BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MILO PHILLIPS,
Petitioner,

vs.

CITY OF CORVALLIS,
Respondent,

and

HOLLINGSWORTH & VOSE FIBER COMPANY,
Intervenor-Respondent.

LUBA No. 2022-019

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Charles W. Woodward IV represented petitioner.

David E. Coulombe represented respondent.

Steven P. Hultberg represented intervenor-respondent.

RUDD, Board Member; RYAN, Board Member, participated in the decision.

ZAMUDIO, Board Chair, did not participate in the decision.

DISMISSED 08/02/2022

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a city land use compatibility statement (LUCS) issued by a city planner to intervenor Hollingsworth & Vose Fiber Company (HVFC) to fulfill an Oregon Department of Environmental Quality (DEQ) requirement for air-quality-related permits.

MOTIONS TO DISMISS

The city and HVFC each filed motions to dismiss petitioner's appeal. The city's motion to dismiss argues, in part, that LUBA lacks jurisdiction because the LUCS falls under the exclusion to our jurisdiction for certain land use compatibility statements. Both the city and HVFC's motions to dismiss take the position that LUBA lacks jurisdiction because petitioner did not exhaust local remedies. We now resolve the motions to dismiss and conclude we lack jurisdiction over the appeal because petitioner failed to exhaust their administrative remedies as required by ORS 197.825(2)(a). We also conclude that we do not have jurisdiction because the appealed decision is excluded from our review under ORS 197.015(10)(b)(H).[1]

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[1] In a final opinion and order issued this date in *Monroe v City of Corvallis*, ___ Or LUBA ___ (LUBA No 2022-036, Aug 2, 2022), we conclude that a city council decision affirming a city manager's decision affirming the city planner's LUCS decision falls within the exclusion to our jurisdiction in ORS 197.015(10)(b)(H)(i) and (iii).

A. Procedural Posture

On March 1, 2022, petitioner filed their notice of intent to appeal (NITA) a June 4, 2021 LUCS signed by a city planner. On March 10, 2022, HVFC filed its motion to intervene. On March 22, 2022, the city filed a motion to dismiss the appeal on multiple bases and to suspend the proceedings until we resolved the motion to dismiss. On March 25, 2022, prior to the transmittal of the record to LUBA, we issued our order granting HVFC's motion to intervene and suspending the appeal until we addressed the city's motion to dismiss.[2]

On April 15, 2022, HVFC filed its motion to dismiss and on April 29, 2022, petitioner filed its response to HVFC's motion to dismiss.[3]

B. Historical Operations of Facility

Two documents provided as attachments to pleadings set out a history of the operation of the facility. These are the excerpt of the Emissions Rate Agreement (Emissions Agreement) and the excerpt of a Mutual Agreement and

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[2] On April 5, 2022, petitioner filed their response to the city's motion to dismiss. On April 19, 2022, the city filed its reply to petitioner's response to its motion to dismiss. On May 3, 2022, petitioner filed a sur-reply to the city's reply. In resolving the appeal, we have considered all pleadings filed.

[3] The city asks that we take official notice of various local land use regulations and its decision "Willamette River Greenway Conditional Development Approval Order 2017-038" (Order 2017-038). City's Motion to Dismiss 4. Because we dismiss this appeal for failure to exhaust administrative remedies, we do not address this motion.

Order (Mutual Agreement).[4] We take the summary of the historical operations on the subject property from these documents.

The facility manufactures glass fiber in plants we refer to as Plant 1 and Plant 2. In 1995, Evanite Fiber Corporation (Evanite), HVFC's predecessor in interest, applied to construct the second manufacturing building on the subject property, Plant 2.

> "In that application, Evanite proposed the use of nitrogen oxide (NOx) and carbon monoxide (CO) emission factors for boilers in order to estimate fiberizer emissions. In order to avoid becoming a major source Evanite requested a synthetic minor limit for NOx. As part of the 1995 application, Evanite demonstrated through modeling that the Facility's NOx emissions would not cause or contribute to an exceedance of the National Ambient Air Quality Standards or result in a [Prevention of Significant Deterioration] increment exceedance. Evanite also offset its particulate emissions with 90 tons of particulate (PM) and 65 tons of particulate with aerodynamic diameter of less than or equal to 10 micrometers (PM_{10}) contemporaneous reductions at their adjoining hardboard

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[4] The provided pages from the Mutual Agreement do not include a signature page but based upon statements in the provided pages, we assume that the anticipated parties are HVFC and DEQ. We are unable to discern from the portion of the Mutual Agreement provided whether it has been executed by the parties. However, because no party objects to our consideration of the excerpt, we accept the statements therein as true for purposes of this opinion. *Murray v. Multnomah County,* 56 Or LUBA 370, 373 (2008) ("we have held that we may consider documents attached to the parties' pleadings, even without a motion under OAR 661-010-0045, for the limited purpose of determining whether we have jurisdiction over the challenged decision.").

