

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SIUSLAW ROD AND GUN CLUB,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF FLORENCE,

10 *Respondent,*

11
12 and

13
14 HECTOR MORALES,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2004-047

18
19 FINAL OPINION

20 AND ORDER

21
22 Appeal from City of Florence.

23
24 Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of
25 petitioner.

26
27 Kathryn P. Brotherton, Eugene, filed a response brief and argued on behalf of
28 respondent. With her on the brief was Emily N. Jerome and Harrang, Long, Gary, Rudnick,
29 PC.

30
31 Heather A. Young, Springfield, filed a response brief and argued on behalf of
32 intervenor-respondent. With her on the brief was Laurence E. Thorp and Thorp, Purdy,
33 Jewett, Urness and Wilkinson, PC.

34
35 BASSHAM, Board Member; HOLSTUN, Board Chair; DAVIES, Board Member,
36 participated in the decision.

37
38 REMANDED

10/26/2004

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

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NATURE OF THE DECISION

Petitioner appeals a decision by the interim city planning director rejecting petitioner’s local appeal of a planning commission decision granting tentative approval of a residential subdivision.

FACTS

Petitioner owns property next to a parcel on which intervenor-respondent (intervenor) proposes a 39-lot residential subdivision. Petitioner’s representatives appeared before the city planning commission in opposition to intervenor’s application for tentative subdivision plat approval. On October 28, 2003, the planning commission issued a written decision approving the application. Petitioner filed a “petition for appeal” with the city on November 10, 2003, pursuant to Florence City Code (FCC) 10-1-1-7.¹ The “petition for appeal” was

¹ FCC 10-1-1-7 provides, in relevant part:

“Under this Title, any quasi-judicial decision of the Planning Commission or Design Review Board may be appealed to the City Council in accordance with the following procedure:

“A. Such appeal shall be initiated within fifteen days after the Planning Commission or Design Review Board has rendered the decision appealed from by filing written notice of intent to appeal with the City Recorder. The person filing the notice of intent to appeal shall also certify the date that a copy of the notice was delivered or mailed by first class mail postage prepaid to all affected parties. If a person filing the notice of intent to appeal fails to so certify in writing, the City Recorder shall not accept for filing the notice of intent to appeal. Except when extended as provided in paragraph C of this subsection, all affected parties shall have ten days from the date the notice of intent to appeal was delivered or mailed in which to file a written petition which complies with paragraph D of this subsection. If a notice of intent to appeal is not filed within the fifteen days specified or if the person filing the notice of intent fails to file a written petition within the fifteen days specified the decision of the Commission or Board shall be final.

“* * * * *

“C. In the event the minutes (approved or unapproved) of the proceedings before the Planning Commission or Design Review Board are not available to the affected parties within five days of the filing of the notice of intent to appeal or the request for review, the fifteen day time limit in paragraph A of this subsection shall be extended to allow the affected parties to have ten days from the date the minutes become available to file the written petitions required by this paragraph. When the minutes

1 accompanied by a certification that petitioner had served the petition on four persons that
2 petitioner viewed to be the only affected parties. Record 34.

3 The city treated the “petition for appeal” as the “notice of intent to appeal” described
4 in FCC 10-1-1-7(A). On November 17, 2003, the city recorder informed petitioner by letter
5 that the minutes of the planning commission proceedings were not yet available, and that
6 pursuant to FCC 10-1-1-7(C) the city would advise petitioner when the minutes were
7 available and when the written petition was due. On December 3, 2003, the city provided
8 petitioner with copies of the planning commission minutes. Record 25. On December 15,
9 2003, petitioner’s representative filed the 10-page written petition for appeal. The petition
10 was not accompanied by a certification that copies of the petition were delivered to affected
11 parties, as required by FCC 10-1-1-7(D)(5). However, the body of the petition stated, in
12 relevant part:

13 “* * * This letter will certify that the appellant’s Notice of Intent to Appeal
14 was delivered to affected parties by first class mail postage prepaid on
15 November 10, 2003, pursuant to FCC 10-1-1-7. Additional notice was
16 delivered by the same means on November 24, 2003, due to the failure to
17 initially obtain a complete list of affected parties from the Planning office.
18 Minutes of the Planning Commission meetings * * * were made available on
19 December 4, 2003.” Record 13.

(approved or unapproved) are available, the Planning Director shall notify the City Recorder in writing of their availability and any extension required by this paragraph.

