



1 Opinion by Holstun.

2 **INTRODUCTION**

3 At its December 9, 1993 regular meeting, the Dunes City  
4 City Council found petitioners to be in violation of the  
5 city zoning ordinance and a city ordinance controlling  
6 removal of vegetation in shoreland areas. That decision was  
7 reduced to writing in an order dated January 5, 1994. The  
8 January 5, 1994 order requires that petitioners obtain  
9 permits, submit a revegetation plan and take certain other  
10 actions concerning a storage shed, pier and boathouse to  
11 correct the identified violations.<sup>1</sup>

12 The record includes a letter dated January 10, 1994,  
13 signed by petitioner Robert Bowen. That letters states, in  
14 its entirety:

15 "With all that is to be done to meet the city  
16 council's order of January 8th [sic], as well as  
17 procuring estimates on combining the pier and  
18 boathouse, etc., I would like to ask for a 90 day  
19 extension of the pier order." Record 61.

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<sup>1</sup>The January 5, 1994 order requires that certain building permits be sought and double permit fees be paid. The order does not specify a deadline for seeking the building permits. Petitioners were ordered to combine their boathouse and dock, or remove one of them, and to seek a conditional use permit for the boathouse or dock within 10 days from the date of the order. Petitioners were ordered to submit a revegetation plan within 30 days of the date of the order.

1 The minutes of the city council's January 13, 1994 meeting  
2 indicate the city council granted petitioner Robert Bowen's  
3 requested extension of time.<sup>2</sup>

4 The record includes a second letter from petitioner  
5 Robert Bowen to the city council, dated April 11, 1994,  
6 which states:

7 "As you know, a 90 day extension was granted me on  
8 January 13th and is due on April 13th. This  
9 enables me to consider all of the various legal  
10 options available to me. This date is one day  
11 before your April meeting. The position I would  
12 like to take is to appeal your action and order of  
13 January 5th, 1994. I know that one day does not  
14 give the council ample time to make roon [sic] for  
15 me on your calendar, and since the council is  
16 going to hear my case on the matter than concerns  
17 the guest cottage on May 12th, I want to request  
18 an extension until that May 12th meeting to  
19 discuss my case. \* \* \*" Record 45.

20 The city council's April 14, 1994 minutes indicate  
21 petitioner's second request for an extension was granted.<sup>3</sup>

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<sup>2</sup>The minutes of the city council meeting include the following under  
"Citizen Input on Unscheduled Items:"

"Bob Bowen requested a ninety day extension to the abatement  
order to comply with the permit issues regarding the docks.

"R. Wilson made a motion to grant the ninety day extension. M.  
Miller seconded the motion. The voting was unanimous, and the  
motion carried." Record 58.

<sup>3</sup>The minutes of that meeting include the following under "Mayor's  
Report:"

"\* \* \* \* \*

"c. Mr. Bowen submitted a request for an additional extension  
regarding his boat dock.

1           On June 9, 1994, the city council considered  
2 petitioner's request to appeal the January 5, 1994 order.  
3 There is no written decision reflecting the city council's  
4 action on June 9, 1994 other than the minutes of that  
5 meeting, which state in relevant part:

6           "R. Bowen - Request to Appeal Boat Dock/Boathouse  
7 Council Order Dated January 5, 1994 Mr. Bowen was  
8 present to appeal the order of January 5, 1994.  
9 He believed that the violation of [Dunes City  
10 Zoning Ordinance] 50, Section 6-I-A stated in the  
11 order did not apply to his situation. Attorney  
12 Gerber advised that the council first needed to  
13 determine if Mr. Bowen had made the appeal within  
14 ten days of the order as required. The two  
15 letters from Mr. Bowen requesting extensions were  
16 read and discussed. The first letter, dated  
17 January 10, 1994, asked for an extension of time  
18 to procure estimates and do the work. The second  
19 letter, dated April 11, 1994 asked for an  
20 extension to consider all of the various legal  
21 option [sic] available and the appeal [sic] the  
22 council action and order of January 5, 1994.

23           "The council discussed with Mr. Bowen the points  
24 of contention. Attorney Gerber reviewed the  
25 options for action by the council:

26           "1) Reopen and resolve the issues

27           "2) Not reopen or consider

28           "3) Not reopen or consider, but resolve issues in  
29 case of appeal

30           "B. Burrows and E. Passenger did not feel the time  
31 frame for appeal had been followed. They also

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"M. Miller made a motion to give Mr. Bowen a ninety day extension. R. Parent seconded the motion. The voting was unanimous, and the motion carried. The matter will be heard at the July City Council Meeting." Record 42-43.

1 felt that Mr. Bowen did not have any evidence that  
2 was not heard before the January order was issued.

