

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving a
4 demolition permit.

5 **MOTION TO INTERVENE**

6 University of Oregon, the applicant below, moves to
7 intervene in this proceeding on the side of respondent.
8 There is no opposition to the motion, and it is allowed.

9 **OTHER MOTIONS**

10 On April 13, 1995, the date the petition for review was
11 due, William D. Helm (movant) filed a document entitled,
12 among other things, a motion to intervene and a motion to
13 file a petition for review. By letter dated April 17, 1995,
14 we informed movant that his document would be treated as a
15 motion to intervene, but would not be accepted as a petition
16 for review. We explained the document fails to comply with
17 the Board's specifications for a petition for review in
18 numerous respects, among them the requirement that the
19 petition for review be typewritten, begin with a table of
20 contents, present a statement of the case, contain a summary
21 of the material facts and set forth assignments of error,
22 with supporting argument. In addition, the document was not
23 accompanied by a certificate of service, as required by
24 Board rule.

25 Movant has since filed three additional motions which,
26 as best we can determine, ask the Board to reconsider its

1 April 17, 1995 decision not to accept the earlier document
2 as a petition for review and to stay this appeal proceeding
3 while movant seeks relief from the U.S. Supreme Court, the
4 Oregon Supreme Court and the Governor. By letter dated
5 April 25, 1995, the Board informed movant that it would
6 consider his motions, providing movant complied with the
7 requirement of OAR 661-10-075(2)(c)(A) and (D) that any
8 document filed with the Board be served on all parties to
9 the appeal and contain a certificate showing service on such
10 parties.

11 As of this date, movant has failed to submit to the
12 Board any certificate of service establishing that any
13 document filed by movant has been served on the other
14 parties to this appeal. This is not merely a technical
15 violation of LUBA's rules. Failure to comply with the
16 service and proof of service requirements of LUBA's rules
17 prejudices the other parties' substantial rights to
18 participate in this appeal, by denying them the opportunity
19 to respond to movant's motions.

20 Accordingly, we deny Mr. Helm's motions.

21 **FACTS**

22 This appeal concerns the demolition of the Amazon
23 Family Housing Complex (Amazon). Amazon is owned by
24 intervenor and consists of 47 buildings on a 13.1-acre site.
25 Amazon is one of the last remaining examples of World War II
26 era pre-fabricated housing used for defense workers and for

1 college students under the G.I. Bill, and of the rowhouse
2 design work of architect Pietro Belluschi. Amazon has been
3 designated as a historic landmark district by respondent
4 City of Eugene (city). The Oregon State Historic
5 Preservation Office has proposed Amazon for listing on the
6 National Register of Historic Places.

7 On December 9, 1994, pursuant to Eugene Code (EC) 9.212
8 (Historic Property Moving and Demolition - Procedure and
9 Criteria), intervenor submitted to the city an application
10 for a permit to demolish Amazon. Record 487. After a
11 public hearing, the Eugene Historic Review Board (EHRB)
12 issued an order approving the application for a demolition
13 permit. Petitioner appealed the EHRB decision to the city
14 council. The city council conducted an "on the record"
15 review of the EHRB decision. After a hearing for argument,
16 the city council issued the challenged decision affirming
17 the EHRB decision to grant the demolition permit. This
18 appeal followed.¹

19 **FIRST ASSIGNMENT OF ERROR**

20 Petitioner argues that ORS 197.175(2)(d) requires the
21 city to make land use decisions "in compliance with" its
22 acknowledged comprehensive plan. Petitioner further argues

¹Pursuant to an agreement made by petitioner and memorialized in the Board's April 4, 1995 order granting a stay of the challenged decision, petitioner does not challenge the demolition permit with regard to four Amazon buildings proposed to be moved to a new site by the city and the St. Vincent dePaul Society of Lane County, and any activities directly associated with such move.

1 that during the proceedings below it contended approving the
2 subject demolition permit is inconsistent with certain
3 policies of the Eugene-Springfield Metropolitan Area General
4 Plan (hereafter Metro Plan) -- Residential Land Use and
5 Housing Element Policies 3, 14 and 20.² Petitioner notes
6 that several Metro Plan policies were applied by the city
7 when it made its decision to designate Amazon as a city
8 Historic Landmark district. According to petitioner,
9 because the challenged city council decision fails to
10 interpret these plan policies, it must be remanded for such
11 interpretation.³ Weeks v. City of Tillamook, 117 Or App
12 449, 844 P2d 914 (1992).

