

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HAL'S CONSTRUCTION, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent,*

11 and

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13 RUTH BARBER AND GARY RHEINSBURG,
14 *Intervenors-Respondent.*
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18 LUBA No. 98-209

19 ORDER

20 Before us are intervenors-respondents' (intervenors') motion to dismiss, the county's
21 motion for an extension of time to file the record, and petitioner's motion to review the
22 supplemental record. We address them in order.

23 **MOTION TO DISMISS**

24 Interveners move to dismiss this appeal. According to intervenors, petitioner failed
25 to file its notice of intent to appeal to LUBA within 21 days of the date the county's decision
26 became final. Because the notice of intent to appeal was not filed within the 21-day appeal
27 period, intervenors contend that we must dismiss this appeal. OAR 661-010-0030(1).
28 Petitioner objects to the motion, arguing that it filed a notice of intent to appeal within the
29 requisite time period.

30 Interveners argue that petitioner failed to file a timely appeal because petitioner
31 erroneously believed that it had the right to appeal the hearings officer's decision to the board
32 of county commissioners. Clackamas County Zoning and Development Ordinance (ZDO)

1 1304.01¹ and 1304.02² provide that the decision is the final decision of the county, unless the
2 decision is an interpretation.

3 According to intervenors, the decision at issue here is an appeal of a planning director
4 decision denying petitioner's request to alter a nonconforming use, and is not an application
5 for an interpretation. Intervenors argue that the county has separate procedures for
6 interpretations, found in ZDO 104.01(C)³ and ZDO 1305.01(K),⁴ and that petitioner's

¹ZDO 1304.01 provides:

“The decision of the Land Use Hearings Officer shall be the final decision of the County, except, in the case of an application for an Interpretation, the Board of County Commissioners may review the decision of the Land Use Hearings Officer on an appeal. * * *”

²ZDO 1304.02 provides:

“An appeal of the County's decision on an administrative action may be appealed to the Land Use Board of Appeals (LUBA) within twenty-one (21) days of the date of mailing of the final written order * * *. If a request for a review of an interpretation by the Land Use Hearings Officer is filed with the Board of County Commissioners, the 21 day LUBA appeal period shall commence on mailing of the Board [of County Commissioner]'s final order (if the Board [of County Commissioners] accepts review), or mailing of a denial of the request for review.”

³ZDO 104.01 provides, in relevant part:

“The review of applications under the provisions of this Ordinance shall be subject to one or more of the three procedures described below. * * *

“A. Staff Review: * * *

“B. Staff Review with Notification: * * *

“C. Quasijudicial Public Hearing Review: An application for a discretionary permit, * * * or interpretation, * * * shall be reviewed under the following procedure: * * *”
[The procedure includes receipt of an application, notice and public hearing, and decision made by a hearings officer, supported by findings.]

⁴ZDO 1305.01 provides, in relevant part:

“The Planning Director, or his designate, subject to the direction of the Board of County Commissioners, shall perform the following duties:

“* * * * *

“K. Decide all questions of interpretation or applicability to specific properties of any provision of this Ordinance. The Planning Director's decision may be appealed to the Land Use Hearings Officer as an initial administrative action. The appeal must be filed within fifteen (15) days of the date of the letter of final action. * * * An

1 caption in its appeal to the board of commissioners, which stated the appeal was an “Appeal
2 of Interpretation by Land Use Hearings Officer,” does not transform a decision regarding an
3 alteration of a nonconforming use that incidentally interpreted the applicability of certain
4 code provisions into an “interpretation” as that term is used in ZDO 1304.01 and 1304.02.
5 Because petitioner did not file its notice of intent to appeal to LUBA until 13 days after the
6 board of commissioners declined to hear petitioner’s appeal, which was more than 21 days
7 after the hearings officer’s decision became final, intervenors contend that petitioner’s LUBA
8 appeal is untimely.

9 Petitioner argues that the hearings officer’s decision in this case adopted a number of
10 interpretations of local code, and it was those interpretations that led to petitioner’s appeal to
11 the board of commissioners. Petitioner claims that it was required to exhaust its local
12 remedies before appealing to LUBA and, according to petitioner, it is not clear from the
13 zoning ordinance that the board of commissioners’ authority to review interpretations is
14 limited to those formal interpretations that are referred to in the code. Petitioner relies upon
15 the holding of the Court of Appeals in *Lyke v. Lane County*, 70 Or App 82, 86, 688 P2d 411
16 (1984) for the proposition that a person opposing a land use decision made by a county
17 hearings officer cannot seek review directly from LUBA when the relevant ordinance
18 provides an opportunity to seek the discretionary review of the board of commissioners.

