

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MILTON ROBINSON,
5 *Petitioner,*

6
7 vs.

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9 CITY OF SILVERTON,
10 *Respondent,*

11 and

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13 NORTH WATER STREET, LLC,
14 *Intervenor-Respondent.*

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16 LUBA No. 2000-114

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19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Silverton.

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24 Patrick E. Doyle, Silverton, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Kelley and Kelley.

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27 No appearance by City of Silverton.

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29 E. Michael Connors and Christopher C. Koback, Portland, filed the response brief.
30 With them on the brief was Davis Wright Tremaine, LLP. E. Michael Connors argued on
31 behalf of petitioner.

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

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36 AFFIRMED

06/12/2001

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

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NATURE OF THE DECISION

Petitioner appeals a letter decision stating that petitioner did not have a right to file a local appeal of a city planning director’s interpretation of local appeal rights.

MOTION TO INTERVENE

North Water Street, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief, and attaches a copy of the reply brief to the motion. In the reply brief, petitioner responds to the arguments made by intervenor regarding LUBA’s jurisdiction and whether petitioner waived an issue by not raising it before the city. With regard to the waiver issue, petitioner contends that he may raise issues regarding compliance with applicable criteria, because the local government’s notice was defective. ORS 197.835(4).¹ Intervenor objects to petitioner’s response to the waiver argument, contending that petitioner should have raised the failure of the local government to list all applicable criteria in its notice of decision as an assignment of error, rather than relying upon a reply brief to support his contention that he may assign error to the city’s failure to address applicable criteria.

We disagree. Petitioner did not have to anticipate that intervenor would argue that petitioner waived his right to raise certain issues. Waiver is a proper subject to address in a reply brief. *Robinson v. City of Silverton*, 37 Or LUBA 521, 525 (2000); *Caine v. Tillamook County*, 24 Or LUBA 627 (1993). Petitioner’s reply brief is allowed.

¹ORS 197.835(4) provides two exceptions to the ORS 197.763(1) requirement that a petitioner raise an issue that may be subject to an assignment of error at LUBA during the proceedings before the local government. ORS 197.835(4)(a) allows petitioner to raise issues at LUBA that were not brought before the local government when “[t]he local government failed to list the applicable criteria for a decision under * * * ORS 197.763(3)(b).”

1 **FACTS**

2 On March 9, 2000, the city planning director approved intervenor’s application for
3 site review for an assisted living facility. Pursuant to local ordinance provisions, the planning
4 director sent notice of the site review decision to the applicant only. On May 26, 2000,
5 petitioner, an adjacent landowner, filed a notice of intent to appeal the site review decision
6 with LUBA.² On May 25, 2000, petitioner attempted to appeal the site review decision to the
7 city planning commission. On June 2, 2000, the planning director sent petitioner a letter
8 denying petitioner’s request for an appeal of the site review decision to the planning
9 commission. In the June 2, 2000 letter, the planning director gave two reasons for denying
10 the local appeal. First, the planning director determined that only the applicant had the right
11 to a local appeal of a site review decision. Second, the planning director determined that the
12 Silverton ordinance required appeals to be filed within 10 days of the date of the initial
13 decision. Thus, the planning director concluded that because petitioner was not the applicant
14 and did not file his local appeal by March 19, 2000, petitioner was not entitled to a local
15 appeal.

16 On June 19, 2000, petitioner then attempted to appeal the June 2, 2000 letter to the
17 planning commission. In a letter dated July 5, 2000, the planning director refused to accept
18 *that* appeal because, on the advice of counsel, the June 2, 2000 letter denying a request for a
19 local appeal was not itself an appealable decision.³ On July 24, 2000, petitioner filed an
20 appeal of the July 5, 2000 letter with LUBA.

²In *Robinson v. City of Silverton*, 38 Or LUBA 785 (2000), *aff’d* 172 Or App 482, ___ P3d ___ (2001), we dismissed petitioner’s appeal because petitioner failed to demonstrate that his appeal was timely filed.

³The July 5, 2000 letter is addressed to petitioner’s attorney and states, in relevant part:

“I have spoken to [the] city attorney * * *, and he has indicated that the Planning Director’s interpretation of the code is different from a substantive land use decision and is not subject to appeal. As such, we are not able to process your appeal of a determination that the City is not able to process an appeal of a [site] review decision. This appeal * * * [has] been returned with the attached fees. * * *” Supplemental Record 2.

1 **JURISDICTION**

2 Petitioner argues that we have jurisdiction to review the July 5, 2000 letter that is at
3 issue in this appeal; intervenor contends that we do not. The parties advance a number of
4 theories and arguments in support of their respective positions concerning our jurisdiction.
5 No purpose would be served by addressing all of those arguments. For the reasons explained
6 below, we conclude that we have jurisdiction over the challenged decision.

7 The challenged decision is the culmination of either (1) an attempt to exhaust an
8 available local appeal under the Silverton Zoning Ordinance (SZO) or (2) an attempt to
9 appeal a decision for which there is no available local appeal under the SZO. We conclude
10 that the challenged decision is either a limited land use decision or a land use decision. In
11 either case, the challenged decision is subject to our jurisdiction under ORS 197.825(1).⁴

12 If petitioner is correct that he is attempting to exhaust available local appeals, the July
13 5, 2000 letter is a limited land use decision, because we have already determined that the
14 underlying site review decision is a limited land use decision.⁵ *Mountain West Investment v.*
15 *City of Silverton*, 38 Or LUBA 400, 403 (2000).