²The plan policies in question provide:

- "3. * * * Periodically monitor and analyze the population and dwelling unit projections to provide a reliable basis for land use decisions and to assure sufficient residential land to maintain a balance between supply and demand." Plan, p. III-A-4 to III-A-5.
- "14. Implement housing programs that provide housing opportunities for all metropolitan area residents without discrimination." Plan, p. III-A-5.
- "20. Conserve the metropolitan area's existing supply of sound housing in stable neighborhoods in residentially planned areas through code enforcement, appropriate zoning, rehabilitation programs, and by discouraging conversions to nonresidential use." Plan, p. III-A-6.

³Petitioner also contends the city erred by failing to address in its findings "the University of Oregon's Long Range Campus Development Plan" (Long Range Plan). Petition for Review 9. However, petitioner does not contend the Long Range Plan has been adopted by the city as part of its plan or land use regulations and offers no other explanation as to why it believes the Long Range Plan establishes standards for the challenged decision. Therefore, we do not consider this issue further.

1 The challenged decision addresses this issue as
2 follows:

3 "* * * Although portions of the Metro Plan were
4 considered by the [City] Council during its review
5 of the original [application for Historic
6 Landmark] designation, that consideration was
7 based on the applicable criteria which included
8 review for consistency with applicable historic
9 preservation policies in the Metro Plan.
10 EC 9.204(b)2.a. No criteria applicable to review
11 of the demolition permit, however, require or
12 authorize that the demolition application be
13 measured against the Metro Plan. * * * Under EC
14 9.212 and 9.204, these issues are not a basis for
15 reversing the [EHRB's] decision." Record 6.

16 This Board is required to defer to a local governing
17 body's interpretation of its own enactment, unless that
18 interpretation is contrary to the express words, purpose or
19 policy of the local enactment or to a state statute,
20 statewide planning goal or administrative rule which the
21 local enactment implements. ORS 197.829; Gage v. City of
22 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
23 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).⁴
24 This means we must defer to a local government's
25 interpretation of its own enactments, unless that
26 interpretation is "clearly wrong." Reeves v. Yamhill
27 County, 132 Or App 263, 269, ___ P2d ___ (1995); Goose

⁴ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

1 Hollow Foothills League v. City of Portland, 117 Or App 211,
2 217, 843 P2d 992 (1992); West v. Clackamas County, 116
3 Or App 89, 93, 840 P2d 1354 (1992). Additionally, as noted
4 by petitioner, under Gage v. City of Portland, 123 Or App
5 269, 860 P2d 282, on reconsideration 125 Or App 119 (1993),
6 rev'd on other grounds 319 Or 308 (1994), and Weeks v. City
7 of Tillamook, supra, 117 Or App at 453, we are required to
8 review the governing body's interpretation of its enactment,
9 as expressed in the challenged decision, and may not
10 interpret the local enactment ourselves in the first
11 instance.

12 The above quoted portion of the challenged decision
13 expresses an interpretation of the Metro Plan and the EC
14 with regard to the issue raised by petitioner. The city
15 council's interpretation is that there are no provisions in
16 the Metro Plan applicable to its review of a demolition
17 permit under EC 9.212. The decision explains that whereas
18 EC 9.204(b)2.a requires the application of the Historic
19 Landmark district to be consistent with Metro Plan historic
20 preservation policies, EC 9.212, which governs demolition
21 permits, does not indicate that any Metro Plan provisions
22 are applicable to decisions on demolition permits. Given
23 the extremely general wording of Metro Plan Residential Land
24 Use and Housing Element Policies 3, 14 and 20 (see n2), and
25 the limited authority the EHRB and city council have to
26 review applications for demolition permits under

1 EC 9.212(4), we do not believe the city council's
2 interpretation is clearly wrong.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 EC 9.212(2) and (3), part of the EC's Historic Landmark
6 Preservation provisions, provide:

7 "(2) Pre-application requirements (demolition).
8 Prior to submittal of an application to
9 demolish a historic property, the owner shall
10 endeavor to prepare an economically feasible
11 plan for its preservation. At a minimum, the
12 owner shall solicit purchase offers for the
13 historic property by giving notice of sale of
14 the property as follows:

15 "(a) Listing the property in [certain
16 newspapers] at least eight times and at
17 regular intervals beginning 90 days
18 before submitting an application;

19 "(b) Posting and maintaining a visible for
20 sale sign on the property beginning at
21 least 90 days before submitting an
22 application;

23 "(c) Making a financial prospectus on the
24 status of the property available to
25 interested persons beginning at least 90
26 days before submitting an application;
27 and

28 "(d) Listing the property in at least two
29 preservation newspapers or magazines at
30 least 30 days before submitting an
31 application.

