BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOUSING LAND ADVOCATES,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent,

and

E3 DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2016-031

ORDER

MOTION TO INTERVENE

E3 Development, LLC (E3), the applicant below, moves to intervene on the side of respondent. Petitioner's notice of intent to appeal in this appeal was filed on March 24, 2016. E3's motion to intervene was filed with LUBA 21 days later, on April 14, 2016. OAR 661-010-0050(1) provides in part that "[s]tatus as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time."

Petitioner opposes the motion to intervene, arguing that although the applicant filed its motion to intervene within 21 days after the notice of intent to appeal was filed, the applicant did not contemporaneously serve a copy of

that motion on petitioner.[1] Petitioner contends that it learned of the motion to intervene indirectly and requested and was provided a copy of the motion to intervene by LUBA, on April 20, 2016. Petitioner also points out that the certificate of service attached to the motion to intervene does not list petitioner's attorney as one of the persons served with a copy of the motion to intervene. We understand petitioner's attorney to contend that the applicant has still not served a copy of the motion to intervene on petitioner's attorney.

Measured from the date a notice of intent to appeal is filed, ORS 197.830(7)(a) and OAR 661-010-0050(2) impose a 21-day deadline for filing a motion to intervene. ORS 197.830(7)(b)(A) grants an applicant standing to intervene, but ORS 197.830(7)(c) requires that a motion to intervene be denied if the motion to intervene is filed after the ORS 197.830(7)(a) 21-day deadline. We understand petitioner to argue that the 21-day deadline for filing the motion to intervene should also be applied to *service* of the motion to intervene and the motion to intervene should be denied as untimely filed. Intervenor has not responded to petitioner's objection to the motion to intervene.

The ORS 197.830(7)(a) 21-day deadline for filing a motion to intervene is strictly enforced. *Grahn v. City of Newberg*, 49 Or LUBA 762, 766 (2005). But the ORS 197.830(7)(a) 21-day deadline is a *filing* deadline, not a *service* deadline. Intervenor's failure to contemporaneously serve petitioner with a

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[1] OAR 661-010-0075(2)(b)(A) provides, in part: "[a]ny document filed with the Board * * * must also be served on all parties contemporaneously."

copy of the motion to intervene was a procedural error that as far as we can tell has not resulted in any prejudice to petitioner's substantial rights. Nevertheless, our rules require that a motion to intervene be served on "all parties." OAR 661-010-0050(2)(e). Intervenor shall have seven days from the date of this order to serve a copy of the motion to intervene on petitioner. If intervenor does not comply with this order and file and serve an amended certificate of service showing that petitioner has been served with a copy of the motion to intervene, within seven days of the date of this order, LUBA will dismiss intervenor from this appeal.

MOTION TO DISMISS

A. Introduction

The city decision that is the subject of this appeal grants intervenor's application for (1) a comprehensive plan/development district map amendment, (2) a variance and (3) subdivision approval. The city apparently has a single map that serves as both its comprehensive plan map and its development district map. Happy Valley Land Development Code (LDC) 16.21.010.[2]

[2] LDC 16.21.010 provides:

> "All development districts contained in this chapter are based on designations formulated for and contained in the Happy Valley revised Comprehensive Plan. The officially adopted land use map in the plan shall be the item used exclusively for the determination of the districts, their boundaries and their designations. The titles and descriptions of districts contained in this chapter are based

Accordingly the approved amendment amends both the LDC and the Happy Valley Comprehensive Plan. For reasons that will become apparent, and to simplify, we refer to the amendment in this order simply as a comprehensive plan map amendment. The decision was rendered by the city planning commission on February 9, 2016. Written notice of that decision was sent to petitioner and others on February 18, 2016. Respondent's Motion to Dismiss, Exhibit 1, page 1. That notice states that the planning commission's decision may be appealed to the city council "within 14 days of the mailing of this Notice of Decision." *Id.* The notice states any such appeal must include "a filing fee of $1000 plus attorney's fees ($2,500 deposit required)[.] *Id.* The notice also states "[i]f no appeal is filed by Thursday, March 3, 2016, at 5:00 p.m., this decision shall be deemed final." *Id.* (Boldface omitted.)

