

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

4 FRANK GOLDEN and CHRISTINE GOLDEN,  
5 *Petitioners,*

6  
7 vs.  
8

9 CITY OF SILVERTON,  
10 *Respondent,*

11 and

12  
13 LAWRENCE T. EPPING,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2008-031  
17

18  
19 FINAL OPINION  
20 AND ORDER  
21

22 Appeal from City of Silverton.  
23

24 Frank Golden and Christine Golden, Silverton, filed the petition for review and  
25 argued on their own behalf.  
26

27 Richard D. Rodeman, Washougal, Washington, filed a response brief on behalf of  
28 respondent.  
29

30 Donald M. Kelley, Silverton, filed a response brief and argued on behalf of  
31 intervenor-respondent. With him on the brief was Kelley & Kelley.  
32

33 HOLSTUN, Board Member; BASSHAM, Board Chair; and RYAN, Board Member,  
34 participated in the decision.  
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36 REMANDED

02/20/2009

37  
38 You are entitled to judicial review of this Order. Judicial review is governed by the  
39 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners appeal a city council decision dismissing their attempted local appeal of a planning commission decision.

**MOTION TO INTERVENE**

Lawrence T. Epping (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is granted.

**FACTS**

In December 2007, the City of Silverton planning commission granted subdivision approval for Pioneer Village Phase 5, over petitioners’ objections. Petitioners attempted to appeal the planning commission approval to the city council as provided for under the city’s code. The city accepted the appeal and prepared a staff report regarding the subdivision approval. At the public hearing on the appeal, intervenor’s attorney moved to dismiss the local appeal because petitioners had not complied with city appeal requirements, in particular that the notice of appeal identify the decision being appealed and the date of the appealed decision. The city council granted intervenor’s motion and dismissed the local appeal. Petitioners appeal that dismissal decision.

**MOTIONS TO DISMISS**

Intervenor moves to dismiss this appeal, and the city moves to dismiss petitioner Frank Golden from this appeal. We address each motion in turn.

**A. Intervenor’s Motion to Dismiss the Appeal**

Intervenor moves to dismiss this appeal on the grounds that the challenged decision is not a land use decision subject to our jurisdiction. ORS 197.015(10)(a)(A) defines “land use decision” to include, among other things, “a final decision or determination made by a local government \* \* \* that concerns the \* \* \* application of \* \* \* a land use regulation.” ORS 197.015(10)(b) excludes decisions that are “made under land use standards which do not

1 require interpretation or the exercise of policy or legal judgment” from the ORS  
2 197.015(10)(a)(A) definition of “land use decision.” As we discuss later, the city dismissed  
3 petitioners’ local appeal on the basis that the notice of appeal did not adequately describe the  
4 decision being appealed. Intervenor argues that in dismissing petitioners’ local appeal the  
5 city was not required to exercise any policy or legal judgment.

6 As our resolution of the first assignment of error makes clear, the city’s decision to  
7 dismiss this appeal applied a land use regulation and required interpretation or the exercise of  
8 policy or legal judgment. It follows that the challenged decision is a land use decision and is  
9 subject to our jurisdiction. Even if the city’s decision to dismiss the appeal did not require  
10 interpretation or the exercise of policy or legal judgment, however, we would still have  
11 jurisdiction over the challenged decision. That is because the local decision petitioners  
12 attempted to appeal is unquestionably a land use decision. *See Breivogel v. Washington*  
13 *County*, 114 Or App 55, 58, 834 P2d 473 (1992) (even if decision dismissing a local appeal is  
14 “ministerial,” LUBA has jurisdiction over a ministerial dismissal decision if the underlying  
15 decision that was the subject of the local appeal is a land use decision).

16 Intervenor’s motion to dismiss is denied

17 **B. The City’s Motion to Dismiss Petitioner Frank Golden**

18 The city moves to dismiss petitioner Frank Golden from this appeal on the grounds  
19 that he did not sign the notice of appeal form. Although petitioner Christine Golden signed  
20 the form, her signature was just added near the bottom. The notice of appeal form provided  
21 by the city does not require or provide a line for an appellant’s signature. More importantly,  
22 the city points to no requirement in the city’s code that requires appellants to sign a notice of  
23 appeal. Finally, under the “Name of Appellant” line of the notice of appeal form, the  
24 appellants are listed as “Christine & Frank Golden.” Record 30. The form only requires that  
25 the name of the appellant be listed, and Frank Golden’s name was listed.