The Emission Agreement was provided in full and was executed by the parties to be effective April 28, 2021. Respondent's Reply to Petitioner's Response to Respondent's Motion to Dismiss Ex 4, at 1-2.

> plant, thus demonstrating that the project would result in a net air quality benefit." Petitioner's Response to Respondent's Motion to Dismiss Ex 3, at 1.

On May 17, 1996, DEQ issued Evanite a minor source Air Contaminant Discharge Permit (ACDP) modification authorizing new construction and limiting certain emissions.[5] Petitioner's Response to Respondent's Motion to Dismiss Ex 3, at 2.

HVFC later acquired the facility from Evanite. In October and December 2014, HVFC performed emission testing for Plant 1, and in February 2015, HVFC performed emission testing for Plant 2. The 2014 and 2015 test results indicated that the Facilities' combined CO emissions exceeded the Title V major source threshold. The Mutual Agreement explains that when Evanite submitted the 1995 expansion application, Plants 1 and 2's combined potential CO emissions exceeded the allowed thresholds.

We understand DEQ to have determined that the results of the 2014 and 2015 testing revealed that the facility expansion permitted in 1996 had the capacity to create emissions requiring an ACDP that Evanite did not obtain, and HVFC's operation of the facility since its acquisition of the facility has been in violation of air quality standards. Petitioner's Response to Respondent's Motion to Dismiss Ex 3, at 3. As a consequence of that determination, DEQ is now requiring HVFC to obtain an ACDP, necessitating HVFC to obtain a LUCs from

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[5] These emission levels are reflected in the Emissions Agreement. Respondent's Reply to Petitioner's Response to Respondent's Motion to Dismiss Ex 4, at 2.

the city. As discussed below, we also understand that HVFC seeks to update another air quality permit to reflect the installation of new pollution control equipment resulting in the reduction of certain other emissions.

C. Completion of the DEQ LUCS

"ORS 197.180(1)(b) requires state agencies to take actions that are authorized by law with respect to programs affecting land use '[i]n a manner compatible with acknowledged comprehensive plans and land use regulations.' All agencies are required to adopt and have adopted rules to comply with ORS 197.180(1)(b)." *Zenith Energy Terminals Holdings LLC v. City of Portland*, ___ Or LUBA ___, ___ (LUBA No 2021-083, Feb 3, 2022) (slip op at 10), *aff'd* 319 Or App 538, 509 P3d 120, *appeal pending* (S068613).

DEQ has adopted regulations setting out its coordination program and has developed a standard LUCS form. The preprinted language on the LUCS form explains that

> "state agencies with permitting or approval activities that affect land use are required by Oregon law to be consistent with local comprehensive plans and have a process for determining consistency. DEQ activities affecting land use and the requirement for a LUCS may be found in Oregon Administrative Rules (OAR) Chapter 340, Division 18." NITA Ex A, at 1.

As we explained in *Eng v. Wallowa County*,

> "a LUCS decision does not, in itself, approve or deny a proposed land use. In itself, a LUCS decision simply determines whether and how a proposed land use (some aspect of which requires a state agency permit, such as a DEQ septic permit) is categorized and treated under the local government's comprehensive plan and land use regulations. For example, whether under the acknowledged

> zoning and land use regulations the land use is allowed without review, allowed with review, conditionally allowed, prohibited, etc." 76 Or LUBA 432, 443 (2017) (citation omitting).

The DEQ LUCS form includes a portion to be completed by the permit applicant and a portion to be completed by the relevant land use jurisdiction.

The portion of the LUCs to be completed by the applicant includes a place to identify the requested DEQ permits. The permits identified on the appealed LUCS are "Air Quality Title V Permit" and "Air Contaminant Discharge Permit." NITA Ex A, at 2.

