonably describe the local government's final  
2 [decision]."

3 The December 21, 1993 notice explicitly states tax lots  
4 39, 81 and 55 are included in the proposal. The zoning map  
5 attached to the notice shows three tax lots are included.  
6 The tax lot numbers admittedly are difficult to read, but we  
7 conclude the zoning map attached to the December 21, 1993  
8 notice is sufficient to put adjoining property owners on  
9 notice that the action will affect more than tax lot 39 and  
10 the U.S. Steel Complex. At the very least, we believe the  
11 large area shaded on that attached zoning map is, together  
12 with the balance of the December 21, 1993 notice, minimally  
13 sufficient to "reasonably describe the local government's  
14 final [decision]." At a minimum, the zoning map was  
15 sufficient to put the petitioner on notice that the Pierce  
16 Auto property could be affected by the proposal. Had  
17 petitioner made the additional inquiries it was invited to  
18 make in the December 21, 1993 notice, it would have learned  
19 the Pierce Auto property was included. Petitioner did not  
20 do so. Therefore, the deadline for petitioner to file its  
21 notice of intent to appeal is not governed by ORS  
22 197.830(3).

23 The deadline for filing the notice of intent to appeal  
24 in this matter is governed by ORS 197.830(8). That statute  
25 requires that the notice of intent to appeal be filed within  
26 21 days after the landmarks commission decision became

1 final. That decision became final on January 12, 1994.  
2 Because the notice of intent to appeal was filed long after  
3 that deadline, LUBA No. 94-157 is dismissed.<sup>7</sup>

4 **LUBA NO. 94-168**

5 In LUBA No. 94-168, petitioner challenges the August  
6 23, 1994 decision by the city planning director rejecting  
7 petitioner's attempted local appeal of the same January 12,  
8 1994 landmarks commission decision petitioner appealed  
9 directly to LUBA in LUBA No. 94-157.

10 In the challenged decision, the planning director  
11 concludes "the appeal was not filed within the 14-day appeal  
12 period permitted by the Portland Zoning Code."<sup>8</sup> Record 1.  
13 The planning director refused to process petitioner's appeal  
14 and returned the appeal form submitted by petitioner. In

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<sup>7</sup>Because we conclude the notice of intent to appeal in LUBA No. 94-157 was not timely filed, we do not consider whether we also lack jurisdiction because petitioner failed to exhaust local appeals, as required by ORS 197.825(2)(a).

<sup>8</sup>The city contends, and no party disputes, that historical landmark designations are processed utilizing the Type III procedure set out in PCC 33.730.030, by providing notice and a hearing before the landmarks commission and the opportunity for an appeal to the city council. PCC 33.730.030(F) and (G) provide:

"F. **Ability to Appeal.** The review body's decision is final unless appealed. The decision may be appealed by the applicant, the owner, and those who have testified orally or in writing at the hearing \* \* \*. The appeal must be submitted to the [Planning] Director within 14 days of the day the notice of decision is mailed. The review body for the appeal will be the City Council."

"G. **When no appeal is filed.** If no one appeals the decision, an approved request takes effect on the day after the last day to appeal."

1 explaining his decision to reject the appeal, the planning  
2 director explains "[t]he basis for my decision is that the  
3 record of the Landmarks Commission's decision clearly and  
4 correctly identified all of the property for which the  
5 Commission approved landmark designation." Id. The  
6 decision goes on to provide additional explanation for why  
7 the planning director believes the December 21, 1993 notice  
8 of public hearing was adequate to provide petitioner with  
9 notice of the property to be considered at the January 10,  
10 1994 public hearing and ultimately affected by the landmarks  
11 commission's decision.

12 Respondents move to dismiss LUBA No. 94-168, contending  
13 the challenged decision is not a land use decision.<sup>9</sup> In the  
14 alternative, respondents argue the planning director did not  
15 have authority to allow petitioner's attempted local appeal  
16 in any case. If the planning director did not have  
17 jurisdiction over petitioner's local appeal, respondents  
18 contend this appeal must be dismissed.

19 **A. ORS 197.015(10)(b)(A)**

20 The planning director's decision concerns the  
21 application of the city's zoning ordinance and, therefore,  
22 satisfies the ORS 197.015(10)(a)(A)(iii) definition of "land  
23 use decision." However, respondents contend the exception

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<sup>9</sup>Under ORS 197.825, our review jurisdiction includes land use decisions and limited land use decisions. However, no party contends the challenged decision falls within the statutory definition of "limited land use decision."

1 to the statutory definition of "land use decision" in  
2 ORS 197.015(10)(b)(A) for decisions "made under land use  
3 standards which do not require interpretation or the  
4 exercise of policy or legal judgment" applies.

5 The above quoted portion of the planning director's  
6 letter states the planning director based his determination  
7 that the local appeal was not timely filed on the adequacy  
8 of the December 21, 1993 notice of local hearing. As our  
9 above decision of LUBA No. 94-157 makes clear, that  
10 determination involves significant factual and legal  
11 judgment and precludes the planning director's August 23,  
12 1994 decision from qualifying for the exclusion from the  
13 definition of land use decision provided in ORS  
14 197.015(10)(b)(A).