32 "(3) Application submittal. An application shall
33 be submitted in a manner prescribed by the
34 planning director. A demolition application
35 shall include sufficient proof that the
36 pre-application requirements listed in
37 subsection (2) of this section have been

1 completed." (Emphases added.)

2 On December 9, 1994, the same day intervenor filed its
3 application for a demolition permit, the planning director
4 issued to intervenor a determination that its application
5 was "complete." Record 400. Also on that date, the
6 planning director issued a memorandum to the city council
7 and EHRB stating the city received a "complete" application
8 for the demolition of Amazon. Record 334. The memorandum
9 goes on to state:

10 "Prior to acceptance of the demolition
11 application, staff reviewed with [a city attorney]
12 applicable sections of the Eugene Code concerning
13 the pre-application requirements. Once the
14 application was submitted, [the attorney] also
15 reviewed the application material and confirmed
16 the staff decision that the application was
17 complete." Id.

18 In the proceedings before the EHRB and city council,
19 petitioner contended the demolition permit should not be
20 granted because intervenor failed to satisfy the
21 pre-application requirements of EC 9.212(2). In the
22 challenged decision, the city council responded to
23 petitioner's contention:

24 "* * * This issue * * * is not an appealable
25 issue. The City Council does not have the
26 authority to reject the demolition application as
27 incomplete. The [EHRB's] authority in the first
28 instance is to: 'approve the [demolition]
29 application unless the [EHRB] finds that a
30 postponement will likely result in preservation of
31 the historic property or retention of the historic
32 property at its current site. A postponement
33 shall be for a maximum of 120 days from the time a
34 complete application is filed.' EC 9.212(4)(b).

1 The [City] Council's authority on review is to
2 determine whether the [EHRB] erred. Under the
3 [EC], it is the responsibility of the Planning
4 Director to determine whether or not the
5 application is complete, including whether or not
6 the demolition application includes sufficient
7 proof that the pre-application requirements listed
8 in [EC] 9.212(2) have been completed. As
9 authorized by EC 9.212, the Planning Director
10 determined that the application was complete and
11 that pre-application requirements had been
12 fulfilled. The [EC] does not permit someone to
13 appeal the Planning Director's determination to
14 the [EHRB] or the [City] Council; the only grounds
15 for appeal are those quoted above from
16 [EC] 9.212(4)(b) (governing the [EHRB's] action),
17 and 9.204(d)2 (governing the [City] Council's
18 action)." (Emphasis added.) Record 5-6.

19 Petitioner contends intervenor's attempts to solicit
20 purchase offers for Amazon were illusory and that intervenor
21 failed to undertake in good faith a plan for the
22 preservation of Amazon, as required by EC 9.212(2).
23 Petitioner further contends the city "has a legal obligation
24 to determine if the condition precedent criteria of
25 [EC] 9.212(2) is [sic] satisfied by an impossible, illusory
26 or bad faith offer to sell the historic property." Petition
27 for Review 15. According to petitioner, both the EHRB, and
28 the city council on appeal from the EHRB decision, erred by
29 failing to adopt findings addressing whether intervenor
30 complied with the pre-application requirements of
31 EC 9.212(2).

32 The city and intervenor (respondents) argue that in the
33 portion of the challenged decision quoted above, the city
34 council interpreted the relevant EC provisions as assigning

1 the responsibility of determining compliance with the
2 pre-application requirements of EC 9.212(2) to the planning
3 director, in a decision to be made when an application for a
4 demolition permit under EC 9.212 is filed. Respondents
5 further argue the city council interprets the relevant EC
6 provisions as not providing for review of the planning
7 director's determination on compliance with EC 9.212(2) by
8 either the EHRB or the city council. Respondents contend
9 this interpretation is not inconsistent with the language,
10 purpose or policy of the relevant EC provisions and, under
11 ORS 197.829 and Clark, is entitled to deference by this
12 Board.

