

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

4   DIANA BOOM, HENRY HORVAT, and    )  
5   MERVIN ARNOLD,                    )  
6                                        )  
7                    Petitioners,        )           LUBA No. 96-071  
8                                        )  
9            vs.                         )           FINAL OPINION  
10                                        )           AND ORDER  
11   COLUMBIA COUNTY,                 )  
12                                        )  
13                    Respondent.        )

14  
15  
16            Appeal from Columbia County.

17  
18            Michael F. Sheehan, Scappoose, filed the petition for  
19 review and argued on behalf of petitioners.

20  
21            Anne Corcoran Briggs, Assistant County Counsel, filed  
22 the response brief and argued on behalf of respondent. With  
23 her on the brief was John K. Knight, County Counsel.

24  
25            LIVINGSTON, Chief Referee; HANNA, Referee, participated  
26 in the decision.

27  
28                    REMANDED                                   06/26/96

29  
30            You are entitled to judicial review of this Order.  
31 Judicial review is governed by the provisions of ORS  
32 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the board of county  
4 commissioners (commissioners) not to intervene in a dispute  
5 over the election of the Scappoose-Spitzenberg citizen  
6 planning advisory committee (Scappoose CPAC).

7 **MOTION TO FILE REPLY BRIEF**

8 Petitioners request permission to file a reply brief,  
9 contending the county's response brief raises new issues,  
10 including challenges to the standing of petitioner Henry  
11 Horvat (Horvat) and to our jurisdiction. Petitioners rely  
12 on OAR 661-10-039, which states that "[a] reply brief shall  
13 be confined solely to new matters raised in the respondent's  
14 brief."

15 Respondent argues that because petitioners' brief  
16 contains a statement of standing, the challenge to standing  
17 in respondent's own brief is not a new matter that justifies  
18 a reply brief. Respondent argues further that because a  
19 motion to dismiss on jurisdictional grounds was made  
20 earlier, petitioner should have anticipated a renewed  
21 jurisdictional challenge would be made in respondent's  
22 brief.

23 Our rules require that each petitioner's brief state  
24 both the facts that establish a petitioner's standing and  
25 why the challenged decision is a land use decision or  
26 limited land use

1 decision subject to our jurisdiction. OAR 661-10-030(3)(a)  
2 and (c). However, such statements customarily do not  
3 include arguments intended to withstand challenges on these  
4 grounds. Therefore, we agree with petitioner that under OAR  
5 661-10-039, it is appropriate to allow a reply brief. See  
6 Sparrows v. Clackamas County, 24 Or LUBA 318, 320 (1992);  
7 Citizens Concerned v. City of Sherwood, 20 Or LUBA 550, 555-  
8 56 (1990).

9 The motion to file a reply brief is granted.

10 **FACTS**

11 **A. Election and Function of County Citizen Planning**  
12 **Advisory Committees**

13 Resolution No. 54-78, which was adopted by the  
14 commissioners on May 3, 1978, governs the election of each  
15 citizen planning advisory committee (CPAC) in the county.  
16 Resolution No. 54-78 states, in relevant part:

17 \* \* \* \* \*

18 "WHEREAS, in order to comply with the Goals and  
19 Guidelines promulgated by the Land Conservation  
20 and Development Commission regarding citizen  
21 involvement in land use planning; and

22 "WHEREAS, there is a need to establish rules to  
23 govern the creation and operation of these CPACs  
24 until there has been adopted a Comprehensive  
25 Zoning Ordinance; now, therefore

26 "BE IT RESOLVED that the rules and regulations,  
27 which are hereto attached, are and shall hereby be  
28 adopted. \* \* \*" Record 29.

29 The regulations attached to Resolution No. 54-78  
30 provide

1 that each planning area, including the Scappoose-Spitzenberg  
2 area, shall have its own CPAC, consisting of seven non-paid  
3 citizens "who have been elected in accordance with the  
4 included election rules." Record 31. Each planning  
5 neighborhood within a planning area has one position on the  
6 CPAC. If there are no nominees for the position allocated  
7 to a particular neighborhood, then that position becomes a  
8 "position at large." Record 34.

