BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FOREST PARK NEIGHBORHOOD ASSOCIATION, Petitioner, vs. CITY OF PORTLAND, Respondent, and JOYCE ENTERPRISES, INC., ORVILLE K. BUCKNER, and JOYCE BARRON, Intervenors-Respondent.	LUBA No. 93-155 FINAL OPINION AND ORDER

Appeal from City of Portland.

James E. McCandlish, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Griffin McCandlish.

Frank Hudson, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

Intervenor-respondent Joyce Enterprises, Inc. was represented by James F. Hutchinson, Portland.

Intervenors-respondent Orville K. Buckner, West Linn, and Joyce Barron, Portland, represented themselves.

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

AFFIRMED IN PART;
REMANDED IN PART 05/16/94

You are entitled to judicial review of this Order.

Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the city planning director determining that two subdivision tentative plan approvals granted in 1991 have not expired. Petitioner also appeals a decision by the city chief planner to refuse to accept petitioner's local appeal of the planning director's decision.

MOTIONS TO INTERVENE

Joyce Enterprises, Inc., Orville K. Buckner and Joyce Barron move to intervene in this proceeding on the side of respondent. There is no objection to the motions, and they are allowed.

FACTS

In 1990, applications were filed for approval of two planned unit developments (PUDs)/subdivisions, Deer Ridge and Killarney Estates.[1] The tentative plans for the subdivisions were approved sometime in 1991. When the subject applications were submitted and the subdivision tentative plan approvals were granted, PCC 34.20.060(A) (1989) required a subdivision final plat to be submitted within two years after approval of the

[1]The city's designations for these applications are CU 99-90/S 50-90 (Deer Ridge) and CU 122-90/S 60-90 (Killarney Estates).

subdivision tentative plan.[2] PCC 34.20.060(A) (1989) also allowed the planning director, upon request by the subdivider and upon making certain findings, to extend that period for one year. However, on February 12, 1992, PCC 34.20.060(A) was amended to require a subdivision final plat to be submitted within three years after approval of the subdivision tentative plan. PCC 34.20.060(A) (1992).

On July 1, 1993, petitioner's representative sent a letter to the city planning director, expressing petitioner's belief that PCC 34.20.060(A) (1989) governs the subdivisions in question, asking whether requests for extension of tentative plan approval had been submitted, and contending neither subdivision qualifies for such an extension. Record 8. Petitioner's letter also asks whether the city views the two tentative plan approvals as having expired and requests that the city explain its interpretation and application of the relevant code provisions. Id.

On August 16, 1993, the planning director sent petitioner a letter (planning director letter) stating PCC 34.20.060(A) (1992) applies and makes the disputed subdivision tentative plan approvals valid for three years. The planning director letter also states it is not necessary for the developers to request an extension of the original,

[2]PCC 34.20.060(A) (1989) is discussed in more detail under the first assignment of error, infra,

two-year approval period. The letter further states that within two years after approval of the two subdivision tentative plans at issue here, the city received requests from the two developers for one year extensions. The letter goes on to explain that both developers were informed tentative plan approval "was valid for three years and extension was no longer an applicable procedure."[3] Record 7.

On August 30, 1993, petitioner filed a local appeal of the planning director letter, on a city form entitled "Appeal of a Type II Decision." Record 2. On September 8, 1993, the chief planner sent petitioner a letter (chief planner letter) refusing to accept petitioner's appeal.

On September 29, 1993, petitioner filed a notice of intent to appeal challenging both the planning director letter and the chief planner letter.[4]

PRELIMINARY ISSUE

This Board has jurisdiction to review both land use decisions and limited land use decisions. ORS 197.825(1). However, in order to resolve certain issues raised in petitioner's challenges to the chief planner letter and the planning director letter, we must first determine whether

---

[3]Apparently, no final plat for either subdivision was submitted within the original two year period.

