BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TODD SCHULTZ, THERESA LOVE and THE STRASBURG COMMONS COMMITTEE,	)	
Petitioners,	)	
vs.	)	
	)	LUBA No. 98-080
CITY OF FOREST GROVE,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
and	)	
BENCHMARK LAND CO. - KNOX RIDGE III, LLC and BENCHMARK LAND CO. - KNOX RIDGE IV, LLC,	)	
Intervenors-Respondent.	)	

Appeal from City of Forest Grove.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Preston, Gates and Ellis.

David C. Noren, Hillsboro, filed a response brief and argued on behalf of respondent.

Jack L. Orchard, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Ball Janik.

GUSTAFSON, Board Member; HANNA, Board Member, participated in the decision.

AFFIRMED 02/26/99

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

Opinion by Gustafson.

NATURE OF THE DECISION

Petitioners appeal a decision of the city council affirming the planning commission's decision that a December 17, 1997 letter written by the community development director was not subject to appeal to the planning commission.

MOTION TO INTERVENE

Benchmark Land Company - Knox Ridge III, LLC, and Benchmark Land Company - Knox Ridge IV, LLC (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioners filed a reply brief. A reply brief is allowed only to the extent it is confined to "new matters raised in the respondent's brief." OAR 661-010-0039. Intervenors moved to dismiss this appeal in their response brief. In Boom v. Columbia County, 31 Or LUBA 318, 319 (1996), this Board held that a reply brief was appropriate to respond to challenges to standing and jurisdiction that were raised for the first time in respondent's brief. To the extent that petitioners' reply brief responds to intervenors' motion to dismiss, it is allowed. The rest of the reply brief simply embellishes the arguments made in the petition for review, and is therefore not allowed under OAR 661-010-0039. Wissusik v. Yamhill County, 20 Or LUBA 246, 250 (1990).

Petitioners' motion to file a reply brief is allowed in part.

FACTS

Intervenors sought approval of a preliminary plat for two phases of a subdivision. Petitioners objected to the development proposal before the planning commission on the grounds that a 181-foot floodplain elevation depicted on the plat was not accurate and that construction activity should occur only above the 185-foot elevation. On November 3, 1997, the planning commission voted to approve intervenors' application, with conditions. The

planning commission imposed a condition of approval that provides: "Require that homes, including foundations, be restricted to an elevation at or above 185 feet." Record 147. Petitioners did not appeal the planning commission decision. The decision was, however, appealed by a third party.

On December 10, 1997, intervenors and the city entered into a stipulated order for preemptory writ of mandamus that required that the city issue a final land use order approving the preliminary plat in accordance with the planning commission's November 3, 1997 decision. The writ of mandamus by its terms rendered the appeal pending before the city council moot.

By letter to the community development director (director) dated December 16, 1997, petitioners requested a clarification of the findings in the November 3, 1997 decision. On December 17, 1997, the director responded with the letter that is at issue in this proceeding. In the letter, the director recites the finding regarding the 185-foot elevation restriction and states, in relevant part:

> "I think the language focuses on the structure, not the land. The Commission could have said something such as 'the developer shall not grade, fill, or otherwise modify parcels such that the resulting land is higher than the current topography' and/or 'the structure shall not be built on ground which is lower than 185 feet as it exists today'. The Commission didn't say that, and we can only guess on the likely results if such a motion had been made. The writ of mandamus limits our ability to continue any City action, so we cannot go back to the Planning Commission to ask them to refine their language.
>
> "We will probably require the builder to certify (by having the information stamped by a registered surveyor), that the lowest point of the crawl space is at or above the 185 feet elevation when forms are in place but prior to concrete being poured. I think the result of the Planning Commission decision will mean some leveling and filling as part of building pad preparation, and slightly higher total building height on some homes as a result of having the pad height (which after construction becomes a crawl space) being designed and filled to the 185 foot level." Record 147.

