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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON  
NEAL HAUSAM,  
*Petitioner,*  
vs.  
CITY OF SALEM,  
*Respondent,*  
and  
TIMOTHY TEMPLE,  
*Intervenor-Respondent.*  
LUBA No. 2000-068  
FINAL OPINION  
AND ORDER

Appeal from City of Salem.

Paul R.J. Connolly, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Connolly and Doyle.

Paul Lee, Assistant City Attorney, Salem, and Gordon Hanna, Salem, filed a combined response brief and argued on behalf of respondent and intervenor-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 11/03/2000

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

**NATURE OF THE DECISION**

Petitioner appeals a city decision granting tentative plan approval for a 41-lot residential subdivision.

**MOTION TO INTERVENE**

Timothy Temple (intervenor), one of the applicants below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

In March 1997, intervenor filed an application for tentative plan approval for Royalann Estates Subdivision No. 4, Phases 1, 2 and 3. The application was approved on April 24, 1997, with 19 conditions. The notice of decision provided that

“[t]his tentative decision is valid and remains in effect for a period of two years. Under [Salem Revised Code] SRC 63.049, this tentative decision is null and void after two years if not finalized.” Record 67.

The final plat for Phase 1 was submitted within the two-year time period, and the resulting lots have been developed. In 1999, when the final plat for Phase 2 was submitted for approval, petitioner advised the city that he had not received notice of the original tentative plan approval decision. In response to this, the city reconsidered its 1997 approval of the tentative subdivision plan for Phases 2 and 3 in January 2000. As part of this process, the city reviewed a request to modify the 1997 tentative plan. The modifications exclude one lot, change street configurations, and reconfigure several lots. The city’s Subdivision Review Committee (Committee) approved the revised 1997 plan on February 14, 2000. The Committee’s decision was appealed to the city planning commission. The applicants submitted a further revised tentative plan to the planning commission, which was approved on May 2, 2000.

This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the city’s 1997 tentative plan decision expired after two years  
3 and before the modified tentative plan was submitted.

4 SRC 63.049 requires an application for final plat approval to be submitted within two  
5 years of tentative plan approval or the tentative approval will expire.<sup>1</sup> According to  
6 petitioner, because intervenor did not submit his final plat for approval until more than two  
7 years after tentative plan approval, the city could not approve the modified tentative plan  
8 approval. The city and intervenor (respondents) respond that petitioner did not adequately  
9 raise this issue for appeal at the local level as required by the local ordinance.<sup>2</sup> Respondents  
10 also assert that due to the city’s failure to send notice of the April 24, 1997 tentative plan  
11 approval to petitioner, no final decision was ever made regarding the original tentative plan  
12 application. Accordingly, respondents argue, because no final decision was made in the  
13 original tentative plan, the two-year expiration period set out in SRC 63.049 never began to  
14 run.

15 Respondents assert that we may not consider petitioner’s argument that the tentative  
16 plan decision expired because petitioner did not raise the issue in his notice of appeal, as  
17 required by local ordinance. SRC 63.335(a) provides, in pertinent part:

18 “Any person, organization or agency entitled to service of a copy of the  
19 decision as provided [by the code] may appeal the decision of the planning  
20 administrator to the planning commission. Appeal shall be taken by filing  
21 written notice of appeal with the planning administrator and paying the appeal

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<sup>1</sup> SRC 63.049(a) provides:

“Except as provided in [SRC 63.049(b)], tentative plan approval shall be valid for a period of two years following the date of the final decision of the planning administrator, commission, or council. If no final plat is submitted for final approval within that time, no final plat shall thereafter be approved; \* \* \* however, the applicant may begin anew the process of tentative plan approval. In such a case the planning administrator, commission, and council shall not be bound by the terms of the prior approval.”

<sup>2</sup> The city and intervenor filed a joint respondents’ brief.

1 fee \* \* \*. *Notice of the appeal shall state wherein the planning administrator*  
2 *failed to conform to the provisions of this chapter.*” (Emphasis added.)

