

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city limited land use decision
4 approving a tentative plan for a subdivision in an area
5 zoned Urban Residential Reserve (URR) on the comprehensive
6 plan map and Residential Reserve (RR) on the zoning map.

7 **MOTION TO INTERVENE**

8 Albert E. Ryckman and Sonia Ryckman move to intervene
9 on the side of respondent. There is no objection to the
10 motion, and it is allowed.

11 **FACTS**

12 On May 11, 1994, intervenors filed an application to
13 subdivide 9.91 acres into 30 single-family lots. The
14 application included proposed findings addressing each of
15 the tentative subdivision plan review criteria in Albany
16 Land Development Code (ALDC) 11.180. Pursuant to ORS
17 197.195(3)(b) and ALDC 1.330(3), which set forth the notice
18 requirements for limited land use decisions, the city gave
19 notice of the application on May 18, 1994. The notice
20 established June 2, 1994 as the deadline for the submission
21 of written comments under ORS 197.195(3)(c)(A) and ALDC
22 1.330(4)(a). Petitioners were among those who submitted
23 comments.

24 After the close of the comment period on June 2, 1994,
25 the city continued discussions with intervenors and their
26 engineering firm regarding the proposed subdivision. On

1 December 29, 1994, more than six months after the close of
2 the comment period, the city made a final decision approving
3 the tentative plat. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 **a. Right to Appeal**

6 Petitioners contend they are entitled to a local appeal
7 from the city's final decision approving a tentative
8 subdivision plan. Petitioners rely on ALDC 1.520(1), which
9 provides:

10 "An affected party may request a public hearing on
11 a tentative land use decision made by staff under
12 the Type II procedure. At the Director's
13 discretion, this hearing will be before the
14 Planning Commission, Hearings Board, or the
15 Landmarks Advisory Commission."

16 Petitioners are mistaken. The challenged decision is
17 not a tentative land use decision, but a limited land use
18 decision, which is defined at ORS 197.015(12)(a) and
19 ALDC 1.290(1) to include the approval or denial of a
20 subdivision or partition, as described in ORS chapter 92.¹

21 ALDC 1.330 sets forth the city's procedures for
22 processing an application for a limited land use decision,

¹ORS 92.040 distinguishes between a "tentative plan" and a "plat." The statute requires submission to the city of an application in writing for approval of a tentative plan, in accordance with procedures established by the applicable local ordinance or regulation. After final approval of the tentative plan, a plat consistent with the tentative plan is prepared and recorded.

1 including tentative subdivision plan approvals.²

2 ALDC 1.330(1) states:

3 "The purpose of the [limited land use] procedure
4 is to provide for land use review of subdivisions
5 and partitions and applications involving
6 descretionary [sic] standards for design or site
7 review of uses permitted outright."

8 ALDC 1.330(2)-(4) are essentially identical to

9 ORS 197.195(3)(a)-(c).³ ALDC 1.330(5) gives the planning

²ORS 92.040 uses the term "tentative plan" to mean what ALDC 1.330 calls a "tentative plat." We uniformly use "tentative plan."

³ORS 197.195(3)(c) states:

"The notice and procedures used by local government shall:

"(A) Provide a 14-day period for submission of written comments prior to the decision;

"(B) State that issues which may provide the basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;

"(C) List, by commonly used citation, the applicable criteria for the decision;

"(D) Set forth the street address or other easily understood geographical reference to the subject property;

"(E) State the place, date and time that comments are due;

"(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;

"(G) Include the name and phone number of a local government contact person;

"(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and

1 director the discretion to refer a limited land use decision
2 to the planning commission or the landmarks advisory
3 commission. However, such a referral is not required.

4 Petitioners apparently confuse final approval of a
5 tentative subdivision plan, which the ALDC makes a limited
6 land use decision, with a tentative staff decision regarding
7 certain types of land use applications. Neither requires a
8 hearing. However, the latter may be appealed locally under
9 the city's "Type II" procedures, which were adopted pursuant
10 to ORS 227.175(10) and which provide for a public hearing.⁴
11 Final approval of a tentative subdivision plan is not a
12 "tentative staff decision," as the phrase is used in
13 ALDC 1.350, and no hearing is available.

14 This subassignment of error is denied.

15 **b. Additional Evidence**

16 Petitioners contend the city prejudiced their
17 substantial rights by accepting evidence into the record
18 after the 14-day comment period without providing an
19 additional opportunity to comment. Respondents reply that
20 during the six months following the close of the comment
21 period, virtually everyone with an interest in the
22 application had ongoing discussions with city staff; that
23 the records pertaining to the application could be reviewed

"(I) Briefly summarize the local decision making process for
the limited land use decision being made."

⁴See ALDC 1.350.

1 at any time; and that the final decision did not differ
2 significantly from what was described in the May 18, 1994
3 notice of proposed action.

4 ORS 197.195(3)(c)(A) and ALDC 1.330(4)(a) require that
5 the local government provide a 14-day period for submission
6 of written comments prior to the decision. ORS
7 197.195(3)(c)(F) and ALDC 1.330(4)(f) require that the local
8 government make copies of all evidence relied upon by the
9 applicant available for review during the comment period.

10 There is evidence in the record of meetings between
11 city staff and intervenors or their agents after the end of
12 the comment period on June 2, 1994, although what occurred
13 at the meetings is not clear. Record 21, 86. For example,
14 the final decision refers to "extensive interaction" between
15 the city and the developer "to evaluate and determine the
16 adequate size and location of the partial and ultimate
17 street improvements as they relate to the proposed
18 development." Record 21. On November 28, 1994,
19 intervenors' engineering firm submitted additional
20 information concerning storm drainage, sanitary sewers, and
21 road improvements. Record 45-54. On December 14, 1994, a
22 traffic engineer submitted modifications of an earlier
23 traffic study. Supplemental Record 8-17.

24 We see nothing in the record that undermines
25 petitioners' contention that the city essentially conducted
26 a dialogue with intervenors or their agents from which

1 interested parties were excluded. Respondents do not cite
2 to the record to support their claim that petitioners and
3 other interested parties continued to participate in the
4 process through the date of a final decision.

5 In closing the comment period, while continuing to
6 accept additional evidence from intervenors over a period of
7 six months, the city violated ORS 197.195(3)(c)(F) and ALDC
8 1.330(4)(f).⁵ The city did not act consistently with the
9 notice it provided to interested parties. Under the
10 circumstances, the city has a statutory obligation to
11 provide an additional comment period before making its final
12 limited land use decision.

13 This subassignment of error is sustained.

14 The first assignment of error is sustained, in part.

15 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

16 The second and third assignments of error challenge the
17 city's findings and the evidence in support of the findings.
18 Since we conclude the record must be reopened and an
19 additional comment period provided, we do not reach these
20 assignments of error.

21 The city's decision is remanded.

⁵We do not think it relevant that the city's final decision was similar to what was described in the notice of decision. It is the relationship between the applicable criteria and the evidence that invites public comment. If the evidence changes and the decision does not, that in itself may be reason to comment further.