16 On the other hand, if the city is correct and petitioner is seeking a local appeal that
17 the SZO does not provide for, the challenged decision is properly viewed as a “land use
18 decision.” The statutory definition of “land use decision” is set out at ORS 197.015(10)(a).⁶

⁴ORS 197.825(1) provides, in relevant part:

“Except as provided in ORS 197.320 and [ORS 197.825(2) and (3)], the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government * * *.”

⁵As defined by ORS 197.015(12), a limited land use decision must be a final decision. The requirement for finality requires that a petitioner exhaust any available local remedies before appealing to LUBA.

⁶ORS 197.015(10)(a) provides, in relevant part, that a “land use decision” includes:

“(A) A final decision or determination made by a local government * * * that concerns the adoption, amendment or application of:

“* * * * *

1 As relevant here, the challenged decision is a land use decision under ORS 197.015(10)(a) if
2 it (1) is final, (2) is a city decision, and (3) applies a land use regulation. Regarding the first
3 requirement, intervenor does not dispute that the challenged decision is final. Regarding the
4 second requirement, we agree with petitioner that the July 5, 2000 letter is a city decision.⁷
5 Regarding the final requirement, the planning director necessarily, if somewhat implicitly,
6 was required to apply the city’s zoning ordinance to determine whether there is a right under
7 that ordinance to appeal the July 5, 2000 letter. Therefore, if petitioner is seeking an appeal
8 of a limited land use decision that is not provided for in the SZO, the challenged decision is a
9 land use decision, and we have jurisdiction to determine whether the city correctly
10 determined that no appeal is available.

11 **ASSIGNMENT OF ERROR**

12 As amended by Ordinance 96-112, the SZO includes the following provisions that
13 describe rights of local appeal:

14 “Every land use decision relating to the provision of this zoning ordinance
15 substantiated by findings of every board, commission, * * * and official of the
16 city is subject to review by appeal in accordance with the provisions of this
17 chapter.” SZO 1.22.⁸

18 “Appeals from decisions of the [Planning] Director shall be reviewed by the
19 Planning Commission.” SZO 1.15.

20 The term “land use decision,” as used at SZO 1.22, is defined by the SZO as follows:

“(iii) A land use regulation.”

⁷We reject intervenor’s suggestion that the planning director’s letter simply incorporates the city attorney’s legal advice and therefore is not properly viewed as a city decision. The planning director relies on the city attorney’s advice, but that reliance does not make the July 5, 2000 letter something other than a city decision.

⁸The SZO apparently was first adopted by Ordinance 498. Neither the city nor either of the parties to this appeal have provided us with a copy of Ordinance 498. The document that we have been provided, and which purports to be the SZO, is actually a bound compilation of many subsequently adopted ordinances that amend Ordinance 498 or an earlier amending ordinance. That compilation does not employ a consistent scheme for numbering its provisions. For lack of a better alternative, citations to specific provisions of the SZO are to the section number and page number where they appear in the bound compilation. SZO 1.22 is a citation to SZO, section 1, page 22.

1 “A final decision or determination pertaining to a land use action that is made
2 by the Governing Body of the City of Silverton, the Silverton Planning
3 Commission, or its designated administrator in accordance with all applicable
4 city codes and ordinances.” SZO 2.11.

5 The term “land use action,” as it is used in the above-quoted definition of “land use
6 decision,” is defined as follows:

7 “A request, by an owner or agent thereof of a parcel of land, for permission of
8 the city to use or develop the parcel for a specific purpose as required by the
9 city’s code or ordinances. Said action shall include requests for Zone and
10 Comprehensive Plan Changes, Lot Line Adjustments, Minor and Major
11 Partitions, Subdivisions and Variance Approvals and Conditional Use
12 Permits.” *Id.*

13 Petitioner argues that the planning director erred in the July 5, 2000 letter in
14 concluding that the June 2, 2000 letter is not subject to a local appeal. According to
15 petitioner, the SZO, as amended by Ordinance 96-112, requires that decisions of the planning
16 director be appealable to the planning commission. Petitioner argues that the June 2, 2000
17 letter is a “decision” of the planning director within the meaning of the above-quoted
18 language from SZO 1.15.

19 Intervenor responds that only “land use decisions,” as that term is defined in SZO
20 2.11, are appealable to the next local level described at SZO 1.15. Intervenor contends that a
21 “land use decision” under the SZO includes only final determinations regarding “land use
22 actions” and, as defined, the June 2, 2000 letter is not a “land use decision.” Intervenor
23 argues that if petitioner wished to appeal the June 2, 2000 letter, petitioner should have
24 appealed the letter directly to LUBA.

25 We agree with intervenor. The city has established a limited appeal process that
26 permits “land use decisions” to be appealed only to the next local level. *See Mountain West*
27 *Investment v. City of Silverton*, ___ Or LUBA ___ (LUBA No. 2000-093, Order on Motion
28 to Dismiss, January 17, 2001), slip op 4 (planning commission interpretation of the city
29 ordinance to allow only one local appeal is reasonable and correct). Petitioner has not
30 demonstrated that the June 2, 2000 letter is a “land use decision” subject to local appeal as
31 provided by SZO 1.15 and 2.11. It therefore follows that petitioner did not have the right to

- 1 appeal the June 2, 2000 letter to any local body.
- 2 Petitioner's assignment of error is denied.
- 3 The city's decision is affirmed.