[4]No party objects to petitioner's appeal of two decisions by a single notice of intent to appeal. See Seneca Sawmill v. Lane County, 6 Or LUBA 454 (1982); Osborne v. Lane County, 4 Or LUBA 368 (1981).

the planning director letter is a land use decision or a limited land use decision.[5]

ORS 197.015(10)(b)(C) provides that the term "land use decision" does not include a local government decision which is a "limited land use decision." ORS 197.015(12) defines "limited land use decision" as:

> "[A] final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
>
> "(a) The approval or denial of a subdivision or partition * * *.
>
> "* * * * *"

There is no dispute that the two developments referred to in the planning director letter are located within the Portland Metropolitan Area Urban Growth Boundary. The planning director letter concerns the application of PCC provisions relevant to the validity of the subdivision

---

[5]In our previous order on respondent's motion to dismiss this appeal, we determined the chief planner letter is a land use decision which this Board has jurisdiction to review. Forest Park Neigh. Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 93-155, Order on Motion to Dismiss, January 25, 1994) (Forest Park), slip op 5. However, we declined to determine at that time whether the planning director letter is a final land use decision or limited land use decision, or whether petitioner's appeal of the planning director's letter was timely filed, because (1) the resolution of these issues is intertwined with the merits of petitioner's challenge to the chief planner letter, and (2) the parties had not addressed the impact of the court of appeals' decision in Weeks v. City of Tillamook, 113 Or App 285, 832 P2d 1246 (1992) on the question of whether the planning director letter is a final decision. Id., slip op at 7-8. The city continues to contend petitioner's appeal of the planning director letter was not timely filed, and we address that issue, infra. However, the city now agrees the planning director letter is a final decision, but expresses no position on whether that final decision is a land use decision or a limited land use decision. Respondent's Brief 4, 9.

tentative plan approvals, and approval of the subdivision final plats, for these developments.[6] We therefore conclude the planning director letter is a limited land use decision.

CHIEF PLANNER LETTER (THIRD ASSIGNMENT OF ERROR)

The chief planner letter explains the city's refusal to accept petitioner's appeal of the planning director letter as follows:

> "[A] letter issued by the Planning Director describing how the code is applied is not a land use review which can be appealed. Only land use decisions processed through a Type II or Type III procedure can be appealed to a local hearings body ([PCC] 33.730.020 and 33.730.030).
>
> "* * * * *
>
> "We are not accepting your appeal and are returning it to you." Record 1.

Petitioner argues that at the time of the request leading to the planning director letter and petitioner's attempted local appeal, the only procedures set out in the PCC for making a land use decision or limited land use decision were the Type II and Type III procedures referred to in the chief planner letter. Of these, only Type II procedures provide for an initial decision by the planning director, without a hearing, and the opportunity for a local

[6]Although the proposed developments were approved as PUDs as well as subdivisions, the planning director letter refers only to approval of the subdivision tentative plans and final plats and does not appear to concern approval of the PUD aspect of the developments. Record 6.

appeal before a hearings body.[7] PCC 33.730.020(E) and (G). Petitioner concedes the PCC does not specifically require that Type II procedures be used in processing a request regarding the validity of a subdivision tentative plan approval, but argues only the Type II procedure is consistent with how its request was processed and its right to a local hearing under ORS 227.175(10). Petitioner further argues that under Type II procedures, when an appeal is filed the planning director must schedule a hearing on the appeal. PCC 33.730.020(I).

The chief planner letter interprets the PCC to provide a local appeal only if the decision sought to be appealed was processed through Type II or Type III procedures. The chief planner letter also implicitly determines that the decision petitioner sought to appeal (the planning director letter) was not processed through Type II or Type III procedures.

This Board is required to defer to a local government's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Clark v. Jackson

[7]Type III procedures involve an initial decision by a reviewing body after a public hearing, with the possibility of an appeal to the city council. PCC 33.730.030.

County, 313 Or 508, 514-15, 836 P2d 710 (1992). Additionally, with regard to the first requirement concerning consistency with the words, purpose and policy of the local enactment, we must defer to a local government's interpretation of its own enactment, unless that interpretation is "clearly wrong." Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992).

We initially note that ORS 227.175(10), relied on by petitioner as the source of a statutory requirement for a local hearing, does not apply here because the planning director letter is a "limited land use decision." ORS 227.175(3) and (10) together require that in acting on an application for a "permit," a city must either (1) hold a public hearing, or (2) provide notice of its decision and an opportunity to obtain a hearing through a local appeal. However, the definition of "permit" in ORS 227.160(2) explicitly states that "permit" does not include a "limited land use decision." ORS 197.195, which establishes minimum procedural requirements for the making of limited land use decisions, does not require that local governments provide either a public hearing or a local appeal. ORS 197.195(3)(a) does require, however, that a local government "follow the applicable procedures contained within its acknowledged comprehensive plan and land use

regulations * * *."

