BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAM DAVIS,
Petitioner,

vs.

CITY OF ASHLAND,
Respondent.

LUBA Nos. 98-217 & 99-051

Appeal from City of Ashland.

William F. Wilson, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief were John Hassen and Hornecker, Cowling, Hassen & Heysell, L.L.P.

Paul Nolte, City Attorney, Ashland, filed the response brief and argued on behalf of respondent.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED	(LUBA No. 98-217)	11/24/99
DISMISSED	(LUBA No. 99-051)	11/24/99

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a determination that a driving range is a permitted accessory use to a public golf course.

MOTION TO FILE REPLY BRIEF

Petitioner moves for permission to file a reply brief. The motion states that the reply brief responds to challenges to the Board's jurisdiction and petitioner's standing that were raised in the response brief. A reply brief accompanies the motion.

Petitioner's reply brief is confined to the issues of jurisdiction and standing that were raised for the first time in the response brief. Accordingly, we grant petitioner's motion to file a reply brief. OAR 661-010-0039.

FACTS

Oak Knoll Golf Course (Oak Knoll) is a public golf course owned by the City of Ashland and operated by the Ashland Parks and Recreation Commission (APRC). APRC is an entity created by the Ashland city charter; however, its authority to operate and maintain the city's parks is independent of the authority of the city council.

As early as April 2, 1998, APRC began planning for the construction of a driving range at Oak Knoll. In June 1998, APRC approached the city planning director to determine what, if any, land use permits were necessary for the driving range. The planning director orally responded that no permits were necessary. APRC proceeded with its plans to install the driving range based on the planning director's oral determination.

Construction of the driving range commenced in October 1998. Because APRC received several inquiries regarding the activities at the golf course, APRC held an open forum on November 16, 1998, where many neighbors expressed their objections and concerns regarding the driving range proposal. APRC held another open forum on the matter on December 14, 1998, where petitioner, among others, expressed objections and concerns.

At that meeting, APRC read into the record an undated letter from the city. The letter put into written form the June 1998 determination by the planning director that the proposed driving range is permitted outright and, therefore, is not subject to further city approvals. The APRC director sent petitioner a facsimile of the planning director's letter on December 15, 1998. On December 22, 1998, petitioner filed a notice of intent to appeal the planning director's letter decision to LUBA (LUBA No. 98-217).

In response to the public comment on December 14, 1998, the APRC reaffirmed its plans to construct the driving range, but formed a Driving Range Committee to explore possible alternative sites within the Oak Knoll property. After the APRC Driving Range Committee failed to identify an acceptable alternative location, APRC affirmed the original location of the driving range on the golf course grounds on March 15, 1999. Petitioner filed a local appeal of the March 15, 1999 APRC decision to the City of Ashland. Petitioner's appeal was denied by the planning director on March 19, 1999, on the basis that a decision by APRC is a decision independent of the city's land use review. Petitioner then appealed APRC's March 15, 1999 decision to LUBA (LUBA No. 99-051).

JURISDICTION

A threshold question in these appeals is whether either the planning director's decision that permits are not required to site a driving range on a public course (LUBA No. 98-217), or the APRC's decision affirming the location of the driving range and directing the completion of construction (LUBA No. 99-051) are "land use decisions" subject to LUBA jurisdiction pursuant to ORS 197.825.[1] We address the latter issue first.

[1]ORS 197.825 provides, in relevant part:

> "(1) [T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision * * *."

A. LUBA No. 99-051

In this appeal, petitioner challenges APRC's March 15, 1999 decision to complete the driving range project. In determining whether and how to proceed to site a driving range, APRC was acting as a landowner, making independent decisions regarding potential uses of its property. APRC's March 15, 1999 decision presumably relied on the planning director's prior advice that no permits were required for APRC's proposed use of its property, and that advice by the city may constitute a land use decision under ORS 197.015(10)(a). However, petitioner makes no attempt to demonstrate that the March 15, 1999 APRC decision was made by one of the decision making bodies identified by ORS 197.015(10)(a), or that the March 15, 1999 decision itself concerns the application of a comprehensive plan or land use regulation.[2] Therefore, LUBA No. 99-051 is dismissed.