19 In *New v. Clackamas County*, 30 Or LUBA 453 (1995), we decided that, prior to the
20 commencement of a local appeal period, the local government must make clear that a local
21 appeal is available, or it may not later contend that a petitioner who failed to appeal locally
22 thereby failed to exhaust all local remedies. In that case, we found that the local ordinance
23 was unclear, and the statement provided by the hearings officer at the commencement of the
24 hearing was equally vague about appeal options. We concluded in that case that “an appeal to

appeal stays proceedings in the matter appealed until the determination of the appeal
by the Land Use Hearings Officer.”

1 the board of commissioners was not an available local remedy that the petitioner was
2 required to exhaust prior to appealing to LUBA.” *Id.* at 458.

3 This case presents the reverse application of the same principle. In this case, it is not
4 clear from the record whether petitioner could appeal the nonconforming use decision to the
5 board of commissioners. The statement of appeal rights in the hearings officer’s decision
6 summarized the appeal rights as follows:

7 “ZDO 1304.01 provides that, with the exception of an application for an
8 ‘Interpretation’ as so classified by the Department of Transportation and
9 Development, the Land Use Hearings Officer’s decision constitutes the
10 County’s final decision for purposes of any appeal to the Land Use Board of
11 Appeals (LUBA). State law and associated administrative rules promulgated
12 by LUBA prescribe the time period within which any appeal must be filed * *
13 *.” Record 40.

14 The board of commissioners’ decision denying the appeal is similarly ambiguous.
15 Memoranda from the planning director and the county counsel show that staff recommended
16 against the board of commissioner’s review of the decision for two reasons. First, the board
17 of commissioners did not have review authority under the zoning code to review the
18 decision. Second, even if the board of commissioners did have review authority, the decision
19 did not contain an issue warranting review. The board of commissioners did not issue a
20 written decision; the board of commissioners merely marked a check on a line to indicate
21 whether it wanted to hear the appeal or not. Thus, even if the board of commissioners
22 determined that it did not have jurisdiction to hear petitioner’s appeal, that determination was
23 not communicated to petitioner.

24 Intervenors contend that the hearings officer’s statement of appeal rights is standard
25 language included in all of his decisions. According to intervenors, petitioner should have
26 known that its application was for an alteration of a nonconforming use and not for an
27 interpretation, because petitioner had recently applied for an interpretation for matters related
28 to the subject of this appeal. However, the procedures for reviewing nonconforming uses had
29 changed in the interim between petitioner’s application for an interpretation and its

1 application for an alteration to a nonconforming use. Neither the code language, nor the
2 decisions of the hearings officer and the board of commissioners state that the hearings
3 officer’s decision could not be appealed as an interpretation.

4 In *Shaffer v. City of Salem*, 137 Or App 583, 587, 905 P2d 1175 (1995), another case
5 involving the exhaustion doctrine under ORS 197.825(2)(a), the Court of Appeals indicated
6 that the exhaustion requirements

7 ““Are not designed to foster gamesmanship on the part of parties or decision
8 makers, of the kind that [intervenors hypothesize] * * *, e.g. in which “local
9 remedies” are artificially fabricated or interpreted as being ‘unavailable’ in an
10 effort to defeat the possibility of timely LUBA appeals.” (Quoting *Tarjoto v.*
11 *Lane County*, 137 Or App 305, 310, 904 P2d 641 (1995)).

12 We conclude that, in cases where it is ambiguous as to whether there is a local appeal,
13 and where the county has not presented us with an interpretation resolving that ambiguity,
14 petitioner is not precluded from an appeal to LUBA because it first requested review by the
15 board of commissioners prior to filing a notice of intent to appeal before LUBA. Petitioner
16 filed its notice of intent to appeal within 21 days of the board of commissioner’s decision
17 denying review, as provided for in ZDO 1304.02. Petitioner’s appeal is therefore timely.

18 Intervenors’ motion to dismiss is denied.

19 **MOTION FOR TIME EXTENSION**

20 On July 29, 1999, we issued an order requiring the county to supplement the record
21 with the record of proceedings before the county hearings officer. In light of the pending
22 motion to dismiss, the county requested an extension of time to file the supplemental record.
23 We granted the extension until the motion to dismiss was resolved. The supplemental record
24 is due seven days from the date of this order.

25 **MOTION TO REVIEW SUPPLEMENTAL RECORD**

26 Petitioner moves for an order to require the county to include the tapes of the
27 proceedings before the hearings officer in the supplemental record. Petitioner also requests

1 an opportunity to review the entire supplemental record before the hearings officer, and file
2 objections to the supplemental record as necessary.

3 Pursuant to OAR 661-010-0026(2), petitioner may file objections to the supplemental
4 record within 14 days of the date the supplemental record is submitted to LUBA. Until such
5 time, petitioner's request that we order the county to include copies of the tapes of the
6 proceedings before the hearings officer is premature, as these tapes may be included in the
7 county's submittal.

8 Dated this 16th day of November, 1999.

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Anne Corcoran Briggs
Board Member