The portion of the LUCS to be completed by the applicant also includes a place for the applicant to describe the project for which the LUCS is sought. This portion of the LUCS, as attached to the NITA, states "See Attachment" but no attachments were included with the version of the LUCS attached to the NITA. *Id.* In its motion to dismiss HVFC describes the action which is the subject of the LUCs as follows:

> "It is important to note that [HVFC] does not have any development proposal before the City. [HVFC] does not propose to increase production, increase air emissions, change its operations, or make any physical or operational changes to its facilities. [HVFC] seeks an updated permit from DEQ simply to reflect [HVFC's] actual and historic air emissions." HVFC Motion to Dismiss 3 n 2.

On June 4, 2021, the city planner signed the portion of the form directed to the local jurisdiction. The instructions on this part of the form state:

> "Written findings of fact for all local decisions are required; written findings from previous actions are acceptable. For uses allowed outright by the acknowledged comprehensive plan, DEQ will accept written findings in the form of a reference to the specific plan

> policies, criteria, or standards that were relied upon in rendering the decision with an indication of why the decision is justified based on the plan policies, criteria, or standards." NITA Ex A, at 3.

As quoted above, the instructions on the form explain that written findings are required and DEQ will accept a reference to specific plan policies, criteria, or standards relied upon in rendering the decision with an indication of why the decision is justified.

The city planner checked the box next to "Yes, the activity is allowed outright by (provide reference for local ordinance):" and added the following language "The *existing* Intensive Industrial use is permitted by right based on the MUT zone standards. The MUT zone was adopted as part of the 2006 Corvallis Land Development Code/periodic review update (Ordinances 2006-24 and 2006-29.)" *Id.* (emphasis added).

Under "Additional Comments," the city planner stated:

> "The MUT zone requires a Conditional Development approval if the use intensifies (a change in operation or increase in production that creates need to obtain permit from DEQ because emissions have increased). [HVFC] has entered into voluntary restriction on emissions (lower than allowed by DEQ) based on agreement with the City of Corvallis, Exhibit A – Emission Rate Agreement is attached to this LUCS." NITA Ex A, at 3.

This appeal followed.

D. Exhaustion of Remedies

ORS 197.825(2)(a) limits LUBA's jurisdiction to "those cases in which the petitioner has exhausted all remedies available by right before petitioning the

board for review[.]" The city and HVFC argue that the appeal should be dismissed because petitioner has failed to exhaust local remedies.

Petitioner asserted that its appeal was timely under ORS 197.830(3)(b).[6] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> > "(a) Within 21 days of actual notice where notice is required; or
> >
> > "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Here, petitioner filed their NITA approximately nine months after the appealed decision was made, but arguably within the deadline for appealing a decision made without a hearing in ORS 197.830(3). However, petitioner did not attempt to file a local appeal of the LUCS prior to filing their NITA.

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[6] Petitioner states in its NITA that it is appealing "the [LUCS sent to [DEQ] for the [HVFC] updated Air Contaminant Discharge Permit of June 4, 2021, attached herewith as Exhibit A. The Petitioner knew or should have known about the LUCS on February 9, 2022. *Id.* Therefore, pursuant to ORS 197.830(3)(b) this NITA is timely." NITA 1.

We have discussed the interplay of ORS 197.830 and 197.825(2) in a number of cases. In *Tarjoto v. Lane County*, 29 Or LUBA 408, *aff'd*, 137 Or App 305, 904 P2d 641 (1995), we addressed the interaction between the exhaustion requirement, the then-current version of ORS 197.830(3), and statutory provisions at ORS 215.416(11) or 227.175(10), which allow local governments to make permit decisions without a hearing, if notice and opportunity for a hearing is provided.

> "We held in *Tarjoto* that ORS 197.830(3) does not provide a direct right of appeal to LUBA of a permit decision made without a hearing pursuant to ORS 215.416(11) or 227.175(10), even if the local government failed to provide petitioner with the notice of application and opportunity for appeal required by those statutes. Instead, we applied the tolling and exhaustion principles * * * and dismissed petitioner's direct appeal of the permit decision, on the grounds that petitioner had not yet exhausted the local appeal that the county was required to give to him.
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> "The Court of Appeals affirmed but on the narrower ground that the county had in fact accepted petitioner's belated local appeal." *Comrie v. City of Pendleton*, 45 Or LUBA 758, 769 (2003) (citation omitted).