3 "K. Hayes made a motion to not reconsider the  
4 order issued to Mr. Bowen January 5, 1994. B.  
5 Burrows seconded the motion. The voting was three  
6 in favor, one opposed. The motion carried."  
7 Record 35-36.

8 On June 30, 1994, petitioners filed a notice of intent  
9 to appeal with LUBA. The notice of intent to appeal  
10 describes the challenged decision as follows:

11 "[T]hat land use decision \* \* \* of respondent  
12 entitled (Abatement Order) which became final on  
13 June 9, 1994 and which involves Findings of Fact,  
14 Conclusions of Law, and the order, reached by the  
15 City Council of Dunes City on January 5, 1994, and  
16 as amended on June 9, 1994. \* \* \*"

17 **MOTION TO DISMISS**

18 Respondent moves to dismiss this appeal, alleging the  
19 city council's June 9, 1994 decision not to reconsider its  
20 January 5, 1994 order is not a land use decision.  
21 Respondent contends the June 9, 1994 decision is not a land  
22 use decision because it "does not apply [statewide planning]  
23 goals, comprehensive plan provisions, land use regulations,  
24 or a new land use regulation."<sup>4</sup> Respondent does not contend  
25 the January 5, 1994 order is not a land use decision, but

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<sup>4</sup>As relevant, a final decision by a local government is a land use decision if it concerns the application of the statewide planning goals, a comprehensive plan provision or a land use regulation. ORS 197.015(10)(a)(A). Although the challenged June 9, 1994 decision may suggest otherwise, we understand respondent to argue the city's comprehensive plan and land use regulations provide no right to a further local appeal or reconsideration of the city council's January 5, 1994 order.

1 rather argues petitioners' notice of intent to appeal was  
2 not timely filed to challenge the January 5, 1994 order.

3 The petition for review is where petitioners generally  
4 establish our jurisdiction.<sup>5</sup> However, where a responding  
5 party moves to dismiss on the basis that the appealed  
6 decision is not a land use decision or that the appeal was  
7 not timely filed, petitioner's response to the motion to  
8 dismiss must establish that we have jurisdiction.

9 Petitioners first object to the motion to dismiss on  
10 the basis that it was not timely filed. OAR 661-10-065(2).<sup>6</sup>  
11 Petitioners contend respondent's motion to dismiss should  
12 have been filed not later than 10 days after the local  
13 record was received by LUBA.<sup>7</sup> Because respondent failed to  
14 do so, petitioners argue we should not consider the motion  
15 to dismiss.

16 A motion challenging LUBA's jurisdiction is not subject  
17 to the 10-day requirement specified in OAR 661-10-065(2).

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<sup>5</sup>OAR 661-10-030(3)(c) requires that a petition for review "[s]tate why the challenged decision is a land use decision or limited land use decision subject to [LUBA's] jurisdiction."

<sup>6</sup>As relevant, OAR 661-10-065(2) provides:

"A party seeking to challenge the failure of an opposing party to comply with any of the requirements of statutes or Board rules shall make the challenge by motion filed with the Board and served on the adverse party within 10 days after the moving party obtains knowledge of such alleged failure. \* \* \*"

<sup>7</sup>The local record was received by LUBA on July 22, 1994. Respondent's motion to dismiss was filed on September 27, 1994.

1 Tournier v. City of Portland, 16 Or LUBA 546, 549 (1988);  
2 Osborne v. Lane County, 4 Or LUBA 368, 369 (1981); Grant  
3 County v. Oregon Dep't of fish and Wildlife, 1 Or LUBA 214,  
4 215 (1980). Even if it were, petitioners' substantial  
5 rights were not affected by respondent's delay in filing the  
6 motion to dismiss. OAR 661-10-005. This appeal proceeding  
7 has been suspended since petitioners filed objections to the  
8 record on July 30, 1994. The delay in filing the motion to  
9 dismiss did not delay the appeal, and we reject petitioners'  
10 argument that the motion to dismiss should not be  
11 considered.

12 The city's January 5, 1994 order applies provisions of  
13 the city's zoning ordinance, and for that reason alone it is  
14 a land use decision if it is a final local decision. The  
15 critical issue is whether there was a local appeal available  
16 to petitioners to challenge the January 5, 1994 order. If  
17 there was, petitioners were required to exhaust such an  
18 appeal before appealing to LUBA. ORS 197.825(2)(a); Lyke v.  
19 Lane County, 70 Or App 82, 688 P2d 411 (1984). Although  
20 petitioners never clearly say so, their notice of intent to  
21 appeal suggests they believe they were pursuing a local  
22 appeal and that local appeal came to an end with the city  
23 council's June 9, 1994 decision to deny them a local appeal.

