

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SOUTHEAST NEIGHBORS,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,

10 *Respondent,*

11
12 and

13
14 VERN BENSON,

15 *Intervenor-Respondent.*

16
17 LUBA No. 2002-127

18
19 FINAL OPINION

20 AND ORDER

21
22 Appeal from City of Eugene.

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24 Donna M. Matthews, Eugene, represented petitioner.

25
26 Emily N. Jerome, Eugene, represented respondent.

27
28 Dan Terrell, Eugene, represented intervenor-respondent.

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

32
33 DISMISSED

11/08/2002

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city’s conditional approval of a tentative subdivision plan.

4 **MOTION TO INTERVENE**

5 Vern Benson (intervenor), the applicant below, moves to intervene on the side of
6 respondent. There is no opposition to the motion, and it is allowed.

7 **FACTS**

8 Pursuant to local code, a tentative subdivision plan is initially reviewed by the city’s
9 planning director, who then issues an administrative decision. On July 2, 2002, the city sent
10 notice of the proposed subdivision plan to petitioner, among others. On July 16, 2002,
11 petitioner submitted comments to the planning director regarding the plan. On August 12,
12 2002, the planning director approved the tentative subdivision plan. Also on August 12,
13 2002, the city sent a notice of decision to petitioner stating that the decision would become
14 final on August 23, 2002, unless an appeal was filed pursuant to Eugene Code (EC)
15 9.035(7).¹ On August 30, 2002, petitioner attempted to appeal the planning director’s
16 decision. The city refused to accept the appeal because it was untimely filed. On September
17 12, 2002, petitioner appealed the planning director’s decision to LUBA.

18 **MOTION TO DISMISS**

19 The city moves to dismiss petitioner’s appeal on the basis that petitioner failed to
20 exhaust all available remedies before appealing to LUBA. ORS 197.825(2).² Petitioner

¹ The notice of decision sent to petitioner by the city states:

“Any person who is adversely affected or aggrieved by this decision, or who is mailed this written notice, may appeal the decision in accordance with the procedures listed in Section 9.035(7) of the Eugene Code. Unless appealed, the Planning Director’s decision is effective on the 11th day after this notice of decision is mailed. In this case, any appeal must be received by 5 p.m. on August 23, 2002. The Planning Director’s decision will not become final until this appeal period has passed.” Motion to Dismiss, Exhibit 5, p 1.

² ORS 197.825(2) provides in relevant part:

1 responds that despite the city’s notice, all available remedies were exhausted because the
2 decision was a limited land use decision. According to petitioner, because a “limited land use
3 decision” is defined as a “final decision or determination,” there are no further administrative
4 remedies to exhaust, and therefore the decision is immediately appealable to LUBA.³
5 Petitioner also argues that the challenged decision refers to EC 9.035(7) and that section does
6 not exist in the version of the code that applies to the challenged application. Because EC
7 9.035(7) does not exist, petitioner contends that there can be no corresponding right of appeal
8 under that code provision.

9 We disagree that the fact that the challenged decision is a limited land use decision
10 means that the planning director’s decision is directly appealable to LUBA. ORS 197.195(5)
11 expressly allows for local appeals of limited land use decisions if the local government so
12 chooses.⁴ Here, the city has provided a right of local appeal of planning director decisions
13 pertaining to subdivisions; the fact that the challenged decision is a limited land use decision

“The jurisdiction of [LUBA]:

“(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]”

³ ORS 197.015(12) provides in relevant part:

“‘Limited land use decision’ is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:

“(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.”

⁴ ORS 197.195(5) provides:

“A local government may provide for a hearing before the local government on appeal of a limited land use decision under this section. The hearing may be limited to the record developed pursuant to the initial hearing under subsection (3) of this section or may allow for the introduction of additional testimony or evidence. A hearing on appeal that allows the introduction of additional testimony or evidence shall comply with the requirements of ORS 197.763. Written notice of the decision rendered on appeal shall be given to all parties who appeared, either orally or in writing, before the hearing. The notice of decision shall include an explanation of the rights of each party to appeal the decision.”

1 does not mean petitioner may appeal directly to LUBA after the planning director decision is
2 made.

3 We agree with petitioner that the 2002 version of the EC located on the city's web
4 site does not contain a section 9.035(7).⁵ However, the 2002 version provides in table 9.7055
5 that tentative subdivision approvals are type II decisions with an initial decision by the
6 planning director and an opportunity for an appeal of the planning director's decision to a
7 hearings officer. EC 9.7220(3) (2002) provides that a decision by the planning director
8 becomes final 13 days after notice of the decision is mailed, unless a local appeal is filed. EC
9 9.7605(1) (2002) provides that a decision of the planning director must be appealed to the
10 hearings officer within 12 days of the date the notice of decision is mailed.

11 Although there appears to be some confusion among the parties as to which version
12 of the EC applies, it is clear under either version of the code that there is a local appeal
13 available to petitioner after the notice of decision of the planning director's decision is
14 mailed. It is also clear that petitioner did not attempt to appeal the planning director's
15 decision until 18 days after the notice of decision was mailed. Under either incarnation of the
16 code, the attempted local appeal was untimely.⁶ Petitioner failed to exhaust all available
17 remedies as required by ORS 197.825(2)(a). Therefore, we do not have jurisdiction to hear
18 this appeal. *Walton v. Clackamas County*, 32 Or LUBA 426, 429 (1997).

19 This appeal is dismissed.

⁵ It appears that EC 9.035(7) is the correct citation in the 1997 version of the EC.

⁶ Even if petitioner were correct that the planning director's decision was directly appealable to LUBA, the appeal was still not timely filed because it was filed more than 21 days after the decision would have become final if there were no right to a local appeal under the EC. ORS 197.830(9).