

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 S&V Properties, LLC,
5 *Petitioner,*
6

7 vs.
8

9 WALLOWA COUNTY,
10 *Respondent.*
11

12 LUBA No. 2023-082
13

14 FINAL OPINION
15 AND ORDER
16

17 Appeal from Wallowa County.
18

19 D. Rahn Hostetter represented petitioner.
20

21 Paige Sully represented respondent.
22

23 RYAN, Board Chair; RUDD, Board Member; participated in the decision.
24

25 ZAMUDIO, Board Member, did not participate in the decision.
26

27 DISMISSED 08/13/2024
28

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

NATURE OF THE DECISION

Petitioner appeals a document entitled “Findings Revision 2 CUP#22-08,” dated July 26, 2022.

BACKGROUND

We set out the facts from the record and the parties’ pleadings. On March 30, 2022, petitioner filed an application for a single-family dwelling with an associated business on land zoned Industrial (M-1). On May 31, 2022, the planning commission held a public hearing on petitioner’s application and at the conclusion, voted three to one to deny the application. As we understand it, under the planning commission’s bylaws, in the event there are not four votes for approval or denial of an application, the application is automatically referred to a hearing before the board of commissioners for a decision. BC Record 9.6.¹ On June 28, 2022, the planning commission referred the matter to the board of commissioners. PC Record 7.4.

On July 20, 2022, the board of commissioners held a public hearing on the application and voted to approve it. The board of commissioners then issued Order 2022-006, “remand[ing the application] to the * * * [p]lanning [c]ommission for approval and instructions to the Chairperson of the

¹ The record that was received on February 15, 2024 contains separate numbering for the planning commission’s record and the board of commissioner’s record. We refer to the board of commissioner’s record as “BC” and the planning commission’s record as “PC.”

1 Commission to execute the Findings of Fact, Conclusions, and Decision of the
2 Wallowa County Planning Commission *in the form attached hereto.*” BC Record
3 11.2 (emphasis added). The parties agree that no document was attached to Order
4 2022-006 when it was adopted at the conclusion of the July 20, 2022, board of
5 commissioners meeting. BC Record 5.2; PC Record 1.1-1.2. However, a
6 document that is in the record includes a notation in the footer “Findings Revision
7 #2 CUP#22-08 July 26, 2022,” and that document is signed by the chair of the
8 planning commission and dated July 26, 2022. BC Record 9.20.

9 On November 22, 2023, petitioner filed an appeal to the board of
10 commissioners of the “Findings Revision 2 CUP#22-08” dated July 26, 2022.
11 *See* BC Record 3.1. On December 1, 2023, petitioner appealed the same decision
12 to LUBA.

13 **JURISDICTION**

14 LUBA has jurisdiction to review a “land use decision.” ORS 197.825(1).
15 ORS 197.015(10)(a) provides that “land use decision” includes certain “final”
16 decisions made by local governments. In addition, under ORS 197.825(2)(a),
17 LUBA’s jurisdiction is limited to “cases in which the petitioner has exhausted all
18 [local] remedies available by right before petitioning [LUBA] for review[.]”
19 Local remedies are considered exhausted only if there are no more local methods
20 available to challenge a local decision. *Lyke v. Lane County*, 70 Or App 82, 688
21 P2d 411 (1984).

22 “The exhaustion requirement, as interpreted, requires that

1 petitioners use all available local remedies before invoking state
2 jurisdiction, furthering the legislative goal of resolving land use
3 issues at the local level whenever possible. The critical issue is not
4 whether a procedure is *required* by the county or whether the county
5 must accept review, but whether there is a procedure available to ask
6 for local review and the right to ask is unconditionally granted.” *Id.*
7 at 86 (emphasis in original).

8 In *Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995), like here, the
9 petitioner filed a local appeal of the decision, and even though there was some
10 question whether a local appeal was available, the county in fact provided a local
11 appeal. Like here, the petitioner also appealed the decision directly to LUBA. In
12 *Tarjoto*, Lane County moved to dismiss the LUBA appeal on the grounds that
13 the petitioner had not “exhausted all [local] remedies available by right before
14 petitioning [LUBA] for review[.]” *See Tarjoto*, 137 Or App at 307. LUBA
15 concluded that the petitioner in *Tarjoto* was exhausting an available local remedy,
16 and dismissed the petitioner’s direct appeal to LUBA of the same decision that
17 was the subject of the local appeal. The Court of Appeals affirmed LUBA’s
18 decision.

19 Petitioner has the burden to establish LUBA’s jurisdiction. *Billington v.*
20 *Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). In response to an order we
21 issued on July 17, 2024 directing petitioner and the county to confirm whether
22 the county has accepted petitioner’s November 21, 2023 local appeal to the board
23 of commissioners of the “Findings Revision 2 CUP#22-08” dated July 26, 2022,
24 petitioner and the county each filed responses confirming that the local appeal
25 was accepted by the board of commissioners, and that proceedings on that appeal

1 are currently pending before the county. Petitioner is exhausting an available
2 local remedy, and therefore the appealed decision is not the county's final
3 decision.² Accordingly, LUBA lacks jurisdiction over the appeal.

4 The appeal is dismissed.³

² On August 12, 2024, LUBA received petitioner's additional notice of related matters that indicates that petitioner has filed a petition for an alternative writ of mandamus in Wallowa County Circuit Court, pursuant to ORS 215.429.

³ On April 11, 2024, LUBA received the county's motion to dismiss the appeal as untimely filed, citing ORS 197.830(3) and (4). Motion to Dismiss 2. Because we conclude we lack subject matter jurisdiction over the appeal, we need not resolve that motion.