3 Petitioner’s notice of appeal of the Committee’s approval specified seven issues for  
4 review on appeal. Record 114-17. However, none of the issues specified by petitioner refer  
5 to the two-year expiration period. That issue was not raised until the final public hearing on  
6 April 18, 2000, in petitioner’s Supplemental Answer to City Staff Comments (supplemental  
7 answer). Record 60-61. The city’s findings state:

8 “In his ‘Supplemental Answer to City Staff Comments’ [petitioner] raises  
9 three new issues. In regard to each of these claims, [petitioner] fails to identify  
10 which of the four approval criteria contained in SRC 63.046 this issue applies  
11 to. The planning commission is not required to determine this factor for him.  
12 Under SRC 63.335, the ‘Notice of appeal shall state wherein the planning  
13 administrator failed to conform to the provisions of this chapter.’ Having  
14 failed to do so, this basis for appeal is found to be without merit.” Record 11.

15 Although the city’s findings are less than clear, the quoted finding appears to  
16 determine (1) that petitioner’s supplemental answer is insufficient to identify the approval  
17 criterion to which the new arguments are directed and (2) that petitioner’s original notice of  
18 appeal failed to identify the issues raised in the local appeal, as required by SRC 63.335. We  
19 disagree with the city that the supplemental answer does not adequately identify the basis of  
20 petitioner’s argument. The supplemental answer states that the original tentative plan  
21 approval has expired, states the applicable code provision, and sets forth petitioner’s  
22 argument that tentative plan approval has expired. However, we agree with the city that  
23 petitioner failed to state in his notice of appeal “wherein the planning administrator failed to  
24 conform to the provisions” of the SRC regarding potential expiration of tentative plan  
25 approval. *See Johns v. City of Lincoln City*, 146 Or App 594, 602-03, 933 P2d 978 (1997)  
26 (local ordinances may require notice of appeal to describe appeal issues with reasonable  
27 particularity).<sup>3</sup>

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<sup>3</sup>Although intervenor made additional changes to the modified tentative plan application after petitioner filed his notice of appeal, we can neither find anything in the record, nor did petitioner identify anything at oral

1 At oral argument, petitioner advanced two additional reasons why we are not  
2 precluded from considering his first assignment of error: (1) the city waived its waiver  
3 defense by addressing the merits of petitioner’s argument in its findings; and (2) petitioner  
4 was not required to raise the issue in his notice of appeal because it is “jurisdictional.”

5 As discussed above, the city’s findings state that petitioner’s notice of appeal failed to  
6 comply with SRC 63.335, and the city rejected the issues raised in the supplemental answer  
7 for that reason. Record 11. The city went on to adopt both initial and alternative findings  
8 rejecting petitioner’s claim on the merits. *Id.* A local government may adopt alternative  
9 findings, either of which may be sufficient to support the decision. *Garre v. Clackamas*  
10 *County*, 18 Or LUBA 877, 881, *aff’d* 102 Or App 123, 792 P2d 117 (1990). A local  
11 government does not waive one legal theory by adopting alternative findings that express a  
12 second legal theory.

13 Petitioner also argues that because the two-year expiration period is “jurisdictional,”  
14 the city was precluded from considering intervenor’s modified tentative plan application. We  
15 understand petitioner to mean by “jurisdictional” that the Committee and planning  
16 commission lacked authority to consider the modified application because of the purportedly  
17 self-executing tentative plan expiration under the SRC. According to petitioner, once the  
18 tentative plan expired by operation of law after two years, the city was divested of authority  
19 to reconsider the application.

20 A local government has original “jurisdiction” over its own land use proceedings. A  
21 local government’s “jurisdiction,” unlike LUBA’s, is not dependent upon threshold  
22 requirements such as a “land use decision” or a properly executed notice of intent to appeal.  
23 *See* ORS 197.825; ORS 197.830(9). In essence, petitioner disagrees with the city’s  
24 alternative legal conclusion that the tentative plan approval did not expire. Regardless of the

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argument, that would demonstrate that the two-year expiration period issue could not have been raised in the original notice of appeal.

1 correctness of that decision, the city had the authority to make the decision in the first  
2 instance and, under the city’s view of SRC 63.335, petitioner was required to raise the issue  
3 in his notice of appeal.

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioner prefaces the three subassignments of error under his second assignment of  
7 error by arguing that the tentative plan application does not comply with the applicable local  
8 ordinances and regulations as required by ORS 92.090.<sup>4</sup> Respondents assert, and we agree,  
9 that petitioner did not raise the issue of compliance with ORS 92.090 below, and he is  
10 precluded from raising that issue for the first time at LUBA. ORS 197.763(1). However,  
11 petitioner also asserts in his three subassignments of error that the application does not  
12 comply with the requirements of the local subdivision ordinance. We will address these three  
13 arguments in turn.

