

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

3
4 MOUNTAIN WEST INVESTMENT CORP.,
5 *Petitioner,*

6
7 and

8
9 MILTON ROBINSON,
10 *Intervenor-Petitioner,*

11
12 vs.

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14 CITY OF SILVERTON,
15 *Respondent,*

16
17 and

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19 NORTH WATER STREET, LLC,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2000-093

23 ORDER ON MOTION TO DISMISS

24 The decision appealed in this case is a planning commission decision rejecting a local
25 appeal of a planning director decision approving a lot-line adjustment. The planning
26 commission's decision was issued June 1, 2000, and the notice of decision stated:

27 "An appeal of the City's decision may be filed with [LUBA] within twenty-
28 one (21) days of the date of this notice. The applicant or any other person or
29 agency who testified either orally or in writing may file an appeal in
30 accordance with ORS 197.830 and 197.845."

31 Petitioner timely appealed the June 1, 2000 decision to LUBA. However, intervenor-
32 petitioner moves to dismiss this appeal, arguing that petitioner failed to exhaust an available
33 administrative remedy. ORS 197.825(2).¹ Specifically, intervenor-petitioner argues that,

¹ORS 197.825(2) provides in relevant part:

"The jurisdiction of the board:

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

1 under the city’s code, planning commission decisions such as the present one are appealable
2 to the city council. Because petitioner failed to appeal the planning commission decision to
3 the city council, intervenor-petitioner argues, the present appeal must be dismissed.²

4 The city’s general appellate procedures are set forth in chapter 4 of an uncodified
5 ordinance, 95-104. Section 3.1(a) of chapter 4 provides

6 “Every decision relating to the provision of this zoning ordinance
7 substantiated by findings of every board, commission, committee, hearings
8 officer, and official of the City is subject to review by appeal in accordance
9 with the provisions of this chapter.”

10 Section 3.2 of chapter 4 prescribes the following “hearings authority”:

11 “a. Appeals from decisions of the Director shall be reviewed by the
12 Planning Commission.

13 “b. Appeals from decisions of the City Engineer shall be reviewed by the
14 Planning Commission.

15 “c. Appeals from decisions of the Planning Commission shall be reviewed
16 by the City Council.

17 “d. Appeals from decisions of the City Council shall conform with
18 applicable ORS provisions.”

19 Consistent with section 3.2(d), section 3.7 provides:

20 “Approval of any development request shall become effective upon expiration
21 of the appeal period, unless an appeal has been filed. Where the hearings
22 authority is the City Council, the effective date for filing an appeal with the
23 State Land Use Board of Appeals (LUBA) shall be 21 days after the notice of
24 disposition of the Council’s action has been mailed.”

25 Under the city’s code, certain development applications, for example minor
26 variances, minor partitions, and lot-line adjustments that require no variance or no more than
27 a minor variance, are reviewed in the first instance by the planning director,. Silverton

²Intervenor-petitioner attempted to appeal the June 1, 2000 planning commission decision to the city council. The city rejected that appeal, and intervenor-petitioner then appealed the decision rejecting his local appeal to LUBA. In a decision issued this date, we dismiss that appeal, for the reasons set forth in a separate order. *Robinson v. City of Silverton*, ___ Or ___ (LUBA No. 2000-113/114, Order on Motions to Dismiss, January 17, 2001); *Robinson v. City of Silverton*, ___ Or LUBA ___ (LUBA No. 2000-113, January 17, 2001).

1 Zoning Ordinance (SZO) 7.03; 12.03(B). Other types of applications, including major
2 variances, zone changes, major partitions, lot-line adjustments that require a major variance
3 and subdivisions, are reviewed in the first instance by the planning commission,. SZO 7.04;
4 8.03; 12.03(A); 17.04. With respect to appeal of partitions and lot-line adjustments,
5 SZO 12.09 provides that:

6 “Any appeal of a partition or lot-line adjustment shall be consistent with the
7 procedures established in Ordinance 95-104. Administrative decisions may be
8 appealed to the Planning Commission and the Planning Commission’s
9 decision may be appealed to the City Council.”

10 Intervenor-petitioner argues that SZO 12.09 and chapter 4, section 3.2(c) of
11 Ordinance 95-104 both provide for review of planning commission decisions by the city
12 council. Because a right of appeal to the city council exists in the city code, intervenor-
13 petitioner argues, petitioner’s appeal to LUBA must be dismissed because petitioner failed to
14 exhaust that local appeal.

15 Intervenor-respondent (intervenor) responds that the June 1, 2000 notice of decision
16 correctly determined that, under the city’s code, the only route to appeal the planning
17 commission’s decision was to LUBA. Intervenor argues that the city understands the above-
18 quoted code provisions, specifically section 3.2, to provide one and only one local appeal for
19 each city land use decision. According to intervenor, if the planning director makes the
20 initial decision, section 3.2(a) provides for a single local appeal to the planning commission,
21 whose decision becomes the city’s final decision. If the planning commission makes the
22 initial decision, intervenor argues, section 3.2(c) provides for a local appeal to the city
23 council, whose decision then becomes the final decision. *See* ORS 227.180(1)(a) (a party
24 aggrieved by the action of a hearings officer may appeal that action to the planning
25 commission or council of the city, or both, however the council prescribes). Intervenor
26 argues that SZO 12.09, on which intervenor-petitioner places especial reliance, is consistent
27 with the city’s understanding of section 3.2, because SZO 7.03 and 7.04 specify that certain

1 types of lot-line adjustments initiate with the planning director, while others initiate with the
2 planning commission.

3 The cited code provisions are ambiguous, and can be plausibly read as intervenor-
4 petitioner reads them or as intervenor reads them. The city has taken the position, expressed
5 in the notice of decision, that the planning commission decision in this case is final and no
6 appeal to the city council exists under the city's code. We cannot say that that understanding
7 of the relevant code provisions is incorrect. *Gage v. City of Portland*, 319 Or 308, 317, 877
8 P2d 1187 (1994); *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988) (review
9 of hearings officer's interpretation is not subject to a deferential standard of review;
10 appropriate standard is whether the interpretation is reasonable and correct). Consequently,
11 intervenor-petitioner has not established that a further local appeal was available to petitioner
12 or any basis to dismiss this appeal pursuant to ORS 197.825(2). Intervenor-petitioner's
13 motion is denied.

14 In an order dated October 19, 2000, we suspended proceedings in this appeal to
15 resolve intervenor-petitioner's motion to dismiss. On that same date, petitioner and
16 intervenor-petitioner filed a combined petition for review. We hereby resume these appeal
17 proceedings. The response brief(s) are due 21 days from the date of this order.

18 Dated this 17th day of January, 2001.

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Tod A. Bassham
Board Chair