B. LUBA No. 98-217[3]

We now turn to petitioner's appeal of the planning director's letter that determines the proposed use is not subject to any city permitting process (LUBA No. 98-217). Respondent provides two theories to support its argument that this decision is not subject to our jurisdiction. First, respondent argues that this decision is ministerial and, therefore,

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[2]ORS 197.015(10)(a) defines "land use decision" to include:

> "(A) A final decision or determination made by a local government or special district that concerns the * * * application of:
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> "* * * * *
>
> "(ii) A comprehensive plan provision; [or]
>
> "(iii) A land use regulation[.] * * *"

[3]It is not absolutely clear from petitioner's notice of intent to appeal in LUBA No. 98-217 whether petitioner challenges the December 14, 1998 APRC oral decision to site the driving range, or the city planning director's letter decision that was submitted to the APRC at the December 14, 1998 meeting. Because the petition for review attaches the planning director's letter, and the city does not question that it is the planning director's letter that is being challenged, we assume that the city planning director's letter constitutes the decision at issue in this appeal.

subject to the exemption to the definition of "land use decision" that is provided in ORS 197.015(10)(b)(A).[4] Second, respondent argues that even if this is a "land use decision" as provided in the statute, petitioner "knew or should have known" about the decision to permit the driving range more than 21 days prior to petitioner's filing of his notice of intent to appeal to LUBA. Thus, respondent argues, because petitioner did not appeal the city's decision in a timely fashion, the appeal should be dismissed.

1. Non-discretionary decision

Ashland Land Use Ordinance (ALUO) 18.20.020 provides, in relevant part:

> "The following uses and their accessory uses are permitted outright [in the Suburban Residential (R-1) district]:
>
> "* * * * *
>
> "(E) Public schools, parks, and recreational facilities."

An "accessory use" is defined as a use "incidental and subordinate to the main use of the property, and which is located on the same lot with the main use." ALUO 18.08.020. ALUO 18.20.030 lists the conditional uses in the R-1 district. Conditional uses include "[r]ecreational uses and facilities, including country clubs, golf courses, swimming clubs and tennis clubs; but not including such intensive commercial recreational uses as a driving range, race track or amusement park." ALUO 18.20.030(E).

The city argues that the planning director's letter was a simple determination that the proposed driving range is a permitted accessory use to a public recreational facility, *i.e.*, the golf course. According to the city, this determination requires neither interpretation nor the

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[4]ORS 197.015(10)(b)(A) provides that the ORS 197.015(10)(a) definition of "land use decision" 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[.] * * *"

exercise of policy and judgment; therefore, it is a ministerial decision outside the scope of our review.

Petitioner argues that the decision to site a driving range on city property under the city's land use regulations is a discretionary decision involving policy judgments because the code otherwise subjects the siting of golf courses in residential zones to the conditional use permit process, and prohibits driving ranges outright. Petitioner contends that in this context, a decision to permit the siting of a driving range as an accessory use to a city-owned and operated golf course involves the resolution of apparent conflicts with other provisions of the code. Petitioner cites *Kirpal Light Satsang v. Douglas County,* 18 Or LUBA 651 (1990) and *Komning v. Grant County*, 20 Or LUBA 481 (1990) for the proposition that the type of decision made here is subject to standards that require interpretation; therefore, this is a discretionary land use decision subject to LUBA review.

We agree with petitioner. The city determined that, notwithstanding the apparently clear language that a driving range is not a permitted "recreational [use] and [facility]" in the city's residential zone, a driving range in conjunction with a public golf course is permitted outright as an accessory use to a public recreational facility. That determination requires interpretation and the exercise of factual and legal judgment. *Komning*, 20 Or LUBA at 492. We conclude that the appealed decision is a land use decision within our review authority.

2. Appeal Deadline

ORS 197.830(3) provides, in relevant part:

> "If a local government makes a land use decision without providing a hearing * * * a person adversely affected by the decision may appeal the decision to [LUBA]:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

The city argues that petitioner should have appealed the planning director's decision within 21 days of the date that he observed the commencement of construction of the driving range at the golf course, which began in late October 1998. Respondent argues that the statute imposes a duty on a petitioner to aggressively pursue an inquiry to discover who made the relevant decision permitting the use. Thus, if a potential petitioner fails to discover the maker and the nature of a land use decision, and fails to appeal the relevant decision within 21 days of the initial observation of construction activity, respondent contends that an appeal to LUBA should be foreclosed. In this case, respondent argues that petitioner should have known that the city had allowed the siting of the driving range in some manner, when he observed the site preparation and the installation of the driving range poles. Therefore, it was incumbent on petitioner to inquire at the city, and then to appeal the city's decision within 21 days of the date petitioner saw the poles being placed on the site.

In early November 1998, petitioner argues, petitioner did approach the agency he believed had authority over the golf course – APRC – and did appear before APRC to protest the siting of the driving range at Oak Knoll. Petitioner argues that he first learned of the planning director's decision regarding the driving range on December 14, 1998, when the planning director's letter decision was read to persons attending the APRC forum. Petitioner received a copy of the planning director's letter on December 15, 1998, and he filed his notice of intent to appeal to LUBA eight days later, on December 22, 1998. Petitioner argues that there was no way for him to know of the planning director's decision prior to the December 14, 1998 APRC meeting. It was not until the December 14, 1998 meeting that he discovered that the city planning director had rendered a decision that the driving range is a permitted accessory use to a public recreational facility and therefore required no city land use approvals.

