

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 MILTON ROBINSON,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF SILVERTON,  
10 *Respondent,*

11 and

12  
13 NORTH WATER STREET, LLC,  
14 *Intervenor-Respondent.*

15  
16 LUBA Nos. 2000-113 & 2000-114

17  
18 ORDER ON MOTIONS TO DISMISS  
19

20 In LUBA No. 2000-113, petitioner appeals a July 5, 2000 letter from the planning  
21 director that rejects his appeal to the city council of a planning commission decision  
22 approving a lot line adjustment needed to develop a care facility. In LUBA No. 2000-114,  
23 petitioner appeals a July 5, 2000 letter from the planning director rejecting his appeal to the  
24 planning commission of the director's decision approving a design review application for the  
25 care facility.<sup>1</sup> Intervenor-respondent (intervenor) moves to dismiss both appeals.

26 **LUBA NO. 2000-113**

27 **A. Background**

28 On March 8, 2000, the planning director approved intervenor's application for a lot  
29 line adjustment. Petitioner, who had submitted comments opposing the application, was  
30 provided with notice of that decision and, on March 17, 2000, appealed that decision to the  
31 planning commission. The planning commission conducted hearings on May 9 and 25, 2000,

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<sup>1</sup>The decisions appealed in LUBA No. 2000-113 and 2000-114 are embodied in the same document, although that document disposes of two separate local appeals involving two separate development applications, for separate reasons. We assume for purposes of the following analysis that the July 5, 2000 letter contains two decisions that must each be analyzed independently from the other.

1 and issued a final written decision on June 1, 2000 denying petitioner’s appeal. The notice of  
2 decision for the June 1, 2000 decision stated:

3 “An appeal of the City’s decision may be filed with [LUBA] within twenty-  
4 one (21) days of the date of this notice. The applicant or any other person or  
5 agency who testified either orally or in writing may file an appeal in  
6 accordance with ORS 197.830 and 197.845.” Record 1.

7 Petitioner received the June 1, 2000 notice of decision and, notwithstanding that the  
8 notice directed that any appeal be filed with LUBA, petitioner attempted to appeal the  
9 planning commission decision to the city council. In a letter dated July 5, 2000, the city  
10 planning director rejected petitioner’s local appeal, on the grounds that “any appeal of the  
11 Planning Commission’s decision on the lot line adjustment application must be to LUBA and  
12 not to the City Council.” Notice of Intent to Appeal Exhibit A. Petitioner then appealed the  
13 July 5, 2000 letter to LUBA.

14 **B. Decision**

15 Intervenor moves to dismiss LUBA No. 2000-113, because the planning  
16 commission’s June 1, 2000 decision was the city’s final decision in this matter, and thus  
17 petitioner’s July 25, 2000 appeal to LUBA was untimely. Intervenor argues that, under the  
18 city’s code, there is only one local appeal available from an administrative decision by the  
19 planning director: to the planning commission. Intervenor argues that the city correctly  
20 concluded in its June 1, 2000 notice of decision and its July 5, 2000 letter that the only  
21 avenue of appellate review of the June 1, 2000 decision was to LUBA.

22 In a decision issued this date, we conclude that under the city’s code the planning  
23 commission correctly determined that any appeals of its decision must be to LUBA.  
24 *Mountain West Investment Corp. v. City of Silverton*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2000-  
25 093, January 17, 2001). The decision at issue in *Mountain West Investment Corp.* is the same  
26 June 1, 2000 decision denying petitioner’s local appeal of the lot line decision. As a  
27 consequence of our decision, it is clear in the present case that the June 1, 2000 decision is

1 the city’s final decision with respect to the lot line adjustment, and petitioner’s attempt to  
2 appeal that decision to the city council was not authorized by the city’s code.

3 The remaining question is the appropriate disposition of the present appeal. The only  
4 pertinent aspect of the July 5, 2000 letter is the above-quoted determination that “any appeal  
5 of the Planning Commission’s decision on the lot line adjustment application must be to  
6 LUBA and not to the City Council.” That determination is nothing more than a reiteration of  
7 the city’s previous determination, expressed in the June 1, 2000 notice of decision, that any  
8 further appeals must be to LUBA. Petitioner may not in an appeal of a subsequent decision  
9 collaterally attack determinations that were made in an earlier decision and merely  
10 reconfirmed in the challenged decision. *Smith v. Douglas County*, 17 Or LUBA 809, *aff’d* 98  
11 Or App 379, 780 P2d 232 (1989). Stated differently, the above-quoted determination that  
12 any appeals must be to LUBA is not an application of a city land use regulation, but simply a  
13 repetition of the city’s earlier determination. In other words, the July 5, 2000 letter, insofar  
14 as it addresses appeals from the planning commission’s decision, is not a “final decision or  
15 determination made by a local government” concerning the application of a land use  
16 regulation. ORS 197.015(10)(a)(A). Accordingly, insofar as the July 5, 2000 letter  
17 addresses appeal of the June 1, 2000 decision, the July 5, 2000 letter is not a land use  
18 decision subject to our jurisdiction.

19 Intervenor’s motion to dismiss LUBA No. 2000-113 is granted. LUBA No. 2000-113  
20 is hereby bifurcated from LUBA No. 2000-114 and will be dismissed in a separate final  
21 opinion and order.