On March 2, 2016 petitioner delivered a letter to the city. In that letter petitioner and another party advanced a number of arguments. Petitioner's Response to Respondent's Motion to Dismiss (Response to Motion to Dismiss) App-1. As relevant here, petitioner argued the plan map amendment must be adopted by the city's governing body (the city council) before it could be final and effective. *Id*. Petitioner took the position that until the city council adopts the amendment "there is nothing to appeal * * *." *Id*. at App-2. According to petitioner, the city never responded to its March 2, 2016 letter, and the city now

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directly upon the designations on the map. No separate zoning map shall exist."

takes the position that the planning commission decision became final on March 3, 2016. Petitioner filed its appeal with LUBA on March 24, 2016 and identifies the planning commission's March 3, 2016 decision as the subject of this appeal.

Generally, where a local appeal is available, that local appeal must be exhausted before filing an appeal with LUBA. ORS 197.825(2)(a); *Kamppi v. City of Salem*, 21 Or LUBA 498, 505 (1991) (where petitioner has an unqualified right of local appeal that appeal must be exhausted before filing an appeal with LUBA).[3] Respondent moves to dismiss this appeal, arguing that because petitioner failed to appeal the planning commission's decision to the city council, petitioner failed to exhaust an available administrative remedy. We set out the LDC provisions that the city relies on in moving to dismiss before turning to the merits.

B. Applicable LDC Requirements

The comprehensive plan map amendment was initiated by intervenor. Such amendments are processed under the city's "Type III" procedure and

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[3] ORS 197.825(2) addresses LUBA's jurisdiction and provides, in relevant part:

> "(2) The jurisdiction of the board:
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> > "(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

receive a public hearing before the planning commission. LDC 16.61.040.[4] The planning commission is the designated review authority for such comprehensive plan amendments. LDC 16.67.030.A.1.[5] In this case the planning commission's decision was final, for purposes of local appeal, on the date the notice of decision was mailed, or February 18, 2016. LDC 16.61.040.F.6.[6] Under LDC 16.61.040.G.1, petitioner was entitled to appeal

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[4] LDC 16.61.040 provides, in part:

> "A. Type III decisions apply to all quasi-judicial decisions and include, but are not limited to: * * * property owner or developer initiated Comprehensive Plan map/land use district map amendments or text amendments[.] * * * With the exception of expedited annexations and master plans over twenty (20) acres in size combined with Comprehensive Plan map/land use district map amendments, the public hearing and land use decision for these applications occur before the Planning Commission. * * *"

[5] As relevant, LDC 16.67.030.A.1 provides: "[t]he Planning Commission shall be the review authority for Comprehensive Plan map/land use district map amendments paired with master plans under twenty (20) acres in size." The parties dispute whether the amendment was "paired with [a] master plan[] under twenty (20) acres in size." For purposes of this order, we assume that it was.

[6] LDC 16.61.040.F.6 provides:

> "Final Decision and Effective Date. The decision of the hearings body on any Type II appeal or any Type III application is final for purposes of appeal on the date it is mailed by the City. The decision is effective on the day after the appeal period expires. If

the planning commission decision to the city council, as a "person who participated or appeared in the proceeding" and a "person entitled to written notice of the Type III decision[.]" Under LDC 16.61.040.G.2 a local appeal of a Type III planning commission decision is initiated by "filing a notice of appeal[,] within fourteen (14) days of the date the notice of decision was mailed[.]" A notice of appeal must include "[t]he filing fee." LDC 16.61.040.G.2.c.v.

As explained earlier, petitioner did not file a notice of appeal, rather petitioner disputed that a local appeal was necessary because, according to petitioner, the decision could not become final without city council approval. Petitioner also did not submit the filing fee and deposit for attorney fees, disputing the city's authority to collect such fees.