The PCC explicitly establishes a right to a local appeal only for decisions made pursuant to Type II and Type III procedures. PCC 33.730.020(G) and 33.730.030(F). Petitioner concedes the PCC does not specifically require that Type II procedures be used in processing a request regarding the validity of a subdivision tentative plan approval. Further, we are cited to no provision in the PCC requiring that all city land use decisions or limited land use decisions be made through Type II or Type III procedures. Consequently, the city's interpretation that no local appeal is available if the decision sought to be appealed was not made through Type II or Type III procedures is not clearly wrong, and we defer to it.

No party contends the challenged decision was made pursuant to Type III procedures. Type II procedures require that an application be made on the appropriate city form and be accompanied by the correct filing fee. PCC 33.730.020(B). Type II procedures also require that the planning director mail notice of the request and of the eventual decision to all owners of property within 150 feet of the subject property. PCC 33.730.020(C) and (F). Type II procedures also require the planning director to prepare a "decision report" and to file that report with the public record of the case. PCC 33.730.020(E). The process resulting in the planning director letter observed none of

these requirements. The chief planner letter correctly determined the planning director letter was not issued through a Type II process, and is not subject to a local appeal.

The third assignment of error is denied.

PLANNING DIRECTOR LETTER

A. Timeliness of Appeal

The city contends this appeal must be dismissed because petitioner did not file its notice of intent to appeal the planning director letter within the time required by statute. The city points out that ORS 197.830(8) provides "[a] notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final."[8] The city contends the planning director letter became final on August 16, 1993, the date it was issued. According to the city, because no local appeal of the planning director letter was available, petitioner had no administrative remedies to exhaust and, therefore, was required to file its notice of intent to appeal within 21 days after August 16, 1993. The city further argues our

[8]The city also argues that if ORS 197.830(3) applies, petitioner failed to file its notice of intent to appeal the planning director letter within 21 days of when petitioner received actual notice of the planning director letter, as required by ORS 197.830(3)(a). However, ORS 197.830(3) applies only where a local government makes a land use decision without providing a hearing. Because the planning director letter is a limited land use decision, ORS 197.830(3) does not apply.

decision in Smith v. Douglas County, 17 Or LUBA 809, 817, 98 Or App 379, rev den 308 Or 698 (1989), establishes that petitioner's pursuit of a nonexistent local appeal did not toll the statutory deadline for filing an appeal with LUBA.

The county decision appealed in Smith concerned an application for a "permit," as that term was defined in ORS 215.402(4) (1989). Smith was decided prior to the 1991 enactment of legislation creating the category of "limited land use decision" and establishing minimum procedural requirements for local governments to follow in making limited land use decisions.[9] 1991 Or Laws, ch 817. Under ORS 197.195, a local government may make a limited land use decision without a hearing and, if it does so, may or may not provide a local appeal. However, ORS 197.195(3)(c)(H) adds a new requirement, not found in the statutes governing "permits," that a local government's notice of its limited land use decisions include an "explanation of appeal rights."

The planning director letter is a limited land use decision that became final on the date it was issued. Based on the record in this case, the only notice petitioner was given of the city's limited land use decision was the planning director letter itself. The planning director

[9]The 1991 legislation amended the parallel definitions of "permit" in ORS 215.402(4) and 227.160(2) applicable to counties and cities, respectively, to provide that "permit" does not include a "limited land use decision." 1991 Or Laws, ch 817, §§ 8 and 8a.

letter does not contain the "explanation of appeal rights" required by ORS 197.195(3)(c)(H). We must determine whether the city's failure to give the required "explanation of appeal rights" tolled the time provided by ORS 197.830(8) for filing an appeal to this Board.

In League of Women Voters v. Coos County, 82 Or App 673, 729 P2d 588 (1986) (League of Women Voters), the court of appeals addressed the effect of a county's failure to give a petitioner the written notice of the county's decision to which that petitioner was entitled under ORS 215.416(8) (now ORS 215.416(10)). The court reasoned that although ORS 197.830(7) (now ORS 197.830(8)) and ORS 215.416(8) do not refer to one another, the legislature did not intend "to permit the nonperformance or delayed performance of [the statutory duty to provide written notice of the decision] to defeat the possibility of a timely appeal from a county's land use decision." League of Women Voters, 82 Or App at 679-80. The court concluded that where ORS 215.416(8) applies, the time provided in ORS 197.830(7) for filing a notice of intent to appeal begins to run "only after the prescribed written notice of the decision is mailed or delivered personally to the party seeking to appeal." League of Women Voters, 82 Or App at 681. This Board has followed the court's reasoning in League of Women Voters in concluding that where other statutory requirements to provide notice of a decision are applicable, the 21 day

period to appeal to LUBA does not begin to run until a petitioner has been given the notice to which he is entitled. Tournier v. City of Portland, 16 Or LUBA 546, 550 (1988) (ORS 227.173(3)).