14 **A. Streets and Public Access Ways**

15 Petitioner argues that the tentative plan application does not provide sufficiently  
16 detailed information concerning the locations of existing and proposed streets and public  
17 access ways abutting the boundaries of the proposed subdivision.

18 SRC 63.040(e)(2) provides, in pertinent part:

19 “\* \* \*The detailed plan shall clearly show \* \* \*;

20 “\* \* \* \* \*

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<sup>4</sup> ORS 92.090(2) provides, in pertinent part:

“No tentative plan for a proposed subdivision and no tentative plan for a proposed partition shall be approved unless:

“\* \* \* \* \*

“(c) The tentative plan complies with the applicable zoning ordinances and regulations and the ordinances or regulations adopted under ORS 92.044 that are then in effect for the city or county within which the land described in the plan is situated.”

1           “(2) The location, names, and right-of-way widths of all existing and  
2           proposed streets and public access ways abutting the boundaries of the  
3           proposed subdivision[.]”

4           Respondents assert that even if the information regarding streets and access ways is  
5           required under SRC 63.040(e)(2), the failure to include required information in a land use  
6           application is harmless error and therefore is not a basis for reversal or remand. In  
7           *McConnell v. City of West Linn*, 17 Or LUBA 502 (1989), we addressed this issue as  
8           follows:

9           “We have held that omission of required information from an application is  
10          harmless procedural error if the required information is located elsewhere in  
11          the record. \* \* \* However, if the required information is not available  
12          elsewhere in the record, and is necessary for a determination of compliance  
13          with applicable approval standards, such an error is not harmless and warrants  
14          reversal or remand of the challenged decision. \* \* \*.” *Id.* at 525 (internal  
15          citations omitted).

16          The information required to be submitted as part of the application by SRC  
17          63.040(e)(2) appears to have been omitted, and respondents do not identify the information  
18          elsewhere in the record. The city responded to this argument below, stating:

19          “The planning administrator has significant information within [his]  
20          knowledge and may not require all information referenced in SRC 63.038.  
21          Thus, the planning administrator can accept an application as complete if the  
22          *additional information within the planning administrator’s unique knowledge*  
23          allows the planning administrator to review the tentative plan.” Record 7  
24          (emphasis added).

25          The planning administrator’s “unique knowledge” is not included in the record and is  
26          thus unavailable as a source of evidentiary support for the challenged decision on appeal.  
27          Therefore, the required information is not located anywhere in the record.

28          Respondents also argue that, even if the information required by SRC 63.040(e)(2) is  
29          not available elsewhere in the record, petitioner has not established any connection between  
30          the missing information and an applicable approval criterion. We disagree. Petitioner argues  
31          that the street and access way information is necessary to demonstrate compliance with SRC  
32          63.051(a)(2), which provides:

1 “The purpose of tentative plan review of a subdivision or partition is to insure  
2 that:

3 “\* \* \* \* \*

4 “(2) The proposed street system in and adjacent to a subdivision or  
5 partition conforms to the Salem Transportation System Plan adopted  
6 under SRC 64.230, and is designed in such a manner as to provide for  
7 the safe, orderly, and efficient circulation of traffic into, through, and  
8 out of the subdivision or partition.”

9 Although SRC 63.051(a)(2) is ostensibly a purpose statement, SRC 63.051(b)  
10 provides that failure to meet the standards of SRC 63.051(a) “shall be grounds for denial of  
11 tentative plan approval.”<sup>5</sup> Petitioner has adequately demonstrated that the omitted  
12 information is necessary to demonstrate compliance with SRC 63.051(a)(2).<sup>6</sup>

13 The application does not include required information regarding all existing and  
14 proposed streets and access ways abutting the proposed subdivision. The information is not  
15 located elsewhere in the record, and the information is necessary to demonstrate compliance  
16 with an applicable approval criterion. Therefore, the failure to provide that information is not  
17 harmless procedural error.

18 This subassignment of error is sustained.

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<sup>5</sup> SRC 63.051(b) provides:

“Lack of compliance with the standards set forth in [SRC 63.051(a)] shall be grounds for denial of tentative plan approval, or for the issuance of certain conditions necessary to more fully satisfy such considerations.”