1 The city’s motion to dismiss petitioner Frank Golden is denied.<sup>1</sup>

2 **MOTION TO STRIKE**

3 Respondents move to strike part of the petition for review on the grounds that the  
4 challenged portion of the petition for review asserts facts that were not included in the  
5 statement of facts section and are not supported by citations to the record. The challenged  
6 portion of the petition for review has no bearing upon our disposition of this appeal and we  
7 therefore decline to strike those assertions of fact.

8 Respondents’ motion to strike is denied.

9 **FIRST ASSIGNMENT OF ERROR**

10 The city dismissed petitioners’ local appeal because the city found that petitioners’  
11 notice of appeal did not meet Revised Silverton Municipal Code (RSMC) requirements.  
12 Petitioners argue that the city misconstrued the RSMC in dismissing their local appeal.  
13 RSMC 18.02.800.010 sets out the requirements for a notice of appeal:

14 “A ‘Notice of Appeal’ shall contain:

15 “1. *An identification of the decision sought to be reviewed including the*  
16 *date of the decision.*

17 “2. A statement of the interest of the person seeking review and that  
18 he/she was a party to the initial proceedings.

19 “3. The specific policy or criteria relied upon for review.

20 “4. If de novo review is requested, a statement summarizing the new  
21 evidence which will be offered and the criteria to which it will relate.

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<sup>1</sup> The city also argues that Frank Golden did not appear before the planning commission. Even if that is true, the planning commission decision is not the decision on appeal at LUBA. The challenged decision is the city council’s decision dismissing petitioners’ local appeal of the planning commission’s decision. As we have noted, petitioner Frank Golden is listed as one of the appellants on the notice of appeal. That is sufficient to constitute an appearance before the city council and confer standing to appeal to LUBA. On remand, the city is free to determine whether Frank Golden made an appearance before the planning commission and if he did not, whether that failure means petitioner Frank Golden lacks standing to appeal the planning commission’s decision.

1                   The decision to grant a de novo hearing rests solely upon the discretion  
2                   of the City Council.” (Emphasis added.)

3                   The notice of appeal form provided by the city includes blank lines to specify the  
4                   “Decision Body,” “Original Decision,” “Date of Decision,” and “Effective Date of  
5                   Decision.” Petitioners, however, left those lines blank. Under the line provided for  
6                   “Statement of specific grounds for the appeal (Attach additional sheets as needed)”  
7                   petitioners wrote “please see attached documents.” Record 30. On their attached documents,  
8                   petitioners stated “[w]e are appealing the recent decision by the Planning Commission to  
9                   recommend approval of phase 5 of Pioneer Village on the following grounds: \* \* \*.” Record  
10                  31. The city’s decision dismissing petitioners’ local appeal states:

11                  “The Appeal made reference to a recent decision by the Planning  
12                  Commission. The Appeal did not identify the decision sought to be reviewed.  
13                  The Appeal did not identify the date of the decision or the effective date of the  
14                  decision.

15                  “\* \* \* \* \*

16                  “After deliberation the Council voted 6-1 to uphold the motion to dismiss  
17                  because:

18                  “The Notice of Appeal did not contain the identification of the decision sought  
19                  to be reviewed; and

20                  “The Notice of Appeal did not contain the date of the decision.” Record 7-8.

21                  Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS  
22                  197.829(1), LUBA may only overturn a local government’s interpretation of its own  
23                  ordinances if the interpretation is inconsistent with the express language, purpose, or policy  
24                  of the ordinance.<sup>2</sup> Respondents argue that RSMC 18.02.800.010 states that a notice of

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<sup>2</sup> ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

1 appeal “shall” contain identification of the decision and the date of the decision being  
2 challenged, the word “shall” is well understood to be mandatory, and therefore the city’s  
3 interpretation is not inconsistent with the meaning of “shall.” We agree with respondents  
4 that the word “shall” is mandatory.<sup>3</sup> We also agree that petitioners’ notice of appeal did not  
5 comply with one of the requirements of RSMC 18.02.800.010. However, the interpretation  
6 that is at issue in this appeal is the city’s implicit interpretation that in addition to requiring  
7 that appellants provide a description of the decision being appealed including the date, the  
8 consequence of not providing that information at the time and in the manner specified by  
9 RSMC 18.02.800.010 is that the local appeal must be dismissed.<sup>4</sup>

10 In *Breivogel v. Washington County*, 114 Or App 55, 834 P2d 473 (1992), the Court of  
11 Appeals found that a local appellant’s failure to comply with county notice of appeal  
12 requirements in that case meant that the local appellant’s appeal must be dismissed. The  
13 county code required appellants to sign their appeals and specified that failure to sign the  
14 appeal “shall be a jurisdictional defect.” 114 Or App at 57. The petitioners failed to sign the  
15 local notice of appeal and the county dismissed their local appeal. The Court held that where  
16 a local government specifies that a local appeal requirement is “jurisdictional,” a failure to

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- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
  - “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
  - “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

<sup>3</sup> RSMC 18.01.005 provides that “**Shall:** As used in this Chapter, is mandatory.”