Petitioners filed an appeal of the director's letter under Forest Grove Land Division Ordinance (FGLDO) 9.116(1), which provides that "[a]n action or ruling of the Community

Development Director may be appealed to the Planning Commission[.]" The planning commission heard petitioners' appeal and decided that the director had neither made a ruling nor taken an action that is appealable under FGLDO 9.116(1). Petitioners appealed the planning commission's decision to the city council. Following an appeal hearing, the city council affirmed the planning commission's decision.

JURISDICTION

Intervenors move to dismiss this appeal on the basis that the December 17, 1997 letter is not a land use decision over which this Board has jurisdiction. Intervenors do not, however, contend that the city council's affirmation of the planning commission's decision (that the director's December 17, 1997 letter was not subject to appeal to the planning commission) is not a land use decision. It is that decision that petitioners challenge in their notice of intent to appeal.

To the extent that the appeal challenges the final determination by the city council affirming the planning commission's decision that the director's December 17, 1997 letter was not subject to appeal, this Board has jurisdiction to review the challenged decision. Kevedy, Inc. v. City of Portland, 28 Or LUBA 227, 240 (1994). That decision necessarily required the city council to apply the code provision pertaining to appeals to determine that the director's letter was not appealable under that code. Under ORS 197.015(10)(a)(A)(iii), a "land use decision" includes a final determination made by a local government that concerns the application of a land use regulation. This Board has jurisdiction over such decisions pursuant to ORS 197.825(1).

Intervenor's motion to dismiss is denied.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the city's determination that the director's December 17, 1997 letter is not an "action or ruling" under FGLDO 9.116(1). Petitioners contend that the letter

is, on its face, an "action or ruling of the Community Development Director" that is subject to the appeal under FGLDO 9.116(1).

Petitioners contend that four circumstances indicate that the challenged letter is, on its face, an "action or ruling" of the director: 1) the letter was written by the director in his official capacity on city letterhead; 2) the letter was written specifically to respond to petitioner Schultz's request for clarification of a permit condition; 3) neither the FGLDO nor the Forest Grove Zoning Ordinance provide any formal interpretation or ruling procedure; and 4) if the director had not intended to make a "action or ruling," he should not have responded in such a formal manner to petitioner Schultz's letter, and that having done so, the city is precluded from claiming that the challenged letter was not an "action or ruling."

Petitioners further contend that FGLDO 9.116(1) must necessarily include both formal and informal actions and rulings by the director. Petitioners reason that, given the lack of any formal process in the city's land use regulations for obtaining a formal action or ruling, FGLDO 9.116(1) must include at least some informal actions. Nonetheless, petitioners go on to argue that the December 17, 1997 director's letter was not entirely informal, because it was a specific response to a request for clarification made in written form and the request for clarification was the sort of interpretational request that should elicit a formal "action or ruling" of the director.

The city responds that the challenged letter does not approve or deny any permit or other application, but merely speculates on the meaning of a past decision and anticipates how a future application might be reviewed; therefore, that letter is not an action or ruling subject to appeal under the city's code. The city also argues that to the extent the city council's decision implicitly interprets FGLDO 9.116(1), that decision should be affirmed under ORS 197.829(1) because it is consistent with the text of FGLDO 9.116(1).

In determining that the challenged letter was not an "action or ruling" of the director, the city council necessarily, albeit implicitly, interpreted FGLDO 9.116(1). That

interpretation is inadequate for our review because the analytical steps of the implicit legal basis for the city council's conclusion is omitted from the challenged decision. See Larson v. Wallowa County, 116 Or App 96, 840 P2d 1350 (1992) (local government's omission of necessary analytical steps in its interpretation or failure to offer an interpretation renders the interpretation inadequate for review); Doob v. Josephine County, 31 Or LUBA 275, 279 (1996) (county decision is inadequate for review where the Board cannot determine the legal basis for county's conclusion). Nonetheless, because we are presented a pure question of law, we find it appropriate to exercise our authority under ORS 197.829(2) to determine "whether the local government decision is correct."[1] See Alliance for Responsible Land Use v. Deschutes Cty., 149 Or App 259, 265-66, 942 P2d 836 (1997), rev dismissed 327 Or 555 (1998) (LUBA may interpret local legislation ab initio and independently, as part of the process of reviewing the local government's decision).