The parties agree that the planning director's decision was not reduced to writing until December 14, 1998, at the earliest. ORS 197.830(8) and OAR 661-010-0015(1) provide

that a petitioner must file a notice of intent to appeal with LUBA within 21 days of the date a land use decision becomes final. OAR 661-010-0010(3) defines when a decision becomes "final" for purposes of appeal to LUBA as "[w]hen it is reduced to writing, [and] bears the necessary signatures of the decision maker(s) * * *." The time to appeal the planning director's decision was within 21 days of December 14, 1998. Petitioner's appeal is therefore timely.

FIRST ASSIGNMENT OF ERROR

ALUO 18.08.595 defines a "planning action" as "[a] proceeding pursuant to this ordinance in which the legal rights, duties or privileges of specific parties are determined * * *." It does not include a ministerial action or a legislative amendment. A "planning action" is subject to processing by one of four procedures: a Staff Permit procedure, or a Type I, II, or III procedure.[5]

According to petitioner, the planning director's decision constitutes a "planning action" under the city code because the "legal rights, duties and privileges" of the APRC in relation to the siting of the driving range were determined. Petitioner argues that the city is obliged to review APRC's request pursuant to the staff permit procedure, because the procedure for addressing this type of planning action is not otherwise described in the code.[6]

Respondent argues that petitioner erroneously focuses on the second clause in the phrase while discounting the first. Respondent claims that there is no "proceeding pursuant

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[5]ALUO 18.108.020(A) defines eight types of applications as "ministerial actions." None on the list is related to the decision at issue in this appeal. Neither of the parties argues that the matter on appeal is a "legislative amendment."

[6]ALUO 18.108.030 provides, in relevant part:

"A. Actions Included [as a staff permit subject to staff permit procedures]:

"* * * * *

"8. Other planning actions not otherwise listed or designated as a Type I, II or III procedure."

to" the ALUO that pertains to a determination such as the one made in this case, and therefore, the planning director's determination was properly made as an informal response to an inquiry rather than through one of the more formal avenues for decision as described in the ordinance.[7]

The planning director's letter states:

> "On the issue of the driving range as part of the golf course, the following facts were used in the City's decision:
>
> "□ The zoning for the golf course area is R-1, single family residential, governed by Chapter 18.20 of the Ashland land use ordinance;
>
> "□ Section 18.20.020 regarding Permitted Uses in the R-1 zone states: '*The following uses and their accessory uses are permitted outright*:'
>
> "□ '**Public** schools, parks, and **recreational facilities'** are outright permitted uses (bold [type] added);
>
> "□ A driving range, located on a golf course, is considered an accessory use to the golf course, which in the case of Oak Knoll is a public recreational facility;
>
> "* * * * *
>
> "To clarify an issue that has been raised regarding conditional uses in the R-1 zone, golf courses [are] listed as a conditional use. However, it has been the City's long-held interpretation that golf courses, as used in the ordinance, relates to private courses, as shown by the other uses listed which refer to country clubs, swimming clubs, and tennis clubs. All of the previously mentioned 'clubs' are generally private, truly commercial operations. It has been the City's opinion that Oak Knoll Golf Course, under the ownership and operation of the Ashland Parks and Recreation Commission, does not fall under this classification, but rather, is a public recreational facility." Record 30 (Emphasis in original.)

Our difficulty with the city's response to this assignment of error is that the decision itself fails to rely on or articulate an interpretation of ALUO 18.08.595. The recitation of

[7]Respondent also argues that the petitioner failed to timely appeal the city's decision. Because we have already discussed this in the jurisdiction section of this opinion, we do not further address this response under the assignments of error.

facts and the "interpretation" included in the planning director's letter do not explain why the proposed action does not constitute a "planning action."

Where there are several possible interpretations of a local code, LUBA may remand a decision to the local government for interpretation in the first instance. *Bradbury v. City of Bandon*, 33 Or LUBA 664, 668 (1997). In this case, the provisions of the code are susceptible to more than one interpretation; therefore, we remand to permit the city an opportunity to determine its meaning in light of the facts of this case.

The first assignment of error is sustained, in part.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner argues that the city failed to provide necessary review procedures when it made its decision that the driving range is a permitted accessory use to a public golf course. Petitioner argues that the planning director's letter constitutes a "permit," as defined by ORS 227.160(2), and that approval of a permit must follow the processes described in ORS 227.175(3) and ORS 227.175(5).