The court of appeals held that where the county provided Tarjoto with a local appeal, Tarjoto was required to exhaust the appeal. We summarized the holdings, concluding that

> "land use decisions appealed to LUBA pursuant to ORS 197.830(3) or (4) are not subject to the ORS 197.825(2)(a) exhaustion requirement, absent circumstances, such as in *Tarjoto*, where a local government voluntarily grants a local appeal. Land use decisions appealed to LUBA pursuant to ORS 197.830(9) *are* subject to the exhaustion requirement. Even in circumstances where the local government failed to provide required notice of the decision to

> petitioner, petitioner must perfect any local appeal from that decision." *Comrie*, 45 Or LUBA at 772 (emphasis in original).

Intervenor points out that, over its objections, the city processed an appeal by other persons of the LUCS that petitioner seeks to challenge. *Monroe v City of Corvallis*, ___ Or LUBA ___ (LUBA No 2022-036, Aug 2, 2022). As we explained in *Eng v Wallowa County*:

> "Typically, where ORS 197.830(3) applies, any fixed local appeal period has expired by the time the petitioner gains 'actual notice' of the decision or encounters circumstances that would, to a reasonable person, constitute knowledge or constructive knowledge of the decision. Thus, where ORS 197.830(3) applies, the underlying decision has become final, in the sense that no local appeal is available.
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> "Sometimes, however, a local government may voluntarily *choose* to provide a local appeal on a permit decision after the local appeal period has expired, even though the local code does not expressly provide for a belated local appeal after the underlying decision has become final. In that rare circumstance, the petitioner must pursue the local appeal thus provided, and any appeal of the underlying decision directly to LUBA under ORS 197.830(3) will be dismissed. *Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995); *see also Comrie*, 45 Or LUBA at 770-771 (discussing the 'sea change' that *Tarjoto* represents with respect to prior caselaw concerning the exhaustion requirement, in circumstances where the local government issues a 'permit decision' without complying with the statutory procedures governing a 'permit' decision)." *Eng*, 76 Or LUBA at 449 (emphasis in original).

Here, there are apparently two potential local appeal paths for a person such as petitioner to exhaust their administrative remedies. One way to appeal the underlying LUCS decision is through the appeal provisions that apply to land use proceedings in Corvallis Development Code (CDC) 2.19.30.01. The CDC

provides that "[e]very decision relating to the provision of [the CDC] substantiated by findings of every board, commission, committee, hearing officer, and *official* of the City is subject to review by Appeal [.]" CDC 2.19.30.01 (emphasis added).[7]

Another way is (or may be) available through the city's municipal code at Corvallis Municipal Code (CMC) 1.11.010.[8] CMC 1.11.010 provides: "[e]very decision of every board, commission, committee, hearings officer and *official* of the City is subject to review by appeal to Council except those decisions relating

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[7] CDC 2.19.30.04 also provides a deadline for appeals that is "within 12 days after a decision is signed. * * *Appeals to the State Land Use Board of Appeal shall be made in accordance with the provisions of state law."

[8] CMC 1.11.010 provides:

> "Appeal to Council.
>
> "Every decision of every board, commission, committee, hearings officer and official of the City is subject to review by appeal to Council except those decisions relating to the Building Code and Fire Code made by the Building Official, Fire Chief, or Board of Appeals. All appeals to the Council must be filed with the City Recorder within twelve (12) days of the date that the decision was made except as otherwise set forth in the Municipal Code or Land Development Code."

For appeal to the city manager, CMC 1.11.012 provides:

"Every decision by employees of the City are appealable to the City Manager except as otherwise set forth in the Municipal Code or Land Development Code. All appeals must be filed with the City Recorder within twelve (12) days of the date that the decision was made unless otherwise set forth in the Municipal Code."

the Building Code and Fire Code made by the Building Official, Fire Chief, or Board of Appeals." (Emphasis added.)

Petitioner did not file a local appeal and accordingly, we agree with the city and intervenor that petitioner failed to exhaust available remedies. LUBA lacks jurisdiction over the appeal. ORS 197.825(2)(a).

E. LUCS Exclusion to LUBA's Jurisdiction (ORS 197.015(10)(b)(H)

In addition, for the reasons set forth in our decision in *Monroe*, ___ Or LUBA ___, issued this same date, we also conclude that the decision petitioner seeks to appeal is not a land use decision subject to our jurisdiction pursuant to ORS 197.015(10)(b)(H).

The motions to dismiss are granted.

The appeal is dismissed.