9 The Columbia County Comprehensive Plan (CCP), adopted  
10 after Resolution No. 54-78, makes express reference to  
11 Resolution No. 54-78, and emphasizes that CPACs are an  
12 important component of the county's citizen involvement  
13 program:

14 "The citizen involvement program has functioned,  
15 and continues to function, much as it was designed  
16 in 1975. CPACs hold regularly scheduled well-  
17 publicized meetings, where they discuss current  
18 and long-range planning issues. CPACs have  
19 reviewed drafts of the comprehensive plan and have  
20 forwarded comments to the Planning Commission for  
21 its consideration.

22 "\* \* \* \* \*

23 "Through these organizations and programs,  
24 citizens are able to participate [in] and be  
25 informed on all phases of County government.  
26 Further, through participation in these  
27 organizations, the views of the citizens can be  
28 expressed to decision-makers who must establish  
29 policies for future development of the County."  
30 CCCP 8.

31 The CCCP sets forth eight policies which emphasize the  
32 county's commitment to support, through appropriate

1 technical assistance, notices, mailings and public meetings,  
2 broad citizen involvement and representation on CPACs. The  
3 CPACs are to have a broadly

1 described, advisory role in implementing, reviewing and  
2 suggesting changes to the county's comprehensive plan.

3 **B. Election of Present Scappoose-Spitzenberg CPAC<sup>1</sup>**

4 On January 16, 1996, the county's chief planner  
5 assisted in the election of three persons to the Scappoose-  
6 Spitzenberg CPAC (Scappoose CPAC). Record 56-62. On  
7 February 6, 1996, a resident of the Scappoose-Spitzenberg  
8 neighborhood appeared before the commissioners to object to  
9 the election results on the basis that the election was not  
10 conducted according to the rules set forth in Resolution No.  
11 54-78. Record 55. On February 7, 1996, another resident  
12 appeared before the commissioners to make similar  
13 objections. Record 53. The commissioners discussed the  
14 Scappoose CPAC elections with disgruntled residents at their  
15 February 14, 21 and 28, and March 6, 1996 meetings, each  
16 time urging the residents to return to the newly elected  
17 Scappoose CPAC to resolve their concerns. Record 24-26, 45,  
18 51-52. The residents attempted to do so, but the  
19 controversy continued. Record 8, 39-44.

20 As explained in February 24 and March 6, 1994 letters  
21 to the commissioners from two objecting residents, there  
22 were declared, unopposed candidates for the positions on the  
23 Scappoose CPAC representing the Apple Valley and Scappoose

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<sup>1</sup>Because the challenged decision is not accompanied by findings, we accept petitioners' version of the facts, which is essentially undisputed by the county, to the extent it is supported by the record.

1 Dikelands neighborhoods. These candidates would have been  
2 seated had Resolution No. 54-78 been followed. Record 27-  
3 28, 46-50. A March 12, 1996 letter to the commissioners  
4 from the former secretary to the Scappoose CPAC contends the  
5 at-large elections deviated from the previous practice of  
6 electing representatives from each neighborhood, in accord  
7 with Resolution 54-78, and that she objected at the January  
8 16, 1996 meeting, when the election occurred. Record 12-14.

9 The commissioners considered the Scappoose CPAC  
10 election again at their March 12, 1996 meeting, and then  
11 voted "not to intervene in the Scappoose CPAC election."  
12 Record 7-9.

13 This appeal followed.

#### 14 **JURISDICTION**

15 We concluded earlier in these proceedings that the  
16 challenged decision "not to intervene" is a statutory land  
17 use decision. Boom v. Columbia County, \_\_\_ Or LUBA \_\_\_  
18 (LUBA No. 96-071, Order on Motion to Dismiss, May 7, 1996).  
19 The county now renews its jurisdictional challenge on three  
20 grounds: (1) jurisdiction over election contests is  
21 exclusively reserved to the circuit courts; (2) petitioners'  
22 appeal is not timely; and (3) because Resolution No. 54-78  
23 is not an ordinance, it is not a land use regulation, as  
24 that term is defined in ORS 197.015(11) and used in ORS

1 197.015(10)(a)(A)(iii).<sup>2</sup>

2 In support of the first contention, petitioner relies  
3 on ORS 258.036, which states petitions that contest election  
4 results must be filed with the county circuit court clerk.  
5 ORS 258.036 is part of ORS Title 23, which establishes the

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<sup>2</sup>ORS 197.015(11) defines "land use regulation" as

"any local government zoning ordinance, land division ordinance  
adopted under ORS 92.044 or 92.046 or similar general ordinance  
establishing standards for implementing a comprehensive plan."  
(Emphasis added.)