The court of appeals applied similar reasoning in Flowers v. Klamath County, 98 Or App 384, 780 P2d 227, rev den 308 Or 592 (1989) (Flowers), concerning the effect of a county's failure to comply with the requirements of ORS 215.416(3) and (5) to provide notice and a hearing on the requirement of ORS 197.830(3)(b) (now ORS 197.830(2)(b)) that a petitioner make an appearance below to have standing to appeal a local government's decision to LUBA. Although the court acknowledged there may be means other than participation in a hearing by which a person may appear, the court stated that "does not alter the fact that the notice and hearing requirements exist, in part, to provide an opportunity to appear and that the failure to discharge them has the effect * * * of minimizing the likelihood that anyone will or can appear." Flowers, 98 Or App at 388. The court concluded the county's failure to comply with the statutory requirements for notice and a hearing was "a failure that bears directly on a petitioner's ability to appear [and, therefore,] obviates the necessity for making a local appearance in order to have standing" to challenge the county's decision before LUBA. Flowers, 98 Or App at 389.

In this case, the requirement of ORS 197.195(3)(c)(H)

for an explanation of appeal rights exists, at least in part, to ensure that a party has the opportunity to file a timely appeal of a limited land use decision in the correct forum. Further, the city's failure to include an "explanation of appeal rights" in the notice of decision given to petitioner, as required by ORS 197.195(3)(c)(H), obviously has a direct bearing on petitioner's ability to file a timely appeal in the correct forum. Based on reasoning similar to that of the court of appeals in Flowers and League of Women Voters, we believe that the 21 day period provided by ORS 197.830(8) for appealing a limited land use decision to LUBA does not begin to run until a petitioner has been given the explanation of appeal rights to which it is entitled under ORS 197.195(3)(c)(H).

Because the city did not give petitioner the explanation of appeal rights to which petitioner is entitled under ORS 197.195(3)(c)(H), petitioner's appeal of the planning director letter was not untimely filed.

B. First and Second Assignments of Error

Petitioner contends the city's determination that PCC 34.20.060(A) (1992), rather than PCC 34.20.060(A) (1989), governs the determination of whether the subdivision tentative plan approvals granted in 1991 have expired is erroneous, because ORS 227.178(3) requires the city to apply the standards and criteria in effect in 1990 when the subdivision applications were first

submitted. Petitioner also contends the city erred by failing to address petitioner's contention that the requirements of PCC 34.20.060(A) (1989) for granting a one year extension of a subdivision tentative plan approval are not met, and by failing to follow Type II procedures in processing petitioner's request.

PCC 34.20.060(A) (1989) provides, in relevant part:

> "Time limit: The Subdivision [final] plat * * * shall be submitted to the Bureau of Planning for approval within 2 years following the approval of the tentative plan, and shall incorporate any modifications required as a condition to approval of the tentative plan. If the property divider wishes to proceed with the division of this land after the expiration of the 2-year period, the divider shall resubmit the tentative plan to the Bureau of Planning and the Planning Director or designated agent may extend the limit for approving such a Subdivision [final] plat for a period not to exceed an additional 1 year, providing it is found that the facts upon which the [tentative plan] approval was based have not changed to an extent sufficient to warrant refiling of the tentative plan subject to the procedures in [PCC] 34.20.020 through 34.20.050 and make any revisions necessary to meet changed conditions. * * *"

PCC 34.20.060(A) (1992) provides:

> "Time limit: The Subdivision [final] plat will be submitted to the Bureau of Planning for approval within 3 years following the approval of the tentative plan, and will incorporate any modifications required as a condition of approval of the tentative plan."