C. The Merits

On the surface, it appears that petitioner failed to take advantage of the appeal right provided by the LDC, and as a consequence failed to exhaust an available remedy, with the further consequence that under ORS 197.825(2)(a) this appeal must be dismissed. In opposing the city's Motion to Dismiss, petitioner relies principally on the Court of Appeals' decision in *Colwell v. Washington County*, 79 Or App 82, 718 P2d 747, *rev den*, 301 Or 338 (1986),

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an appeal is filed, the decision becomes effective on the day after the appeal is decided by the City Council."

and LUBA's decision in *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009). We turn first to *Colwell*.

Colwell concerned a comprehensive plan map amendment for a 68-acre property. That amendment was approved by the planning commission. Petitioners in *Colwell* attempted to appeal that planning commission decision to the board of county commissioners, but failed to timely submit a required transcript fee, and their appeal was ultimately dismissed for that reason. LUBA dismissed petitioners' appeal of that dismissal, for failure to perfect and exhaust the available local appeal to the board of county commissioners. *Colwell v. Washington County*, 14 Or LUBA 245, 250 (1986). On appeal, the Court of Appeals reversed. In doing so the Court of Appeals pointed out that a land use decision may require both quasi-judicial procedures and legislative action:

> "*Petersen [v. Klamath Falls*, 279 Or 249, 566 P2d 1193 (1977)] and *Stewart [v. City of Corvallis*, 48 Or App 709, 617 P2d 921 (1980), *rev den* 290 491 (1981)] illustrate that the necessity for quasi-judicial procedures at one stage of a land use decision and the permissibility of or necessity for a "legislative" or policy determination at a different stage are not mutually exclusive." Colwell, 79 Or App at 87-88 (footnote omitted).

The Court of Appeals also concluded that the relevant statutes require that all comprehensive plan amendments must be adopted by the county governing body. The Court of Appeals set out the text of ORS 215.050(1); 215.060 and parts of ORS 197.010(1) and ORS 197.015(5):

"ORS 215.050(1) provides:

> "'*The county governing body* shall adopt and may from time to time revise a comprehensive plan and zoning, subdivision and other ordinances applicable to all of the land in the county. The plan and related ordinances may be adopted and revised part by part or by geographic area." (Emphasis supplied.)

"ORS 215.060 provides:

> "'Action by the *governing body of a county* regarding the plan shall have no legal effect unless the governing body first conducts one or more public hearings on the plan and unless 10 days' advance public notice of each of the hearings is published in a newspaper of general circulation in the county or, in case the plan as it is to be heard concerns only part of the county, is so published in the territory so concerned and unless a majority of the members of the *governing body* approves the action. The notice provisions of this section shall not restrict the giving of notice by other means, including mail, radio and television."

> "*See also* ORS 197.010(1) (comprehensive plan '[m]ust be adopted by the appropriate *governing body* at the local and state levels'); ORS 197.015(5) ('Comprehensive plan' means a generalized, coordinated land use map and policy statement of the *governing body* of a local government * * *'). * * *" 79 Or App at 85-86 (emphasis in ORS 215.060 added; other emphases in original).

Those statutes for the most part have not been amended. They have not been amended in any way that is material in resolving the city's motion to dismiss.

Based on those four statutes, the Court of Appeals concluded the plan amendment could not become final unless and until the board of commissioners took action on the comprehensive plan map amendment, and that petitioners

were not required by ORS 197.825(2)(a) to exhaust the local appeal that the county provided because no purpose would be served by such an appeal since final board of commissioner action would be required in any event:

> "We conclude that, under ORS 215.050 and the relevant provisions of ORS chapter 197, small-tract plan amendments, like all other enactments and changes of comprehensive plans, must be adopted by the governing body of the planning jurisdiction. As noted above, the county argues and LUBA concluded that petitioners' failure to invoke governing body action in accordance with the county's procedural provisions nevertheless means that petitioners did not exhaust local remedies and cannot appeal to LUBA. The county's and LUBA's thesis seems to be that pursuing *all* procedures the county may make available is necessary to exhaust remedies, regardless of whether there is anything to be remedied by those procedures. We held in *Portland Audubon Society v. Clackamas Co.*, 77 Or App 277, 712 P2d 839 (1986), that it was not a jurisdictional prerequisite under ORS 197.825(2)(a) to seek reconsideration of a governing body decision before appealing to LUBA, although the county procedures permitted reconsideration to be sought. It was at least implicit in our reasoning in *Portland Audubon Society* that ORS 197.825(2)(a) does not require the pursuit of local remedies that are unlikely to serve any purpose except redundancy. The problem here is even more basic: petitioners' pursuit of the county remedies that they did not exhaust could have achieved nothing except convincing the governing body to do what ORS 215.050 and 215.060 already required it to do. * * *" 79 Or App at 91-92.