22 **LUBA NO. 2000-114**

23 **A. Background**

24 On March 9, 2000, the city planning director approved a design review application  
25 for a care facility. The city apparently provided no notice of that decision to anyone other  
26 than the applicant. On May 25, 2000, petitioner filed a local appeal of the March 9, 2000

1 decision, seeking to appeal that decision to the planning commission.<sup>2</sup> On June 2, 2000, the  
2 planning director informed petitioner by letter that the city rejected his appeal, on two  
3 grounds:

4       “\* \* \* It has been determined that according to Section 18.8.8 of Ordinance  
5 96-126 that only the applicant may appeal a decision of the reviewer. Since  
6 [petitioner is not] the applicant in this matter, the City’s ordinance specifically  
7 states that you do not have standing to appeal this decision. In addition, City  
8 ordinances require that an appeal be filed within 10 days of the date of the  
9 decision. The decision granting approval of the design review was dated  
10 March 9, 2000. Your appeal statement was received on May 25, 2000, which  
11 is significantly more than 10 days from the date of decision.” Affidavit of  
12 Christopher P. Koback Exhibit C 7.

13       Petitioner then sought reconsideration of the June 2, 2000 letter. On July 5, 2000, the  
14 planning director responded by letter:

15       “I have spoken to [the] City Attorney, Rich Rodeman, and he has indicated  
16 that the Planning Director’s interpretation of the code is different from a  
17 substantive land use decision and is not subject to appeal. As such, we are not  
18 able to process your appeal of a determination that the City is not able to  
19 process an appeal of the design review decision. This appeal, as well as the  
20 appeal of the Planning Commission’s decision on a proposed lot line  
21 adjustment for property on South Water Street, have been returned with the  
22 attached fees. \* \* \*” Notice of Intent to Appeal Exhibit A.

23       Petitioner then appealed the July 5, 2000 letter to LUBA.

24       **B. Decision**

25       Intervenor moves to dismiss LUBA No. 2000-114, arguing that the city correctly  
26 determined that petitioner’s attempt to appeal the March 9, 2000 decision was untimely.  
27 Intervenor also argues that the city’s final decision rejecting petitioner’s appeal of the March  
28 9, 2000 decision was issued on June 2, 2000, and that petitioner should have appealed that  
29 decision to LUBA rather than seeking the city’s reconsideration. According to intervenor,  
30 that fact that petitioner was able to entice the city into confirming its June 2, 2000 decision in

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<sup>2</sup>Petitioner also appealed the March 9, 2000 design review decision directly to LUBA. LUBA dismissed that appeal, because petitioner failed to demonstrate that he was entitled to file an appeal with LUBA pursuant to ORS 197.830(5). *Robinson v. City of Silverton*, 38 Or LUBA 785 (2000). That decision is currently on appeal to the Court of Appeals.

1 its July 5, 2000 decision does not change the fact that the June 2, 2000 decision was the final,  
2 appealable decision. Consequently, intervenor argues, the July 5, 2000 decision was not a  
3 final, appealable land use decision.

4 Petitioner makes a number of responses, to the effect that the March 9, 2000 decision  
5 is not final and the city erred in failing to provide him with a local appeal of that decision.

6 To the extent the arguments of both parties address the March 9, 2000 decision or the  
7 correctness of the city's determination in the June 2, 2000 letter that petitioner's appeal of  
8 that decision was untimely, those arguments have no bearing on whether the Board has  
9 jurisdiction over the only decision that is before us: the July 5, 2000 letter. *Ramsey v. City of*  
10 *Portland*, 28 Or LUBA 763, 768 (1994) (in review of decision rejecting a local appeal, the  
11 merits of the underlying decision are outside the scope of LUBA's review). Under the  
12 present circumstances, the only challenge petitioner can bring before us is whether the city  
13 correctly determined in its July 5, 2000 letter that there is no available appeal of the June 2,  
14 2000 letter under the city's code.

15 If the July 5, 2000 letter had simply reiterated the substance of the June 2, 2000 letter,  
16 intervenor might be correct that the July 5, 2000 letter would not constitute an appealable  
17 land use decision. *See* discussion above, citing *Smith*, 17 Or LUBA at 816-17 (petitioner  
18 may not in an appeal of a subsequent decision collaterally attack decisions that were made in  
19 an earlier final decision and merely reconfirmed in the challenged decision). However, the  
20 July 5, 2000 letter embodies a distinct determination, not addressed in the June 2, 2000 letter,  
21 that no appeal of the June 2, 2000 letter is available under the city's code.

22 Although petitioner does not identify any procedure or authority in the city's code  
23 that allows him to appeal the June 2, 2000 decision rejecting his local appeal, that issue goes  
24 to the merits of his appeal to LUBA and cannot be resolved in the current posture of this  
25 case. If the July 5, 2000 letter is correct, then the appropriate disposition is to affirm that  
26 decision, which would have the practical effect that the city's June 2, 2000 letter was final

1 with respect to petitioner's appellate options. If petitioner demonstrates that he is entitled to  
2 a local appeal of the June 2, 2000 letter, then the appropriate disposition is to remand the July  
3 5, 2000 decision to the city to provide petitioner with a local appeal of the June 2, 2000 letter.

4 For the foregoing reasons, intervenor has not demonstrated that we lack jurisdiction  
5 over petitioner's appeal of the July 5, 2000 letter, or any other basis to dismiss that appeal.  
6 Intervenor's motion is denied.

7 **SCHEDULE**

8 In an order dated September 13, 2000, we suspended proceedings in this case to  
9 resolve the foregoing motions to dismiss. The record was filed in this case on September 12,  
10 2000. Further proceedings in this case will continue from that point. The parties will have  
11 the period prescribed by OAR 661-010-0026 to file objections to the record. Assuming no  
12 such objections are received, the petition for review will be due 21 days, and the response  
13 brief due 42 days, from the date of this order.

14 Dated this 17th day of January, 2001.

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Tod A. Bassham  
Board Chair