ORS 197.015(10) states, in relevant part:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local  
government or special district that concerns the  
adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

"(B) \* \* \* ; and

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not  
require interpretation or the exercise of policy or  
legal judgment;

"(B) Which approves or denies a building permit issued  
under clear and objective land use standards;

"(C) Which is a limited land use decision; or

"\* \* \* \* \*" (Emphasis added.)

1 procedures applicable to various specified elections. ORS  
2 Title 23 does not apply to the election of members to the  
3 Scappoose CPAC.

4 In support of the second contention, the county  
5 contends the time for appeal started when the election was  
6 "certified" by the chief county planner on January 16, 1996.  
7 Record 62. We agree with petitioners that in the absence of  
8 some statement to the contrary somewhere in the county's  
9 plan or zoning ordinance, their first recourse was to the  
10 commissioners who, by deciding not to intervene, effectively  
11 recognized the results of the January 16, 1996 election. It  
12 is that decision, made on March 12, 1996, that petitioners  
13 challenge in this appeal. The notice of intent to appeal,  
14 filed on April 1, 1996, was therefore timely.

15 We also reject the third contention. Notwithstanding  
16 the use of the word "ordinance" in ORS 197.015(11), whether  
17 a land use regulation is adopted by resolution or ordinance  
18 is unimportant. Baker v. City of Milwaukie, 271 Or 500,  
19 511, 533 P2d 772 (1985); City of Oregon City v. Clackamas  
20 County, 17 Or LUBA 476, 487, aff'd 96 Or App 651, rev den  
21 308 Or 315 (1989).

22 The challenged decision concerns the application of  
23 Resolution No. 54-78, which implements the county's  
24 comprehensive plan. It is a statutory land use decision.  
25 We again reject the county's jurisdictional challenge.

1 **STANDING OF PETITIONER HORVAT**

2 The county contends Horvat does not have standing to  
3 appear before this Board because he did not appear before  
4 the local government orally or in writing, as required by  
5 ORS 197.830(2)(b). Petitioners contend that because the  
6 county made a land use decision without providing a hearing,  
7 Horvat has standing simply by filing a timely notice of  
8 appeal. ORS 197.830(3).

9 Neither the CCCP nor the county's zoning ordinance  
10 describe a process for challenging CPAC elections. Although  
11 the commissioners did provide several opportunities for both  
12 sides to the dispute over the January 16, 1996 election to  
13 be heard, there was no hearing, as the term is defined in  
14 ORS 215.402 and used in ORS 197.830.<sup>3</sup> Therefore, Horvat has  
15 standing under ORS 197.830(3).

16 **ASSIGNMENT OF ERROR**

17 Petitioners assign error to the conduct of the January  
18 16, 1996 election of the Scappoose CPAC and the refusal of  
19 the commissioners to require compliance with the election  
20 procedures set forth in Resolution No. 54-78. The county

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<sup>3</sup>ORS 215.402(2) defines "hearing" as:

"[A] quasi-judicial hearing, authorized or required by the ordinances and regulations of a county \* \* \*:

"(a) To determine in accordance with such ordinances and regulations if a permit shall be granted or denied; or

"(b) To determine a contested case."

1 acknowledges Resolution No. 54-78 was not followed, but  
2 apparently recognizes the Scappoose CPAC anyway.

3         The Scappoose CPAC plays an advisory role in the county  
4 planning process.         The CCCP acknowledges the role of  
5 Resolution No. 54-78 with respect to CPACs.     If the county  
6 recognizes a CPAC chosen in violation of established  
7 election procedures, as it apparently has, it ignores a  
8 substantive violation of its own comprehensive plan and land  
9 use regulations and frustrates the goals set forth in the  
10 citizen involvement chapter of the CCCP.     A CPAC, such as  
11 the present Scappoose CPAC, chosen in violation of the  
12 county's regulations is a nullity.

13         The county's decision is remanded.