“D. The written petition on appeal shall include:

“* * * * *

“5. A certification of the date that a copy of the written petition on appeal was delivered or mailed by first class mail postage prepaid to all affected parties.

“* * * * *

“I. The Council, by resolution shall establish a schedule of filing fees for all appeals from final decisions of the Planning Commission or Design Review Board. Council shall use the following criteria in establishing such a fee schedule; that the fee charged bear some relation to the City’s cost in processing the appeal; and that the fee or fees charged be consistent in amount with fees charged by similar municipalities or agencies.”

1 The record reflects no further action regarding the appeal until January 28, 2004,
2 when the city issued a notice of public hearing, scheduling petitioner's local appeal for a
3 February 17, 2004 hearing before the city council. On January 30, 2004, the city recorder
4 sent petitioner's representative an e-mail stating, in relevant part:

5 "Please forgive the e-mail, but after reviewing the file on the Morales Appeal
6 late this evening, it appears that we have not received the list of affected
7 parties that you had the Notice of Intent to Appeal delivered to. Your letter of
8 December 15, 2003, states that you had made one mailing and after realizing
9 you didn't have the complete list of Affected Parties, you sent an additional
10 notice. We will need that list of Affected Parties to complete the appeal
11 process.

12 "There is also a \$275.00 filing fee which must be paid.

13 "Thank you for your attention to this matter, and I look forward to hearing
14 from you." Record 7.

15 On February 6, 2004, the city interim planning director sent the following letter to
16 petitioner's attorney:

17 "In reviewing the Morales file, I reviewed correspondence from [petitioner's
18 representative] indicating the intent of the Suislaw Rod & Gun Club to file an
19 appeal of the Morales project approval. In doing so, I discovered major
20 omissions from the required steps to process an appeal. FCC 10-1-1-7, D.5,
21 requires '[a] certification of the date that a copy of the written petition on
22 appeal was delivered or mailed by first class mail postage prepaid to all
23 affected parties.' No such certification accompanied the written petition.

24 "In addition, there is no record of the Suislaw Rod & Gun Club having
25 remitted the filing fee (\$275) to initiate the appeal.

26 "With these errors on the part of your client, and after conferring with the City
27 Manager and the City Attorney, I find that there is no legal basis for
28 proceeding with an appeal of the Planning Commission's approval of
29 Resolution 03-06-24-14. The timeline for appeal has expired. No appeal will
30 be processed." Record 6.

31 The February 6, 2004 letter rejected petitioner's local appeal of the planning
32 commission decision, and the city subsequently canceled the public hearing scheduled before
33 the city council on that appeal.

1 On February 27, 2004, petitioner filed with LUBA a notice of intent to appeal that
2 appealed both (1) the planning commission decision and (2) the February 6, 2004 letter.
3 LUBA required petitioner either to (1) elect to appeal only one of the two decisions or (2) file
4 a separate notice of intent to appeal for the second decision. Petitioner filed a second notice
5 of intent to appeal, and the appeal of the February 6, 2004 decision was assigned LUBA No.
6 2004-047.² We now resolve petitioner’s challenges to the February 6, 2004 decision.

7 **MOTION TO STRIKE**

8 The city moves to strike pages 3-4, 5-7, and 19-20 of the appendix to the petition for
9 review, arguing that the documents therein are not in the record and petitioner has not offered
10 any basis for LUBA to consider extra-record documents. Petitioner concedes that the
11 documents are not in the record, and does not move to take evidence under OAR 661-010-
12 0045 or offer any other basis for us to consider those documents. Absent circumstances not
13 present here, our review is limited to the local record. ORS 197.835(2). The motion to strike
14 is granted.

15 **OBJECTION TO RECORD SUPPLEMENT**

16 Petitioner objects to a form letter from the Board to the parties listing the dates of the
17 city comprehensive plan and code on file with LUBA, and requesting that the respondent
18 provide updated copies if more recent updates are available. Petitioner objects to inclusion of
19 the city comprehensive plan or land use regulations into the record of this appeal, other than
20 the three pages of city code included in the record filed June 16, 2004.

21 Petitioner fails to appreciate that copies of the city comprehensive plan and land use
22 regulations provided to us by respondent are not part of the local record or LUBA’s record on

² We ultimately granted the city’s motion to dismiss LUBA No. 2004-033, the appeal of the planning commission decision. *Suislaw Rod & Gun Club v. City of Florence*, ___ Or LUBA ___ (LUBA No. 2004-033, May 26, 2004). Our reasons for dismissing that appeal are set out in a separate order issued that date. *Suislaw Rod & Gun Club v. City of Florence*, ___ Or LUBA ___ (LUBA Nos. 2004-033/047, Order on Motion to Dismiss, May 26, 2004).