24 The challenged decision can be read to reject  
25 petitioners' attempt to appeal the city council's January 5,  
26 1994 order, on the basis that petitioners' January 10 and

1 April 11, 1994 letters were inadequate to request a timely  
2 local appeal of the city council's January 5, 1994 order.  
3 However, neither respondent nor petitioners identify any  
4 city comprehensive plan or land use regulation provisions  
5 giving petitioners a right to appeal the January 5, 1994  
6 order. We do not see how a local government could provide a  
7 local right of appeal from a decision of its governing body,  
8 since the governing body is the highest local decision  
9 maker. Some local governing bodies do give parties a right  
10 to request reconsideration of an otherwise final decision.  
11 However, no party cites a plan, land use regulation or other  
12 city provision granting petitioners a right to seek  
13 reconsideration.

14 Even if such provisions for rehearing or  
15 reconsideration by the city council existed, the Court of  
16 Appeals explained in Portland Audubon Society v. Clackamas  
17 Co., 77 Or App 277, 281-82, 712 P2d 839 (1986) that a right  
18 to request rehearing or reconsideration by the highest local  
19 decision maker is not an "appeal" that a petitioner is  
20 obligated to exhaust before appealing to LUBA:

21 "A request for a rehearing by the same body that  
22 made the challenged decision is different from a  
23 request for review of that decision by a superior  
24 body. Review moves the case to a higher authority  
25 and closer to an ultimate decision; rehearing  
26 keeps the case with the body which has already  
27 considered it. \* \* \* A discretionary rehearing is  
28 not one of the 'remedies available by right' which  
29 the legislature required petitioner to exhaust  
30 before seeking LUBA review of the [local  
31 government's] action." (Footnote omitted.)

1 In the omitted footnote, the Court of Appeals expressed no  
2 opinion on the effect a request for local rehearing might  
3 have on the deadline for filing a notice of intent to appeal  
4 at LUBA. However, we find it unnecessary to reach that  
5 issue in this appeal for two reasons.

6 First, it is petitioners' obligation to establish our  
7 jurisdiction in this matter. Billington v. Polk County, 299  
8 Or 471, 475, 705 P2d 232 (1985); Miller v. City of Dayton,  
9 22 Or LUBA 661, 665, aff'd 113 Or App 300, rev den 314 Or  
10 573 (1992); Anderson Bros. v. City of Portland, 18 Or LUBA  
11 462, 464 (1989). To do so, petitioners must establish that  
12 their notice of intent to appeal was timely filed.  
13 Petitioners identify no comprehensive plan, land use  
14 regulation or other city provision granting them a right to  
15 seek rehearing or reconsideration of the January 5, 1994  
16 order. Neither do petitioners attempt to establish that  
17 such a rehearing or reconsideration, assuming it were  
18 requested, would have the legal effect under local  
19 legislation of preventing the January 5, 1994 order from  
20 becoming a final decision for purposes of appeal to LUBA  
21 until the rehearing or reconsideration were complete.

22 Second, the record shows the only local action  
23 petitioners took within 21 days after the January 5, 1994  
24 order was submittal of the January 10, 1994 letter, quoted

1 supra.<sup>8</sup> The January 10, 1994 letter simply seeks additional  
2 time to comply with the January 5, 1994 order; it does not  
3 seek rehearing or reconsideration of the January 5, 1994  
4 order.<sup>9</sup> Therefore, the city council's January 5, 1994 order  
5 is a final decision and the deadline for appealing that  
6 decision to LUBA expired on January 26, 1994.

7 Finally, there are no provisions in the city plan or  
8 land use regulations providing for reconsideration or  
9 rehearing of city council decisions, or at least no party  
10 contends such plan or land use regulation provisions exist.  
11 Therefore, the city council's June 9, 1994 decision to deny  
12 petitioners' request for reconsideration does not concern  
13 the application of a comprehensive plan provision or land  
14 use regulation. ORS 197.015(10)(a)(A). Accordingly, the  
15 June 9, 1994 decision is not itself a land use decision.

16 Respondent's motion to dismiss is granted.

17 This appeal is dismissed.

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<sup>8</sup>ORAR 661-10-015(1)(a) provides, in pertinent part:

"The Notice [of Intent to Appeal] shall be filed with [LUBA] on  
or before the 21st day after the date the decision sought to be  
reviewed becomes final or within the time provided by  
ORS 197.830(3) through (5). \* \* \*"

Petitioners do not contend the city failed to provide them written  
notice of the January 5, 1994 order or that ORS 197.830(3) through (5)  
applies here.

<sup>9</sup>The April 11, 1994 letter does seek reconsideration or an appeal, but  
by that time the January 5, 1994 order had become final, and the 21-day  
deadline for filing an appeal with LUBA had expired.