13 Respondents argue the record shows the planning
14 director made a decision regarding the compliance of
15 intervenor's application with the pre-application
16 requirements of EC 9.212(2). Record 334, 400. Respondents
17 further argue the planning director's December 9, 1994
18 decision is separate from the decision of the EHRB and city
19 council on the merits of the application. According to
20 respondents, because the planning director's decision was a
21 final decision, and not appealable to the EHRB or city
22 council, it was appealable to LUBA, but any such appeal had
23 to be filed within 21 days of the planning director's
24 decision. ORS 197.830(8). Respondents contend petitioners
25 failed to appeal the planning director's decision within the
26 allowed time and, therefore, cannot challenge the planning

1 director's decision in this appeal.⁵

2 Respondents concede that under EC 9.212(3), the city is
3 allowed to accept and process intervenor's application for a
4 demolition permit only if the application "include[s]
5 sufficient proof that the pre-application requirements [of
6 EC 9.212(2)] have been completed." The first question we
7 must decide is whether the city council may interpret the EC
8 as making that determination solely the responsibility of
9 the planning director, and not subject to review by the EHRB
10 or city council.

11 EC 9.212(3) states that demolition permit applications
12 "shall be submitted in a manner prescribed by the planning
13 director." EC 9.212(4)(b) provides that the EHRB "shall
14 approve the application unless [it] finds that a
15 postponement will likely result in preservation of the
16 historic property or retention of the historic property at
17 its current site." EC 9.212(4)(b)1-3 list certain factors
18 the EHRB may consider in making this determination.

⁵Respondents also argue that even if this Board can review the planning director's determination of compliance with EC 9.212(2) in this proceeding, at Record 6 (Assignment #2), the decision interprets the relevant provision of EC 9.212(2) regarding the issue raised by petitioner, and petitioner does not challenge that interpretation. Petitioner responds that respondents mischaracterize petitioner's argument as contending EC 9.212(2) limits the required solicitation of purchase offers to offers for "cash-only" sales of the subject property. Respondents' Brief 19. Regardless of the precise nature of petitioner's argument, we note the findings cited by respondent do not address the pre-application requirements of EC 9.212(2), but rather the criteria of EC 9.212(4)(b) governing the EHRB's decision on whether a demolition permit should be postponed for a maximum of 120 days from the time a "complete" application is filed. Therefore, we do not consider these findings further.

1 EC 9.212(6) provides "[a]ppeals shall be filed and decided
2 in the same manner as provided by [EC] 9.204 relating to
3 [Historic Landmark] designation appeals." EC 9.204(c) and
4 (d) provide for appeals of EHRB decisions to the city
5 council. EC 9.204(d)2 provides:

6 "* * * The [city] council shall reverse or modify
7 the decision of the [EHRB] if it finds that the
8 [EHRB] failed to follow the procedures applicable
9 to the matter before it in a manner that
10 prejudiced the substantial rights of the
11 appellant, made a decision not supported by
12 substantial evidence in the whole record or
13 improperly construed the applicable law. * * *"

14 With regard to the EHRB's consideration of a demolition
15 permit application, EC 9.212(4)(b) specifically authorizes
16 the EHRB only to consider the criteria set out in that
17 provision. Therefore, we defer to the city council's
18 interpretation that the EHRB is not authorized to review the
19 planning director's determination of compliance with the
20 pre-application requirements of EC 9.212(2). EC 9.212(6)
21 states that appeals under EC 9.212 shall be as provided in
22 EC 9.204. EC 9.204 provides only for appeals of EHRB
23 decisions to the city council. Therefore, we also defer to
24 the city council's interpretation that the planning
25 director's decision is not appealable to the city council.
26 Consequently, we agree with respondents that the planning
27 director's decision is the city's final decision on the
28 compliance of intervenor's application with the
29 pre-application requirements of EC 9.212(2).

1 However, we disagree with respondents' contention that
2 the planning director's decision is a separate final
3 decision that should have been appealed to this Board within
4 21 days after December 9, 1994, and cannot be challenged in
5 this appeal. Of course, had the planning director refused
6 to accept intervenor's application, on grounds of
7 noncompliance with the pre-application requirements of
8 EC 9.212(2), that would have been a final land use decision
9 appealable to this board. See Breivogel v. Washington
10 County, 114 Or App 55, 58-59, 834 P2d 473 (1992). On the
11 other hand, a planning director decision to accept and
12 process intervenor's application simply initiates a
13 development review process that eventually leads to a final,
14 appealable local decision. See City of North Plains v.
15 Washington County, 24 Or LUBA 78, 80-81 (1992). Challenges
16 concerning the acceptance and processing of the application
17 must wait until the conclusion of the local review process.
18 McKenzie River Guides Assoc. v. Lane County, 19 Or LUBA 207
19 (1990).