1 appeal. Petitioner also fails to appreciate that the Board has consistently taken official notice
2 of local government comprehensive plans and land use regulations, pursuant to Oregon
3 Evidence Code 202. Petitioner’s objection is denied.

4 **FIRST ASSIGNMENT OF ERROR**

5 The challenged February 6, 2004 letter sets out two bases for rejecting petitioner’s
6 local appeal. First, that petitioner failed to file a certification that the written petition had
7 been delivered to affected parties, as required by FCC 10-1-1-7(D)(5), and second, that
8 petitioner failed to submit the required \$275 filing fee.

9 Petitioner argues that the planning director has no authority under the relevant code
10 provisions to summarily reject an appeal that has already been accepted and scheduled for a
11 hearing, on either of the two cited bases. According to petitioner, once the city accepted the
12 local appeal and scheduled it for a public hearing before the city council, the planning
13 director was without authority to belatedly declare that the appeal had not been perfected and
14 then to reject the appeal. We understand petitioner to argue that the two cited bases—failure
15 to certify service of the written petition and failure to pay the filing fee—are not
16 “jurisdictional” under the city’s code, in the sense that their *untimely* performance is not a
17 sufficient basis to reject the local appeal and divest the city council of jurisdiction to review
18 the appeal. Therefore, we understand petitioner to argue, the city must give petitioner a
19 reasonable opportunity to cure the defects by providing the required certificate of service and
20 paying the required fee. According to petitioner, the January 30, 2004 e-mail was the first
21 notice it had that there *was* an appeal fee, and that e-mail imposed no deadline to submit the
22 fee or suggested that dismissal would ensue if the fee was not submitted within a particular
23 timeframe. Further, petitioner argues that the February 6, 2004 letter from the interim
24 planning director was the first hint petitioner had that the city believed the petition for appeal
25 filed December 15, 2003, was missing the certificate of service required by FCC 10-1-1-
26 7(D)(5).

1 The city responds that petitioner’s failure to provide the certificate of service for the
2 written petition and petitioner’s failure to pay the \$275 filing fee means that petitioner failed
3 to perfect the local appeal within the time prescribed. In the city’s view, because petitioner
4 failed to perfect the local appeal within the 15-day appeal period set out in FCC 10-1-1-7(A),
5 and that period had already expired, the city lacked jurisdiction over the appeal and properly
6 dismissed it. Respondent’s Brief 5-6. The city cites several authorities, including *Breivogal*
7 *v. Washington County*, 114 Or App 55, 834 P2d 473 (1992), and *Tipton v. Coos County*, 29
8 Or LUBA 474 (1995), *aff’d* 137 Or App 633, 904 P2d 1094 (1995), for the proposition that
9 where a local government’s filing requirements for local appeals are “jurisdictional,” failure
10 to satisfy those requirements within the time prescribed deprives the local government of
11 jurisdiction to hear the appeal. The city also cites *Ramsey v. City of Portland*, 29 Or LUBA
12 139 (1995), for the proposition that the city may reject an appeal where the appellant fails to
13 file the required appeal fee.

14 Intervenor agrees with the city that the interim planning director correctly rejected
15 petitioner’s appeal for failure to provide the required certificate of service and pay the
16 required fee. According to intervenor, FCC 10-1-1-4(B)(4) prohibits the planning director
17 from accepting an appeal or a petition for review, once the director determines that the appeal
18 or petition is missing required information or fees.³ Intervenor further argues that there are
19 two additional bases, not cited by the director, for dismissing petitioner’s appeal.⁴

³ FCC 10-1-1-4 provides, in relevant part:

- “A. Applications and Petitions required by Title 10 and 11 of this Code shall be on forms prescribed by the City.

- “B. Except when this Code provides to the contrary, acceptance of an application or petition regulated by Titles 10 and 11 of this Code:
 - “1. May be received by the Planning Director at any time and shall not be considered as accepted solely because of having been received.