The planning director letter explains the city's decision that PCC 34.20.060(A) (1992) applies as follows:

> "[A]ll substantive requirements which were in

> place at the time of a land division application, will continue to apply to all final approvals of plats which have not expired. [PCC] 33.700.090(B). This Code provision is based upon ORS 227.178(3) which requires that 'approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.' This statute freezing regulations applies to approval criteria in effect at the time. It does not apply to procedural matters such as the length of the life of a permit approval.
>
> "[PCC] 34.20.060 presently states that an application is valid for three years following approval of [a subdivision] tentative plan. The application of this procedural standard in no way violates [PCC] 33.700.090(b) or ORS 227.178(3) because it does not involve the application of a standard or criterion. * * *" (Emphasis in original.) Record 6.
>
> ORS 227.178(3) provides, in relevant part:
>
> "If the * * * city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

There is no dispute that the city's comprehensive plan and land use regulations were acknowledged in 1990, when the subdivision applications in question were first submitted. There is also no dispute that in 1990 when the subdivision applications in question were originally submitted, the term "application" in the above quoted statutory provision included applications for subdivision.[10] Thus, there is no

[10]At present, ORS 227.178(3) applies to applications for permits, limited land use decisions and zone changes. In 1990,

dispute that ORS 227.178(3) applies to the city's approval or denial of the subdivision applications filed in 1990.

Therefore, we must decide whether the time limit provision of PCC 34.20.060(A) (1989) falls within the term "standards and criteria," as used in ORS 227.178(3). In this regard, the meaning of the term "standards and criteria" in ORS 227.178(3) is a question of state law, and the city's interpretation and application of this term does not bind this Board. Davenport v. City of Tigard, 121 Or App 135, 140, 854 P2d 483 (1993). In Davenport, the court of appeals stated the role of the statutory term "standards and criteria" is "to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings." Id. at 141. According to the court, "standards and criteria" includes code provisions "that the [local] government does apply and that have a meaningful impact on its decision." Id.

The city has created a two-stage (tentative plan and final plat) approval process for subdivision applications. This is reflected by the statement in the planning director letter that "all substantive requirements which were in

---

ORS 227.178(3) (1989) applied to applications for permits and zone changes. However, prior to the 1991 legislation creating limited land use decisions, urban subdivisions were "permits," as that term was defined in ORS 227.160(2) (1989). See n 9, supra.

place at the time of a land division application, will continue to apply to all final approvals of plats * * *."[11] Thus, under ORS 227.178(3), both subdivision tentative plan and final plat approvals are based on the "standards and criteria" in effect when the subdivision application is initially filed. Compare Tuality Lands Coalition v. Washington County, 22 Or LUBA 319, 328-30 (1991) (parallel provision of ORS 215.428(3) does not require a county to apply the standards in effect when one development application is submitted to a second, separate and distinct application).

PCC 34.20.060(A) (1989) contains substantive factors having a meaningful impact on whether the city may approve a subdivision final plat. For instance, if a developer wishes to submit its final plat more than two years after tentative plan approval, it must show that the facts upon which the approval was based have not changed sufficiently to warrant having to refile its application. We conclude PCC 34.20.060(A) (1989) constitutes "standards and criteria" for a subdivision application, within the meaning of ORS 227.178(3). Consequently, the validity of the two subdivision tentative plan approvals at issue here, and the city's ability to approve a final plat for these subdivisions, is governed by PCC 34.20.060(A) (1989), and

[11]We also note that no mention is made in PCC Chapter 34.20 of a separate application for subdivision final plat approval.

the planning director letter errs in determining otherwise.

Because we determine the planning director letter errs in applying PCC 34.20.060 (1992), rather than PCC 34.20.060 (1989), the decision must be remanded for application of the correct standard. On remand, the city will have to address petitioner's contentions that the standards of PCC 34.20.060 (1989) for a one year extension are not satisfied.

Petitioner also argues the city erred by failing to follow Type II procedures in processing its request. It is apparent from the planning director letter that the city's handling of petitioner's request was influenced by the city's belief that PCC 34.20.060(A) (1992) governs and that the application of PCC 34.20.060(A) (1992) does not require discretion. Because the city will be applying a different code provision on remand, we believe the city should have the opportunity to intepret its code in the first instance concerning what procedures should be used in responding to petitioner's request with regard to application of PCC 34.20.060(A) (1989).[12]

The first and second assignments of error are sustained.

The chief planner letter is affirmed. The planning

[12]However, we note we determine above that a decision concerning the validity of urban subdivision tentative plan approvals, and the approval of urban subdivision final plats, is a limited land use decision and must, at a minimum, satisfy the procedural requirements of ORS 197.195.

director letter is remanded.