LUBA's decision in *Wetherell* concerned a change of the comprehensive plan map designation for a 160-acre parcel, and while the board of commissioners, on its own motion, reviewed the planning commission decision granting the amendment, the applicant moved to dismiss petitioner's subsequent LUBA appeal for failure to exhaust administrative remedies,

because the petitioner failed to file a notice of local appeal. Applying the reasoning in *Colwell* and a number of other LUBA decisions, LUBA concluded "where the governing body is required by law to adopt the final decision, as is the case with comprehensive plan amendments, ORS 197.825(2)(a) does not require the petitioner to file a local appeal of a lower body's initial decision to the governing body, in order to invoke LUBA's jurisdiction over the governing body's final decision." *Wetherell*, 58 Or LUBA at 648. LUBA denied the motion to dismiss in *Wetherell*. *Id*. at 652.

Before turning to the city's arguments concerning *Collwell* and *Wetherell*, we note there was a statutory amendment in 1987 that likely limits the holding in *Colwell*. Although ORS 215.431 is not entirely free of ambiguity, it appears to expressly authorize county governing bodies to allow planning commissions and hearings officers to make final decisions on some types of comprehensive plan amendments.[7]

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[7] ORS 215.431 provides:

> "(1) A county governing body may authorize, by ordinance or order, the planning commission or hearings officer to conduct hearings on applications for plan amendments and to make decisions on such applications.
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> "(2) A decision of the planning commission or hearings officer on a plan amendment may be appealed to the county governing body.
>
> "(3) This section shall apply notwithstanding the provisions of ORS 215.050, 215.060 and 215.110.

The city first argues that the decision in this case is properly viewed as quasi-judicial under *Strawberry Hill 4-Wheelers v. Benton County*, 287 Or 591, 603-04, 601 P2d 769 (1979), and therefore can properly be decided by the planning commission. The disputed decision may well be quasi-judicial, but as the Court of Appeals explained in *Colwell*, that does not mean that the relevant statutes do not require governing body action before a quasi-judicial comprehensive plan amendment can become final and effective.

The city next argues that the decisions in both *Colwell* and *Wetherell* were county decisions, not city decisions. The city contends the holdings in those cases therefore do not apply. The city is certainly correct that the decisions at issue in both *Colwell* and *Wetherell* were county rather than city decisions. The city is also correct that two of the statutes the Court of Appeals relied on in *Colwell*, ORS 215.050 and 215.060 apply only to counties.

There do not appear to be any statutes that are analogous to ORS 215.050 and 215.060 in ORS chapter 227. While ORS 227.186(2) directs that

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> "(4) A decision of a planning commission, hearings officer or county governing body under this section shall comply with the post-acknowledgment procedures set forth in ORS 197.610 to 197.625.
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> "(5) The provisions of this section shall not apply to:
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> "(a) Any plan amendment for which an exception is required under ORS 197.732; or
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> "(b) Any lands designated under a statewide planning goal addressing agricultural lands or forestlands."