1 As the cases cited by the city indicate, the authority of local government planning
2 staff to reject a local appeal for failure to comply with code procedural requirements depends
3 greatly on the particular requirements of the code. At issue in *Breivogal* was a county code
4 provision that specified that failure to file a signed petition for local appeal by the due date
5 was a “jurisdictional defect.”⁵ The petitioner filed a timely petition but failed to sign it.
6 After initially accepting the petition, the county planning director dismissed the appeal as
7 “deficient” and “negated” on account of the absent signature. LUBA reversed, after
8 concluding that a signature on a cancelled check provided with the petition sufficed to satisfy
9 the signature requirement. The Court of Appeals disagreed, finding that there is no
10 reasonable doubt that the county code required a signature on the petition itself. 114 Or App
11 at 58. The court remanded to LUBA to address unresolved estoppel issues. On remand,
12 LUBA rejected those estoppel issues, including an argument that the petitioners had complied
13 with the “spirit” of the signature requirement. Where a local filing requirement is

“2. Shall be reviewed by the Planning Director within fourteen (14) days to determine if the application is complete, including required drawings, plans, forms, statements and fees paid.

“3. Shall be determined to be complete and shall be accepted when the required information, forms and fees are included.

“4. Shall not be accepted when the Director determines that an application is incomplete. When an application or petition is incomplete, the Director shall mail written notice to the applicant and disclose exactly what information, forms or fees are lacking. The application shall be deemed complete by the Director upon receipt of the missing information, forms or fees. If the applicant refuses to submit the missing information or forms, the application shall be deemed complete for review and action on the 31st day after the Director first received the application. The Director shall mail written notice to the applicant when the application is accepted.”

⁴ We briefly describe the two additional bases asserted in intervenor’s brief, in n 7 below.

⁵ The code provision at issue in *Breivogal* stated, in relevant part:

“Failure to file a signed original petition * * * by 5:00 p.m. on the due date, with the proper fee, shall be a jurisdictional defect. Failure to amend a petition to correct any other identified deficiency within seven days (7) calendar days of notice thereof shall be a jurisdictional defect.” 114 Or App at 57.

1 “jurisdictional,” we stated, neither LUBA nor the local government may disregard that
2 requirement. *Brievogel v. Washington County*, 24 Or LUBA 63, 68, *aff’d* 117 Or App 195,
3 843 P2d 982 (1992) (citing *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA
4 690, 693 (1988)).⁶

5 Similarly, in *Tipton* the county code required that the hearings body “shall summarily
6 dismiss the appeal” if it finds that the notice of intent to appeal does not comply with
7 applicable filing requirements, including a requirement to state facts establishing that the
8 appellant has standing. The county board of commissioners rejected the appeal because the
9 petitioners’ notice of intent to appeal failed to state facts establishing their standing to appeal
10 the planning commission decision. LUBA affirmed, concluding that the filing requirement
11 was “jurisdictional” and the county was mandated to dismiss the appeal. 29 Or LUBA at
12 477.

13 In *Ramsey*, the petitioner filed a local appeal just before 4:30 p.m. on the last day to
14 file the appeal, without either paying the required fee or submitting an approved fee waiver,
15 although the appeal was accompanied by a request for a fee waiver. Planning staff returned
16 the appeal the next business day, for failure to pay the required fee or submit an approved fee
17 waiver. The city’s code required that the appeal be accompanied by either the fee or a waiver
18 approved prior to submitting the appeal. We affirmed the staff decision to reject the local
19 appeal, concluding that it was petitioner’s responsibility to either submit the required fee or
20 obtain a fee waive prior to filing the appeal. 29 Or LUBA at 145.

21 As the foregoing cases indicate, where the local government code makes it clear that
22 certain appeal requirements are “jurisdictional,” or mandatory prerequisites to an appeal, then
23 planning staff can and indeed must reject an appeal that does not satisfy those requirements.

⁶ As the court noted in *Brievogel*, 114 Or App at 57, n 2, the term “jurisdictional” is probably not the most accurate description of such code provisions. According to the court, such local code appeal provisions are more accurately viewed as imposing “certain procedural requirements that are mandatory prerequisites to an appeal to the governing body.” *Id.*

1 The initial question in the present case, then, is whether anything in the FCC makes
2 submission of a certificate of service with the petition on appeal and submission of the filing
3 fee “jurisdictional,” or mandatory prerequisites to an appeal, as the city contends. We
4 conclude that the answer is no.