<sup>6</sup> Additionally, the failure to provide the required information regarding utilities, facilities, and easements also affects compliance with the tentative plan approval criteria. SRC 63.046(b)(2) requires findings that “[p]rovisions for water, sewer, streets, and storm drainage facilities comply with the city’s public facility plan.” SRC 63.046(b)(3) requires findings that “[t]he tentative plan complies with all applicable provisions of this Code \* \* \*.”



1           **B.       Detention Facilities, Drainage Courses, and Easements**

2           Petitioner argues that the tentative plan application does not provide sufficiently  
3 detailed information regarding existing and contemplated detention facilities, drainage  
4 courses, and easements.

5           SRC 63.040(e) provides, in pertinent part:

6           “\* \* \* The detailed plan shall clearly show \* \* \*:

7           “\* \* \* \* \*

8           “(7)   The location, size, and use of all contemplated and existing public  
9           areas, including all existing easements, and contemplated or existing  
10          detention facilities, within the proposed subdivision;

11          “(8)   The location and disposition of any wells, creeks, drainage courses,  
12          wetlands identified on the State Wetland Inventory, detention  
13          facilities, drainage ways, septic tanks, drain fields, and easements in or  
14          adjacent to the proposed subdivision[.]”

15          Respondents again rely on the planning administrator’s “unique knowledge” to  
16 provide the missing information and argue that the omitted information is not necessary to  
17 demonstrate compliance with an applicable approval criterion. We disagree. As we discussed  
18 above, the planning director’s “unique knowledge” is not in the record and is therefore not  
19 available as a source of evidentiary support. Petitioner argues that the missing utility and  
20 easement information is necessary to demonstrate compliance with SRC 63.051(a)(3), which  
21 provides, in pertinent part:

22          “The purpose of tentative plan review of a subdivision or partition is to insure  
23 that:

24          “\* \* \* \* \*

25          “(3)   That the proposed subdivision or partition will be adequately served \*  
26          \* \* by other utilities appropriate to the nature of the subdivision or  
27          partition.”

28          The omitted information is necessary to determine whether the subdivision will be  
29 adequately served by other utilities appropriate to the nature of the subdivision. Petitioner

1 has adequately demonstrated that the omitted information is necessary to demonstrate  
2 compliance with SRC 63.051(a)(3).<sup>7</sup>

3 The application does not include required information regarding utilities, facilities,  
4 and easements. The information is not located elsewhere in the record, and the information is  
5 necessary to demonstrate compliance with an applicable approval criterion. Therefore, the  
6 failure to provide that information is not harmless error.

7 This subassignment of error is sustained.

### 8 **C. Street Profiles**

9 Petitioner argues that the tentative plan does not provide street profiles where the  
10 proposed street grade is greater than six percent.

11 SRC 63.040(f) provides that tentative plans shall include:

12 “Street profile within 100 feet of any point where the street grade is proposed  
13 to be greater than 6 percent or the overall topography of the land is greater  
14 than 10 percent.”

15 Neither petitioner nor respondents address the issue of whether street profiles are  
16 actually required due to the grade of the streets or the overall topography of the area.  
17 However, petitioner raised the issue below, and the city was required to respond to the issue.  
18 *Thomas v. Wasco County*, 30 Or LUBA 302, 310 (1996). The city does not contend that the  
19 information is contained in the record and again relies on the planning administrator’s unique  
20 extra-record additional knowledge. Petitioner asserts that approval of the tentative plan  
21 without the allegedly required street profiles implicates compliance with SRC 63.051(a)(2),  
22 which requires that the tentative plan “provide for the safe, orderly, and efficient circulation  
23 of traffic into, through, and out of the subdivision.” We believe petitioner has adequately

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<sup>7</sup> As noted earlier, SRC 63.051(b) provides that failure to meet the standards of SRC 63.051(a) “shall be grounds for denial of tentative plan approval.”

1 demonstrated that the omitted information is necessary to demonstrate compliance with SRC  
2 63.051(a)(2).

3           The application does not include required information regarding street profiles. The  
4 information is not located elsewhere in the record, and the information is necessary to  
5 demonstrate compliance with an applicable approval criterion. Therefore, the failure to  
6 provide that information is not harmless error.

7           This subassignment of error is sustained.

8           The second assignment of error is sustained.

9           The city's decision is remanded.