<sup>4</sup> We agree with respondents that petitioners did not comply with RSMC 18.02.800.010(1) because they did not specify the date of the decision. Respondents also argue that petitioners failed to comply with RSMC 18.02.800.010(1) because they identified the challenged decision as a “recommendation of approval” from the planning commission rather than “approval” by the planning commission. We do not agree that identifying the planning commission’s decision as a recommendation of the planning commission rather than a decision of the planning commission constitutes a violation of the RSMC 18.02.800.010 requirement for an “identification of the decision.”

1 comply with those “jurisdictional” requirements properly results in dismissal of the local  
2 appeal. *Id.* at 58-59.<sup>5</sup>

3 In *Tipton v. Coos County*, 29 Or LUBA 474 (1995), the county zoning ordinance  
4 required that the notice of local appeal include information establishing, among other things,  
5 that the appellants had standing to appeal. The ordinance further provided that if appellants  
6 were found to be lacking standing that the county “shall summarily dismiss the appeal.” *Id.*  
7 at 476. The local appellants failed to provide information establishing that they had standing  
8 to appeal. We affirmed the county’s decision to dismiss the local appeal because the local  
9 code established mandatory prerequisites to the appeal and specified that the consequence of  
10 not satisfying the specified prerequisites in the local notice of appeal was summary dismissal.  
11 *Id.* at 477.

12 In *Siuslaw Rod and Gun Club v. City of Florence*, 48 Or LUBA 163 (2004), under the  
13 City of Florence code a local appeal had to be initiated by a timely “notice of intent to  
14 appeal” and once that notice was filed there was a 10-day deadline to file a “written petition.”  
15 The city’s code required that the written petition include a “certification” that the petition had  
16 been delivered or mailed to affected parties. After accepting petitioner’s appeal in *Siuslaw*  
17 *Rod and Gun Club*, the city dismissed the appeal, citing petitioner’s failure to file the  
18 required certification with the petition and its failure to file the required filing fee. *Id.* at 169.  
19 On appeal, we cited *Breivogel* and *Tipton* for the proposition that where a local filing  
20 requirement is “jurisdictional,” neither LUBA nor the local government may disregard that  
21 requirement. We went on to explain that the City of Florence code did not make the failure  
22 to file the petition certification or pay the filing fee “jurisdictional” or mandatory  
23 prerequisites to an appeal. The Florence city code did make failure to comply with certain

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<sup>5</sup> The Court noted that the term “jurisdictional” is probably not the most accurate term, but understood it to mean local provisions that imposed “certain procedural requirements that are mandatory prerequisites to an appeal.” *Id.* at 57 n 2.

1 other specified requirements jurisdictional or mandatory requirements that would lead to  
2 dismissal. However the city’s code also specified that measures short of dismissal were  
3 required for other missing information. *Id.* at 172-74. Because the failures cited by the city  
4 in dismissing the appeal were not “jurisdictional” or mandatory prerequisites, we remanded  
5 the city’s decision.

6 As the foregoing cases illustrate, where a city or county code makes it clear that  
7 requirements are “jurisdictional” or mandatory requirements, in the sense that failures to  
8 comply with those requirements will lead to dismissal of a local appeal, a local government  
9 may reject or dismiss a local appeal when a local appellant fails to comply with those  
10 requirements. The cases also illustrate that when the local code specifically provides other  
11 measures for remedying the omission, dismissal of the local appeal is improper. The present  
12 case falls somewhere in between those two extremes. RSMC 18.02.800.010 merely sets out  
13 the requirements for a notice of appeal. Unlike the codes in *Breivogel* or *Tipton* the RSMC  
14 does not specifically provide that the failure to provide the information requires dismissal of  
15 the local appeal. Unlike *Siuslaw Rod and Gun Club*, however, the RSMC does not expressly  
16 provide that a notice of appeal that deviates from specified requirements can subsequently be  
17 corrected by belatedly providing the required information. The RSMC is silent as to what the  
18 consequences of failing to comply with RSMC 18.02.800.010 are.