ORS 227.160(2) defines "permit" as "discretionary approval of a proposed development of land * * *." ORS 227.175(3) provides that the local government must hold at least one public hearing on an application for a "permit" prior to making a decision on the application, unless notice is given and an opportunity to request a hearing is provided in accordance with ORS 227.175(10). In this case, petitioner argues that the planning director determined "(1) Oak Knoll is a public recreation facility; (2) a driving range is an accessory use; (3) a driving range is not an intense commercial use; and (4) further land use review is not required." Petition for Review 10-11. Petitioner contends that these determinations constitute discretionary approval of a proposed development of land because they required interpretation or the exercise of policy or legal judgment. *See Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515, 520 (1991) (determination that a medical waste incinerator is similar to other uses in the city's industrial zone is a permit).

Respondent argues that the planning director's decision does not constitute a "permit," as that term is defined in ORS 227.160(2), because the city's decision was a ministerial action. Therefore, the city argues, no notice and opportunity for hearing are required.

We cannot determine from the decision or this record whether the subject decision constitutes a "permit." On its face, the decision appears to constitute a "decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone * * *." ORS 227.160(2)(b). The latter is a statutory exception to the definition of "permit." *See North Portland Citizens v. City of Portland*, 32 Or LUBA 70, 73 (1996), *aff'd* 145 Or App 548, 930 P2d 902, *rev den* 325 Or 247 (1997) (a determination that a parole and probation office is an office use, permitted as of right in the city's General Commercial zone, is not a permit).

However, even if the city considered the challenged decision to be a zoning classification decision pursuant to ORS 227.160(2)(b), it does not follow that the city's characterization of its decision under the statute is correct. In the third assignment of error, petitioner argues that the proposed driving range involves the addition of parking spaces, the installation of mechanical equipment, and creation of a structure (the net and poles) that exceeds 2,500 square feet in size; each of which, if true, would appear to subject the proposed use to the city's review and approval under its code and Site Design and Use Standards (SDUS). If the proposed use is subject to the city's discretionary approval under applicable city legislation, then any city decision allowing the proposed use is properly characterized as a "permit" as defined by ORS 227.160(2). On the other hand, if the provisions identified in the third assignment of error are not applicable to the proposed use, and the proposed use is not subject to the city's discretionary approval, then the city's decision may be properly characterized as a zoning classification decision.

Unfortunately, we cannot determine whether the city's decision is a permit or a

zoning classification decision, because the challenged decision does not consider whether the proposed use implicates any provisions of the city's code or SDUS in a manner that requires the city's approval under those provisions. We conclude that remand is necessary to allow the city to determine in the first instance whether the standards petitioner identifies in the third assignment of error are applicable to the proposed use.

The second and third assignments of error are sustained.

FIFTH ASSIGNMENT OF ERROR

In this assignment of error, petitioner argues that the proposed driving range structure exceeds 35 feet in height because the poles that hold up nets to catch the golf balls are 50 feet in height. Because ALUO 18.20.040(E) provides that the maximum building height in the R-1 zone is 35 feet, petitioner argues, the city's decision must be reversed. Respondent argues that a determination that a structure exceeds the height standards is an enforcement issue, and not a land use decision subject to our review.

ORS 197.835(9)(a)(D) provides that we may reverse or remand a land use decision if the local government improperly construed the applicable law in making its decision. Petitioner argues that this is a clear-cut issue of law, and not a determination of fact. However, like the issue of whether the subject decision is a "planning action" under the city's ordinance, a determination of whether poles which hold up netting constitute a "structure" as defined in the local code is a matter better left to the city to interpret in the first instance. While we may have the authority under ORS 197.829(2) to make our own determination, we decline to do so. Petitioner may, upon remand, raise the issue of compliance with ALUO 18.20.040(E) with the city.

The fifth assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioner argues that the city's interpretation that a driving range is a permitted accessory use is not reasonable and correct.

As we stated in *Warren v. City of Aurora*, 23 Or LUBA 507, 513 (1992)

> "LUBA's role as an appellate tribunal is to *review* the city's explanation for why it believes its decision satisfies relevant approval standards. If this Board were to take the initiative in the first instance to identify potential approval standards * * * and interpret ambiguous plan or development code language, it would be assuming the role [of] the city. * * * The statutory requirements limiting this Board's role to reviewing the city's findings supporting its decision serves the purpose of preventing this Board from substituting its judgement for that of the city where the applicable law and the facts leave the city discretion." (Emphasis in original.)

We have already determined that the city's decision is inadequate for review and that the decision must be remanded to permit the city to determine what process and standards may be applicable to the siting of the driving range. It serves no purpose to address this remaining assignment of error. The fourth assignment of error is denied.

The city's decision is remanded.