



1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city planning manager decision  
4 rejecting his local appeal of a city hearings officer's  
5 decision approving a variance, on the ground that  
6 petitioner's local appeal was not timely filed.

7 **MOTION TO INTERVENE**

8 Tosco Northwest Company, the applicant below, moves to  
9 intervene in this proceeding on the side of respondent.  
10 There is no objection to the motion, and it is allowed.

11 **FACTS**

12 Intervenor applied to the city for a variance to reduce  
13 the required setback along the west property line of certain  
14 property owned by intervenor from 30 feet to 4 feet.  
15 Intervenor proposed to place a service station, convenience  
16 market and car wash on the subject property.

17 Petitioner owns the property adjoining the west  
18 property line of intervenor's property. Petitioner's  
19 property contains a rental dwelling. Petitioner appeared at  
20 the October 14, 1994 hearing before the hearings officer and  
21 testified in opposition to the variance request.

22 On November 7, 1994, the hearings officer issued a  
23 decision granting the variance, with certain conditions.  
24 Also on November 7, 1994, the city mailed notice of the  
25 hearings officer's decision to certain persons. Whether the  
26 city mailed notice of the decision to petitioner and, if it

1 did so, to what address such notice was mailed, are disputed  
2 by the parties.

3 Petitioner contends he was not given notice of the  
4 hearings officer's decision until December 21, 1994, when a  
5 copy of the decision was mailed to petitioner by a city  
6 planner, after petitioner contacted the planning department  
7 to inquire about the status of the variance proceeding. On  
8 January 4, 1995, petitioner filed an appeal to the city  
9 council from the hearings officer's decision. On  
10 January 12, 1995, the planning manager issued a decision  
11 rejecting petitioner's appeal because it was untimely filed  
12 under Salem Revised Code (SRC) 114.200(b).<sup>1</sup>

13 This appeal followed.

14 **MOTION TO DISMISS**

15 The city moves to dismiss this appeal on the ground  
16 that petitioner failed to exhaust administrative remedies  
17 available below, as required by ORS 197.825(2)(a).<sup>2</sup> The

---

<sup>1</sup>SRC 114.200 is entitled "Appeal to Council." SRC 114.200(b) provides,  
in relevant part:

"A written notice of appeal shall be filed with the  
administrator within 15 city business days after the record  
date of the decision as provided in SRC 114.190[.]

"\* \* \* \* \*"

The challenged decision states petitioner's local appeal is untimely  
because the city mailed petitioner a copy of the hearings officer's  
decision on November 7, 1994. Record 5.

<sup>2</sup>ORS 197.825(2)(a) provides that LUBA's jurisdiction:

1 city contends that, as established in Kamppi v. City of  
2 Salem, 21 Or LUBA 498 (1991), petitioner had a right to  
3 appeal the planning manager's January 12, 1995 decision  
4 rejecting his local appeal to the city council, under  
5 SRC 114.200(c):

6 "Any person adversely affected or owning property  
7 within the notification area wishing to appeal a  
8 land [use] decision for which no notice of a  
9 hearing is provided in this code, shall file  
10 written notice of appeal with the administrator as  
11 above provided within 15 city business days of the  
12 date the person knew or should have known of the  
13 decision."

14 The city further contends petitioner learned of the  
15 planning manager's decision rejecting his local appeal no  
16 later than January 27, 1995 (on which date petitioner filed  
17 his notice of intent to appeal with LUBA), but failed to  
18 file an appeal of the planning manager's decision to the  
19 city council within 15 city business days, as required by  
20 SRC 114.200(c). The city argues that if petitioner had  
21 appealed the planning manager's decision to the city  
22 council, petitioner would have had an opportunity to contest  
23 the planning manager's determination that notice of the  
24 hearings officer's decision was mailed to petitioner on  
25 November 7, 1994, and to convince the city council that  
26 petitioner's local appeal of the hearings officer's decision

---

"Is limited to those cases in which the petitioner has  
exhausted all remedies available by right before petitioning  
[LUBA] for review[.]"

1 should be accepted.

2 Petitioner contends all Kamppi says is that a  
3 petitioner must file a local appeal in order to exhaust  
4 local remedies and vest LUBA with jurisdiction. Kamppi, 21  
5 Or LUBA at 502. Petitioner argues he did just that in this  
6 case. Petitioner argues his January 4, 1995 local appeal of  
7 the hearings officer's decision was filed under  
8 SRC 114.200(c), and contends he is not required to file yet  
9 another local appeal under SRC 114.200(c) to exhaust local  
10 administrative remedies. Petitioner further argues that the  
11 January 12, 1995 letter decision rejecting his local appeal,  
12 although signed by the planning manager, is in effect a  
13 decision of the city council and, therefore, any further  
14 attempt to appeal to the city council would be futile.