5 The pertinent FCC provisions mandate that failure to comply with three specified
6 appeal requirements will result in rejection or dismissal of the appeal. First, FCC 10-1-1-
7 7(A) provides that if the appellant fails to certify that the *notice of intent to appeal* was served
8 on the appropriate persons, “the City Recorder shall not accept for filing the notice of intent
9 to appeal.” *See* n 1. FCC 10-1-1-7(A) further specifies that if the appellant fails to file either
10 (1) the notice of intent to appeal or (2) the written petition on appeal within the prescribed
11 periods, then the appealed decision “shall be final.” *Id.* No similar language is used with
12 respect to other FCC local appeal requirements. In particular, nothing in the FCC 10-1-1-
13 7(D) specifications for the content of the petition on appeal suggests that failure to comply
14 with those specifications must result in dismissal of the appeal. With respect to appeal fees,
15 while FCC 10-1-1-7(I) provides that the city council may by resolution establish a schedule
16 of filing fees, nothing in the FCC cited to us expressly requires that the filing fee accompany
17 the filing of the notice of intent to appeal, much less suggests that failure to do so is a
18 jurisdictional defect that must result in dismissal. Consequently, *Breivogel*, *Tipton* and
19 *Ramsey* do not provide much guidance in the present case, because those cases all involve
20 violations of code provisions that are expressly jurisdictional or mandated prerequisites to
21 appeal.

22 The authority of local government staff to summarily reject a local appeal for failure
23 to comply with appeal requirements that the code does *not* make “jurisdictional” or
24 mandatory prerequisites to appeal is less clear. However that question is resolved in other
25 cases, its resolution in the present case is relatively straightforward. As intervenor points out,
26 albeit for a different purpose, the city’s code appears to explicitly address circumstances

1 where an application or petition is incomplete for failure to submit required information or
2 fees. FCC 10-1-1-4, quoted in n 3, is partially directed at initial acceptance of land use
3 permit applications, and in that respect appears to implement ORS 227.178(2). However, it
4 also governs acceptance of “petitions” regulated by FCC Title 10, which would seem to
5 include notices of intent to appeal and petitions for appeal under FCC 10-1-1-7. Under
6 FCC 10-1-1-4, unless the code elsewhere provides to the contrary, the planning director must
7 review an application or petition within 14 days to determine if all required information is
8 included and fees paid. If information is missing or fees are unpaid, the director shall mail
9 written notice to the applicant identifying the missing information or fees. FCC 10-1-1-
10 4(B)(4).

11 As noted above, FCC 10-1-1-7(A) mandates rejection or dismissal of an appeal in
12 three circumstances, and failures to provide the certificate of service along with the petition
13 on appeal or pay the required fee are not among those circumstances. Read together with
14 FCC 10-1-1-7, FCC 10-1-1-4 appears to require the planning director to provide the appellant
15 an opportunity to cure failure to submit the appeal fee and the certificate of service that must
16 accompany the petition on appeal. For whatever reason, no one at the city apparently
17 reviewed petitioner’s notice of intent to appeal to determine if it was accompanied by the
18 filing fee, or the petition on appeal to determine if it was accompanied by a certificate of
19 service, until long after the notice and petition were submitted. The February 6, 2004
20 decision rejecting petitioner’s appeal did not provide petitioner with an opportunity to pay the
21 fee and submit the certificate of service, as FCC 10-1-1-4 appears to require, but rather
22 proceeded on the assumption that petitioner’s initial failure to submit the fee and certificate
23 deprived the city of authority to proceed on the appeal.

24 Although petitioner does not cite to FCC 10-1-1-4, that code provision supports its
25 argument that the planning director did not have the authority to summarily reject petitioner’s
26 appeal without providing petitioner an opportunity to cure the two identified deficiencies.

1 Because (1) the two identified deficiencies are not “jurisdictional” under the code, (2) the
2 code seems to require that the planning director provide an opportunity to cure the two
3 identified defects, and (3) nothing in the code authorizes the planning director to summarily
4 reject an appeal based on the two identified defects, we agree with petitioner that the
5 planning director erred in doing so. Therefore, remand is necessary for petitioner’s appeal to
6 proceed to the city council. *See Shaffer v. City of Salem*, 137 Or App 583, 905 P2d 1175
7 (1995) (remanding to the city council to hear a local appeal that was rejected by the planning
8 manager, where the manager had no authority to reject the local appeal).