19 Respondents are correct that petitioners failed to comply with RSMC  
20 18.02.800.010(1), because they did not specify the date of the appealed decision. *See* n 4.  
21 The city could have certainly required petitioners to provide the missing information even  
22 though it is clear that there was no confusion on the part of the city about the identity of the  
23 decision that petitioners wished to appeal or its date.<sup>6</sup> As we have already noted, a detailed

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<sup>6</sup> We emphasize that this is not a case where petitioners failed to provide the required information in the notice of appeal, the city called that failure to petitioners’ attention, and petitioners thereafter refused to provide the required information.

1 staff report was prepared for the appeal hearing. Dismissal of a local appeal for failure to  
2 comply with an informational requirement like specifying the date of the appealed decision  
3 in the local notice of appeal, however, is a sufficiently harsh sanction that we believe a local  
4 government may dismiss the appeal only if its code expressly provides that dismissal is the  
5 sanction for not including that date in the notice of appeal. We are not directed to any other  
6 provision of the RSMC indicating that dismissal of an appeal based on such a failure furthers  
7 the policy or purpose of the RSMC. Absent any indication in RSMC 18.02.800.010 or  
8 elsewhere in the RSMC that an appeal will be dismissed if required information is not  
9 supplied in precisely the manner directed in the code, we conclude the city misconstrued the  
10 applicable law by interpreting RSMC 18.02.800.010(1) to allow it to dismiss petitioners'  
11 local appeal based on petitioners' failure to specify the date of the appealed decision in the  
12 notice of appeal.<sup>7</sup>

13 We have no question that some procedural requirements can be made “jurisdictional,”  
14 with dismissal of an appeal the consequence for failure to comply with such requirements.  
15 But it also seems likely that an attempt to make some more mundane procedural  
16 requirements jurisdictional may well at some point be found to impinge on the rights that are  
17 extended to parties in land use proceedings under state law. *See Breivogal*, 114 Or App at  
18 58-59 (“[r]espondents do not contend that, and we therefore do not decide whether, the  
19 county’s ‘jurisdictional’ requirement contravenes state law”). However, with that caveat, we  
20 merely decide in this case that if the City of Silverton wants to make dismissal of a local  
21 appeal the consequence for failure to comply with an informational requirement like the

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<sup>7</sup> We emphasize that this is not a case where petitioners failed to file their local appeal within the 10 day deadline specified in RSMC 18.02.800(2). Failure to file a local appeal within the 10 day deadline specified in the RSMC is a much more serious error with potential impacts on the requirements for appealing the city’s decision to LUBA. Failure to timely file a local appeal may well be a basis for refusing to accept a local appeal or dismissing a local appeal, without regard to whether the RSMC expressly states that such a failure will result in dismissal. We need not and do not decide that question here.

1 RSMC 18.02.800.010(1) requirement to specify the date of the appealed decision, it must do  
2 so with sufficient clarity to put the parties in a local appeal on notice that failures to comply  
3 with that informational requirement will lead to dismissal of the appeal.

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners argue that by refusing to accept their local appeal the city suppressed  
7 citizen involvement in violation of Goal 1 (Citizen Involvement). Goal 1 requires a local  
8 government to adopt a citizen involvement program (CIP). Where the challenged decision  
9 does not involve an amendment to the CIP, the only way a petitioner can demonstrate a  
10 violation of Goal 1 is by demonstrating that the local government failed to comply with the  
11 CIP. *Wade v. Lane County*, 20 Or LUBA 369, 376 (1990). The city’s local appeal  
12 procedures presumably were adopted in part to implement the city’s CIP. Although the city  
13 erroneously interpreted those procedures in processing petitioners’ local appeal, that error  
14 constitutes a violation of the RSMC. That error does not constitute a violation of the city’s  
15 obligation under Goal 1 to *develop* a CIP. *Jaffer v. City of Monmouth*, 51 Or LUBA 633, 657  
16 (2006).

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioners argue that their failure to adequately describe the challenged decision was  
20 merely a technical error that did not prejudice the substantial rights of any parties and  
21 therefore the city should not have dismissed their local appeal. Petitioners rely on OAR 661-  
22 010-0005 for their argument.<sup>8</sup> OAR 661-010-0005, however, is LUBA’s administrative rule

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<sup>8</sup> OAR 661-010-0005 provides:

“[LUBA’s] rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable

1 that explains how LUBA treats technical violations of *LUBA's rules*. While local  
2 governments could likely decide to employ a similar standard in treating such violations of  
3 local rules, OAR 661-010-0005 does not apply to local governments and local governments  
4 are not bound to treat technical errors in the same manner as LUBA.

5 The third assignment of error is denied.

6 The city's decision is remanded.

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time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661-010-0015(1) or a petition for review under OAR 661-010-0030(1) is not a technical violation.”