20 In other words, the submittal of a particular land use
21 permit application leads to one local review process,
22 including any local appeals, and culminates in one final
23 local land use decision appealable to this Board. Any
24 relevant issues concerning the acceptance, processing and
25 approval or denial of such application may be raised in an
26 appeal to this Board, subject to the requirements of

1 ORS 197.763(1) and 197.835(2) that such issues have been
2 raised below. Although ORS 197.825(2)(a) requires that
3 local appeals be exhausted, the fact that the local code may
4 limit the scope of review of a local appellate body in
5 considering a local appeal does not similarly limit this
6 Board's scope of review. Cummings v. Tillamook County, 26
7 Or LUBA 139, 143 (1993); Davenport v. City of Tigard, 25
8 Or LUBA 67, 70, aff'd 121 Or App 135 (1993); see Tice v.
9 Josephine County, 21 Or LUBA 371, 376 (1991).

10 Thus, in this appeal, petitioner may challenge the
11 planning director's determination that intervenor's
12 application complies with the pre-application requirements
13 of EC 9.212(2). However, assuming the planning director's
14 decision to accept intervenor's application is part of the
15 final decision challenged in this appeal, that decision, as
16 reflected in the memoranda at Record 334 and 400, simply
17 states the conclusion that the pre-application requirements
18 are satisfied. We are not required to give the planning
19 director's interpretation of the EC the deference accorded
20 to an interpretation of the governing body. Gage v. City of
21 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Watson v.
22 Clackamas County, supra. However, without findings
23 identifying the facts relied on and explaining the basis for
24 the planning director's determination of compliance with
25 EC 9.212(2), we are unable to perform our review function.

26 The second assignment of error is sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 ORS 358.653(1) provides:

3 "Any state agency or political subdivision
4 responsible for real property of historic
5 significance in consultation with the State
6 Historic Preservation Officer [(SHPO)] shall
7 institute a program to conserve the property and
8 assure that such property shall not be
9 inadvertently transferred, sold, demolished,
10 substantially altered or allowed to deteriorate."
11 (Emphasis added.)

12 ORS 358.653(4) states that "political subdivision" includes
13 "counties, cities, school districts and any other
14 governmental unit within the state," other than state
15 agencies as defined in ORS 358.635(2).

16 Petitioner contends there is undisputed evidence in the
17 record that intervenor failed to consult with SHPO regarding
18 the demolition of Amazon, as required by ORS 358.653(1).
19 Petitioner further contends it raised this issue below, and
20 the city erred by not addressing this issue in its findings
21 and by making a decision that is inconsistent with a state
22 statute. According to petitioner, ORS 197.829(4) requires
23 this Board to reverse or remand a local government decision
24 that is inconsistent with a state statute.⁶

⁶ORS 197.829 provides, as relevant here:

"[LUBA] shall affirm a local government's interpretation of its
comprehensive plan and land use regulations, unless [LUBA]
determines that the local government's interpretation:

** * * * *

1 ORS 197.829 governs this Board's scope of review in
2 reviewing local government governing bodies' interpretations
3 of local enactments. ORS 197.829(4) has nothing to do with
4 whether a particular statutory provision applies directly as
5 an approval standard for a local government land use
6 decision, which is the issue here.

7 ORS 358.653 imposes requirements on state agencies and
8 political subdivisions that are "responsible for"
9 historically significant property in the proprietary sense.
10 It refers to decisions concerning the sale, lease,
11 maintenance and demolition of such properties. We do not
12 believe ORS 358.653 establishes requirements for state
13 agencies and political subdivisions to follow in carrying
14 out their authority to regulate property under the ownership
15 and control of other entities. Additionally, as we stated
16 in ONRC v. City of Seaside, ___ Or LUBA ___ (LUBA No.
17 93-228, March 13, 1995), slip op 35-36, there is no general
18 requirement that a local government must, prior to approving
19 a permit, find that every potentially relevant federal or
20 state statutory requirement is satisfied.

21 Accordingly, we agree with respondents that whereas
22 ORS 358.653(1) imposes a duty on intervenor to consult with
23 SHPO regarding Amazon, it does not impose a duty on the city

"(4) Is contrary to a state statute, land use goal or rule
that the comprehensive plan or land use regulation
implements."

1 to determine that such consultation has occurred before
2 approving the requested permit.

3 The third assignment of error is denied.

4 The city's decision is remanded.