9 There remains the question of what actions the city council must, or can, take with
10 respect to petitioner’s appeal on remand. Without intending to prescribe any particular range
11 of action, it seems to us that the city’s actions on remand potentially include at least the
12 following. First, the city council could provide petitioner the required written notice and
13 opportunity to cure the two identified deficiencies by a date certain and proceed to a hearing
14 on the merits of the appeal if petitioner does cure, or dismiss the appeal if petitioner does not.
15 In addition, if the appeal goes forward, to the extent it is consistent with the city code or other
16 applicable authority, the city council could consider one or both of the additional grounds
17 raised by intervenor in his response brief, and reject the appeal on those grounds.⁷

18 The first assignment of error is sustained.

⁷ The two additional reasons raised by intervenor are (1) the certificate of service filed along with the notice of intent to appeal on November 10, 2003, did not list intervenor, and therefore failed to comply with the FCC 10-1-1-7(A) requirement to certify service to “all affected parties”; and (2) the petition on appeal was filed December 15, 2003, after the 10-day deadline imposed by FCC 10-1-1-7(C) expired. Although we need not and do not address the merits of these arguments, we note that the city’s brief takes the position that the filing of the certificate of service on November 10, 2003, adequately complied with the FCC 10-1-1-7(A) requirements. Respondent’s Brief 3. No party responds to intervenor’s arguments regarding timely filing of the petition on appeal under FCC 10-1-1-7(C). It is worth noting, however, that FCC 10-1-1-7(A) specifies that if the petition for appeal is not filed on time that the decision appealed “shall become final.” *See* n 1. In other words, timely filing of the petition for review is among the procedural requirements that the FCC treats as “jurisdictional” or a mandatory prerequisite to maintaining an appeal.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner argues under the second assignment of error that the interim planning
3 director's February 6, 2004 decision failed to advise petitioner of its right to appeal the
4 February 6, 2004 decision to the city council. The city and intervenor respond that the
5 February 6, 2004 decision is not among the decisions that can be appealed to the city council
6 under any FCC provision.

7 We concluded in our discussion of the first assignment of error that the interim
8 planning director lacked authority to reject petitioner's appeal to the city council. Under such
9 circumstances, petitioner is not obligated to appeal the planning director's decision to the city
10 council. *See Shaffer*, 137 Or App at 587 (petitioner is not obligated to appeal to the city
11 council a planning director's facially authoritative and facially final dismissal of his appeal of
12 a hearings officer's decision to the city council). *A fortiori*, the city did not err in failing to
13 provide petitioner notice of appeal rights in the February 6, 2004 decision that petitioner was
14 not obligated to pursue.

15 The second assignment of error is denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 Petitioner argues under the third assignment of error that the October 28, 2003
18 planning commission decision was improperly adopted and noticed and therefore never
19 became final. Because the planning commission decision did not become final, petitioner
20 argues, its attempt to appeal that decision on November 10, 2003, was premature. Petitioner
21 urges us to remand this appeal back to the city with directions to complete the planning
22 commission's approval of the subdivision application, and issue a final decision.

23 We do not understand petitioner's arguments. Petitioner has not established that there
24 were in fact procedural irregularities in adopting or providing notice of the October 28, 2004
25 planning commission decision, much less that any such procedural irregularities affected the

1 finality of the October 28, 2003 decision.⁸ Further, petitioner has not established that any
2 procedural irregularities in adopting or providing notice of the October 28, 2003 decision
3 have a bearing on the February 6, 2004 decision before us. Even if such procedural
4 irregularities occurred with respect to the planning commission decision, they cannot be
5 challenged in an appeal of the February 6, 2004 decision.

6 Finally, petitioner's arguments regarding finality and premature appeal are
7 particularly perplexing. The October 28, 2003 planning commission approval did not
8 become final on the date the planning commission adopted it, because under the city's code
9 there is a 15-day appeal period for planning commission decisions. If no appeal is filed
10 within that 15-day period, the planning commission decision becomes final. FCC 10-1-1-
11 7(A). However, an appeal *was* filed during that 15-day period, which means the planning
12 commission decision did not become final on expiration of the 15-day period. The finality of
13 the planning commission decision depends on the outcome of petitioner's local appeal, which
14 has yet to be decided. Petitioner's arguments regarding finality and premature appeal provide
15 no bases to reverse or remand the February 6, 2004 decision.

16 The third assignment of error is denied.

17 The city's decision is remanded.

⁸ Petitioner does not move to take evidence outside the record under OAR 661-010-0045 with respect to the alleged procedural irregularities, but simply argues that the present record, which includes few documents from the planning commission proceedings, fails to establish that required procedures were followed.