15 **B. Lack of Jurisdiction to Allow an Untimely Local**  
16 **Appeal**

17 Respondents contend that, in the circumstances  
18 presented in this case, a direct appeal to LUBA as provided  
19 in ORS 197.830(3) was the only possible avenue of appeal  
20 remaining to challenge the landmarks commission's January  
21 12, 1994 decision after the 14-day deadline for filing a  
22 local appeal of that decision expired. Respondents contend  
23 that even if the December 21, 1993 notice of hearing was  
24 inadequate, the PCC does not include provisions analogous to  
25 ORS 197.830(3) which would allow the city to accept an  
26 appeal of the landmarks commission's January 12, 1994

1 decision filed after the 14-day deadline established by the  
2 PCC for appealing to the city council.

3 PCC 33.730.030(F), quoted supra at n 8, explicitly  
4 limits the right of local appeal to "the applicant, the  
5 owner, and those who have testified orally or in writing at  
6 the hearing \* \* \*." Since petitioner is neither the  
7 "applicant," the "owner" nor a person who "testified orally  
8 or in writing at the hearing," petitioner was not entitled  
9 to file a local appeal of the landmarks commission's January  
10 12, 1994 decision. Moreover, petitioner's attempted appeal  
11 was not filed within the 14-day time limit specified in PCC  
12 33.730.030(F). Under PCC 33.730.030(F), at the time  
13 petitioner's local appeal was filed, the landmarks  
14 commission's January 12, 1994 decision had become a final  
15 decision and no additional right of appeal remained under  
16 the PCC.

17 According to respondents, because petitioner was not  
18 one of the persons entitled to file an appeal under PCC  
19 33.730.030(F), and in any event did not file the appeal  
20 within the 14-day time limit established by PCC  
21 33.730.030(F), the planning director had no authority to  
22 allow the appeal. The planning director's decision does  
23 suggest that petitioner's local appeal might have been  
24 allowed, even though untimely filed, had the planning  
25 director agreed with petitioner that the notice of local  
26 hearing was inadequate to describe the action taken in the

1 landmarks commission's January 12, 1994 decision. However,  
2 we agree with respondents that this suggestion is erroneous.  
3 The planning director correctly denied the attempted local  
4 appeal because petitioner is not among the persons entitled  
5 to file a local appeal of the landmarks commission's January  
6 12, 1994 decision and because the local appeal was not  
7 timely filed. The December 21, 1993 notice, had it been  
8 inadequate to describe the action taken on January 12, 1994,  
9 would provide a basis for petitioners to appeal to LUBA  
10 within 21 days of the date petitioner learned of the  
11 decision. However, any inadequacies in the December 21,  
12 1993 notice of hearing provide no basis for suspending the  
13 running of local appeal deadlines until an adversely  
14 affected person receives "actual notice" or "knew or should  
15 have known of the decision."

16 We leave open the possibility that a local code might  
17 include provisions analogous to ORS 197.830(3), so that a  
18 local appeal could be allowed after the local deadline for  
19 filing an appeal expires, where a notice of local hearing  
20 provided to an adversely affected person fails to reasonably  
21 describe the decision ultimately adopted. However,  
22 petitioner cites no such PCC provision.<sup>10</sup> We hold that,

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<sup>10</sup>Because the city has no such code provision, and in any event we have already determined the December 21, 1993 notice of hearing was adequate to reasonably describe the decision adopted on January 12, 1994, it is not necessary to allow an evidentiary hearing to consider whether petitioner obtained actual notice of the January 12, 1994 decision more than 14 days before it attempted to file its local appeal.

1 absent local code provisions specifically allowing a local  
2 appeal in the circumstances described in ORS 197.830(3), the  
3 exclusive right of appeal in those circumstances is to LUBA.  
4 In such circumstances, an adversely affected person is  
5 neither entitled to a local appeal, nor obligated to seek a  
6 local appeal, before appealing to LUBA.

7 We conclude the planning director correctly determined  
8 petitioner's attempted appeal should be rejected. Although  
9 we agree with respondents that the planning director lacked  
10 authority to grant the local appeal requested by petitioner,  
11 because it was not timely filed (see Century 21 Properties,  
12 Inc. v. City of Tigard, 99 Or App 435, 439-40, 783 P2d 13  
13 (1989), rev den 309 Or 1990)), this does not mean the  
14 planning director's decision to reject the appeal is not a  
15 land use decision. Therefore, the proper disposition of  
16 LUBA No. 94-168 is to affirm the planning director's  
17 decision, rather than to dismiss the appeal.<sup>11</sup>

18 The parties have not yet filed their briefs in this  
19 matter. However, because it is clear from the parties'  
20 arguments regarding the motions to dismiss that the planning

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<sup>11</sup>This is not a case where the local government lost jurisdiction over a pending land use proceeding before the local government reached a final decision in that proceeding. See Standard Insurance Co. v. Washington County, 97 Or App 687, 776 1315 (1989) (where the county decision challenged in a LUBA appeal attempts to make a final decision in a county land use proceeding concerning property annexed by a city prior to conclusion of the county land use proceedings, dismissal of the LUBA appeal is appropriate). Here the city had jurisdiction to render a land use decision rejecting an untimely local appeal of the January 12, 1994 landmarks commission decision.

1 director correctly petitioner's attempted local appeal, we  
2 affirm the planning director's decision.

3 LUBA No. 94-157 is dismissed. The city decision  
4 challenged in LUBA No. 94-168 is affirmed.