15 As an initial point, we disagree with petitioner's  
16 contention that his January 4, 1995 local appeal of the  
17 hearings officer's decision approving a variance was filed  
18 under SRC 114.200(c). SRC 114.200(b) establishes the filing  
19 deadline for, and requirements for the contents of, an  
20 appeal from a decision made by the hearings officer or  
21 planning commission after a hearing, as provided in  
22 SRC 114.190. SRC 114.200(a) identifies the persons who may  
23 appeal such decisions as (1) the applicant, (2) any person  
24 entitled to notice of the proposal or hearing on which the  
25 decision was based, or (3) any person who testified at or  
26 submitted written comments for such hearing. Petitioner's

1 January 4, 1995 local appeal was filed under SRC 114.200(a)  
2 and (b), and was rejected by the planning manager for  
3 failure to comply with the deadline established by  
4 SRC 114.200(b).

5 In contrast, SRC 114.200(c) creates a right to appeal  
6 to the city council from a land use decision for which the  
7 code provides no right to notice of a hearing, states who  
8 may appeal such decisions, and establishes a deadline for  
9 such appeals. Kamppi, 21 Or LUBA at 501-02. The challenged  
10 decision by the planning manager rejecting petitioner's  
11 local appeal is a land use decision because it concerns the  
12 application of the SRC and because it would make the  
13 hearings officer's decision approving the requested variance  
14 the city's final land use decision.  
15 ORS 197.015(10)(a)(A)(iii); Breivogel v. Washington County,  
16 114 Or App 55, 58, 834 P2d 473 (1992); Ramsey v. City of  
17 Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 94-167, March 30, 1995),  
18 slip op 5-6.

19 Further, there can be no question that petitioner was  
20 adversely affected by the planning manager's decision  
21 rejecting his local appeal. Finally, no party contends the  
22 SRC provides for a notice of hearing before the planning  
23 manager makes a decision to reject a local appeal he  
24 believes to be untimely filed, and we are aware of no such  
25 code provision. Therefore, we agree with the city that  
26 under SRC 114.200(c), petitioner had an unqualified right to

1 appeal the planning manager's decision to the city council  
2 within 15 business days of when petitioner learned of the  
3 planning manager's decision.

4 Petitioner has not established any reason to believe  
5 that appealing the planning manager's decision to the city  
6 council would have been a futile act.<sup>3</sup> Petitioner's  
7 argument appears to be based on a fear that the planning  
8 manager would summarily reject a local appeal of his  
9 January 12, 1995 decision. However, the basis for the  
10 planning manager's rejection of petitioner's January 4, 1995  
11 local appeal was that it was not timely filed under  
12 SRC 114.200(b). There is no reason why petitioner could not  
13 have filed a timely local appeal of the planning manager's  
14 January 12, 1995 decision under SRC 114.200(c). Such an  
15 appeal would have given the city council the opportunity to  
16 consider argument and evidence concerning whether petitioner  
17 was given the notice of the hearings officer's decision to  
18 which he was entitled and whether, if petitioner was not  
19 given the required notice, petitioner's January 4, 1995  
20 local appeal was timely under relevant SRC provisions.

21 The purpose of ORS 197.825(2)(a) is to assure a local  
22 government decision is reviewed by the highest level local

---

<sup>3</sup>We see no reason to conclude the planning manager's decision was in fact a decision of the city council. There is nothing in the record indicating the city council instructed the planning manager to make the challenged decision or even was aware of petitioner's January 4, 1995 appeal.

1 decision making body the local code makes available, before  
2 an appeal to LUBA is pursued. Moody v. Deschutes County, 22  
3 Or LUBA 567, 569 (1992); McConnell v. City of West Linn, 17  
4 Or LUBA 502 (1989). Because petitioner had a right to  
5 appeal the challenged decision to the city council under  
6 SRC 114.200(c) and failed to do so, the city's motion to  
7 dismiss is granted.

8 This appeal is dismissed.<sup>4</sup>

---

<sup>4</sup>Petitioner filed a motion for evidentiary hearing, seeking to introduce evidence that the city failed to give petitioner notice of the hearings officer's decision prior to December 21, 1994. We must dismiss this appeal due to petitioner's failure to exhaust an available local appeal of the planning manager's decision. Therefore, the facts alleged by petitioner, even if true, would not affect the outcome of this appeal. Accordingly, petitioner's motion for evidentiary hearing is denied.