The text of FGLDO 9.116(1) clearly provides that an action or ruling of the director may be appealed. However, the terms "action or ruling" are not defined in the FGLDO. Pursuant to the statutory construction methodology enunciated in PGE v. Bureau of Labor and Industries, 317 Or 606, 610-11, 859 P2d 1143 (1993), we look to the context of FGLDO 9.116(1) to determine the city's intent in enacting that provision with respect to the meaning of the language "[a]n action or ruling of the Community Development Director[.]" See Sanchez v. Clatsop County, 146 Or App 159, 163, 932 P2d 557 (1997) ("In construing a statute or ordinance, [LUBA's] role is to determine the enacting body's intent. The best evidence of that intent is the law's text and context.")

---

[1] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

The context of FGLDO 9.116(1) indicates that an "action or ruling" of the director refers to the decisions that the director is required to make in other sections of the FGLDO. Those decisions generally pertain to the approval, denial, or conditional approval of applications under specific provisions of the FGLDO. For example, FGLDO 9.103(1) grants the director the authority to approve or disapprove land division proposals. FGLDO 9.104(2)(g) provides that "a decision" made by the director on a tentative plat application may be appealed to the planning commission according to the provisions of FGLDO 9.116. Likewise, under FGLDO 9.105(4), "a decision" made by the director on a final plat may be appealed as provided in FGLDO 9.116. Under FGLDO 9.106(1), a person may submit a land partition proposal to the director for approval. The director must approve, approve with conditions, or deny the proposed land partition. FGLDO 9.106(2)(b). Any condition that the director imposes may be appealed to the planning commission under FGLDO 9.116. FGLDO 9.106(2)(b). "A decision" made by the director on a proposed partition is also appealable to the planning commission. FGLDO 9.106(5).

The broad range of decision-making authority granted the director does not extend specifically to issues of storm drainage, erosion, and sedimentation control under FGLDO 9.111. The director is conspicuously absent from that section's provisions, which assign duties specifically to the city engineer.

The designation of the city engineer as the city official with review and decision-making authority under FGLDO 9.111 suggests that that area is one in which the director is not expected to make an "action or ruling." The challenged letter did not approve or deny any application. The letter does no more then repeat a previous condition of approval made by the planning commission and speculate as to how that condition may be applied in the future. We therefore determine that the city council correctly decided that the challenged letter was not an action or ruling of the director under FGLDO 9.116(1).

Petitioners' first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that even if the council's determination that the director's December 17, 1997 letter was not an "action or ruling" under FGLDO 9.116(1) is sustainable, the council's decision is procedurally defective because it fails to adopt findings as required by ORS 227.173(2). That statute provides:

> "Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

ORS 227.173(2) is limited by its terms to "[a]pproval or denial of a permit application or expedited land division." We do not understand petitioners to argue that that the challenged council decision involves the "[a]pproval or denial of a permit application or expedited land division." ORS 227.173(2) does not apply to the challenged decision.

Petitioners also argue that without findings, this Board has no interpretation to review or defer to under ORS 197.829. However, in light of our decision under the first assignment of error, petitioners' argument fails.

Petitioners' second assignment of error is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

In their third and fourth assignments of error, petitioners contend that the December 17, 1997 letter is a land use decision under statutory and case law. Petitioners did not appeal that letter to this Board. Because the time to do so expired prior to the time petitioners filed their notice of intent to appeal in this matter, this Board lacks jurisdiction to review that letter.

The third and fourth assignments of error are denied.

The city's decision is affirmed.