"[a]ll legislative acts relating to comprehensive plans, land use planning or zoning adopted by a city shall be by ordinance[,]" which presumably requires city council action, the scope of the term "legislative acts" in ORS 227.186(2) is not clear and the parties disagree regarding whether the disputed comprehensive plan amendment for the 4.86-acre property qualifies as a "legislative act[]" within the meaning of ORS 227.186(2). How that question is resolved has potentially significant ramifications for the notice requirements set out at ORS 227.186(3)-(8), which the parties arguments do not consider. Because the motion to dismiss must be denied on other grounds, we do not determine here whether ORS 227.186(2) requires that the comprehensive plan map amendment at issue in this appeal must be adopted "by ordinance[.]" ORS 227.090(1) sets out the powers of city planning commissions and authorizes city planning commissions to "recommend and make suggestions to the [city] council and other public authorities concerning" land use regulations and plans.[8] But ORS 227.090(1) does not authorize planning commissions to adopt

[8] ORS 227.090(1) provides, in part:

> "(1) Except as otherwise provided by the city council, a city planning commission may:
>
> > "(a) Recommend and make suggestions to the council and to other public authorities concerning:
> >
> > "* * * * *

or amend comprehensive plans, and it is unclear whether the "[e]xcept as otherwise provided by the city council" language in ORS 227.090(1) was intended to authorize city councils to limit the powers granted by ORS 227.090(1), or to expand them, or both. Because no party takes a position on that question, we do not pursue it further. ORS 227.180(1)(a) gives a party who is aggrieved by a hearings officer's action on a permit or zone change a right to appeal that decision to the city council. But ORS 227.180(1)(b)

> "(C) Establishment of districts for limiting the use, height, area, bulk and other characteristics of buildings and structures related to land development;
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> "* * * * *.
>
> "(b) Recommend to the council and other public authorities plans for regulating the future growth, development and beautification of the city in respect to its public and private buildings and works, streets, parks, grounds and vacant lots, and plans consistent with future growth and development of the city in order to secure to the city and its inhabitants sanitation, proper service of public utilities and telecommunications utilities, including appropriate public incentives for overall energy conservation and harbor, shipping and transportation facilities.
>
> (c) Recommend to the council and other public authorities plans for promotion, development and regulation of industrial and economic needs of the community in respect to industrial pursuits.
>
> "* * * * *."

provides that a city council "may provide that the decision of a hearings officer or other decision-making authority in a proceeding for a discretionary permit or zone change is the final determination of the city." ORS 227.180(1)(b) appears to allow city councils to delegate final zoning map amendment decision making authority. Importantly, however, ORS 227.180(1)(b) does not authorize city councils to delegate final decision making regarding applications for comprehensive plan map amendments.

In *Colwell* two of the statutes the Court of Appeals relied on do not have clear analogues in ORS chapter 227, and ORS chapter 227 is less clear about whether city councils may delegate final decision making authority for comprehensive plan map amendments than ORS 215.050 and 215.060. But ORS 215.050 and 215.060 are not the only statutes the Court of Appeals relied on. The court also relied on ORS 197.010(1) (comprehensive plan "[m]ust be adopted by the appropriate *governing body* at the local and state levels") and ORS 197.015(5) ("'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the *governing body* of a local government * * * ") to conclude that a comprehensive plan map amendment must be adopted by a local government's governing body. Both of those statutes apply to cities, as does Statewide Planning Goal 2, which provides in part that "[a]ll land-use plans and implementation ordinances shall be adopted by the governing body * * *."

In *Sokol v. City of Lake Oswego*, 18 Or LUBA 375 (1989), LUBA found

that the city's code required in that case that the city council take final action on the plan amendment, but LUBA also noted that a final decision by the city council was also required by the Court of Appeals' decision in Colwell. *Sokol*, 18 Or LUBA at 382, n 7. We recognized that *Colwell* concerned a county decision, but pointed out, as we have here, that *Colwell* was also based on other statutes that apply to cities as well as counties. Absent an exception like the one granted to counties for certain comprehensive plan amendments, the Court of Appeals' holding in *Colwell* applies here, and final action by the city council was required before the disputed comprehensive plan map amendment could become final. As was the case in *Colwell*, petitioner was not required by ORS 197.825(2)(a) to exhaust a remedy that would do no more than require the city council to do what applicable statutes and Goal 2 already require the city council to do.

On April 12, 2016, LUBA granted the city's request to suspend the deadline for filing the record in this appeal until the motion to dismiss was resolved. Now that we have denied the motion to dismiss, the record shall be due 21 days from the date of this order.

Dated this 23rd day of May, 2016.

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Michael A. Holstun
Board Member