

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

3
4 PHILIP C. LANG,
5 *Petitioner,*

6
7 vs.

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9 CITY OF ASHLAND,
10 *Respondent,*

11
12 and

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14 MELISSA SYKEN,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2011-067

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19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Ashland.

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24 Thomas Dimitre, Ashland, filed the petition for review and argued on behalf of
25 petitioner.

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27 No appearance by City of Ashland.

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29 Christian E. Hearn, Ashland, filed the response brief and argued on behalf of
30 intervenor-respondent. With him on the brief was Davis Hearn and Bridges, PC.

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32 HOLSTUN, Board Member, RYAN, Board Chair; BASSHAM, Board Member;
33 participated in the decision.

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35 AFFIRMED

11/04/2011

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

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NATURE OF THE DECISION

This appeal concerns a city decision that grants site review and conditional use approval to convert and enlarge an existing 614-square foot residence into a 599-square foot retail store with an attached 447-square foot residence. The decision also grants variances to off-street parking and landscape buffer requirements.

MOTION TO INTERVENE

Melissa Syken, one of the applicants below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Below, we deny petitioner’s first assignment of error, and conclude that the city council did not err by rejecting petitioner’s local appeal of the planning commission’s decision in this matter. We therefore do not consider petitioner’s assignments of error that challenge the city council’s alternative findings that consider petitioner’s local appeal and affirm the planning commission’s decision on the merits. Our statement of the facts is therefore limited to the facts that are relevant to our disposition of the first assignment of error.

On March 8, 2011, the planning commission held a public hearing on the proposed retail store/residence. At that public hearing, petitioner appeared and presented testimony in opposition to the proposal. Petitioner also submitted a March 8, 2011 letter in which he set out in writing, under five numbered headings, why he believes the “Application Should be rejected.” Record 166-68. The planning commission approved the proposal and issued its written decision on April 12, 2011. Petitioner hand-delivered his notice of local appeal on April 23, 2011. In a May 26, 2011 letter, intervenor objected that petitioner’s notice of local appeal failed to specify the grounds for appeal adequately. The city council conducted a

1 hearing on petitioner’s appeal on June 7, 2011 and issued its final decision on June 21, 2011.
2 This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Under the Ashland Land Use Ordinance (ALUO), the planning commission’s
5 decision is a “Type II” decision. Appeals of Type II decisions to the city council are
6 governed by ALUO 18.108.110. ALUO 18.108.110(A) establishes the requirements for a
7 local notice of appeal, and is set out in part below:

8 “Appeals of Type II decisions shall be initiated by a notice of appeal filed
9 with the City Administrator. The standard Appeal Fee shall be required as
10 part of the notice. *All the appeal requirements of [ALUO] 18.108.110,*
11 *including the appeal fee, must be fully met or the appeal will be considered by*
12 *the city as jurisdictionally defective and will not be heard or considered.*

13 “1. The appeal shall be filed prior to the effective date of the decision of
14 the Commission.

15 “2. The notice shall include * * * a clear and distinct identification of the
16 specific grounds for which the decision should be reversed or
17 modified, based on identified applicable criteria or procedural
18 irregularity.” (Emphasis added.)

19 Petitioner’s April 23, 2011 notice of local appeal includes the following text to
20 comply with the ALUO 18.108.110(A) “jurisdictional[]” requirement that the notice of local
21 appeal “shall include * * * a clear and distinct identification of the specific grounds” for
22 appeal:

23 “My objections to this planning action are contained in a detailed written
24 document submitted and referred to in oral testimony at the March 8, 2011
25 hearing. My appeal will be based on those solid and clear objections –
26 possibly with some amplification. I assume that this material and/or any
27 additional material which would be related to it need not be submitted prior to
28 the hearing date set. If this is not the case, please notify me immediately by
29 phone or FAX (see this letterhead).” Record 104.

30 There is no dispute that petitioner’s April 23, 2011 local notice of appeal was timely
31 filed or that the required appeal fee was submitted with the local notice of appeal. However,
32 in its June 21, 2011 decision, the city council adopted the following findings in which it

1 concluded that petitioner’s local notice of appeal was inadequate to comply with ALUO
2 18.108.110(A):

3 “ALUO 18.108.110.A.2 requires that each appeal set forth ‘a clear and
4 distinct identification of the specific grounds for which the decision should be
5 reversed or modified, based on identified applicable criteria or procedural
6 irregularity.’ To identify the grounds for appeal, [petitioner] referenced a
7 submittal he had previously provided during his testimony before the Planning
8 Commission. These grounds were not restated in the appeal request, and a
9 copy of the originally submitted materials detailing the grounds was not
10 provided with the appeal request. The item referenced was part of the record
11 and the specific objections to the proposal were clearly listed therein as
12 follows: 1) Failure to meet the permitted uses in the R-2 District (as detailed
13 in [ALUO] 18.24.020; 2) Failure to meet the Conditional Uses in the R-2
14 District (as detailed in [ALUO] 18.24.030; 3) The proposal cannot provide
15 adequate parking and will further worsen the current parking situation; 4) The
16 proposal will adversely affect livability in the immediate area; 5) Failure to
17 meet the requirement that the site be located on a street having a fully-
18 improved sidewalk on at least the side occupied by the business (as detailed in
19 [ALUO] 18.24.020).

20 “The Council finds that this attempt to incorporate appeal issues by reference
21 to other documents, without clearly and distinctly identifying the appeal
22 issues in the appeal request or providing copies of the documents referenced
23 with the appeal request, is not a sufficiently clear and distinct identification of
24 the grounds for which the decision should be reversed or modified based on
25 identified applicable criteria or procedural irregularity as required in the code,
26 and as such the appeal request itself is rejected. *However, given that the*
27 *objections referenced by [petitioner] within the record were themselves clear*
28 *and distinct, and reference applicable criteria, the Council believes that if the*
29 *matter were to come before the Land Use Board of Appeals (LUBA) on appeal*
30 *from the appellant, it is entirely possible that LUBA would refer the matter*
31 *back to the City to address the specific items referenced by Dr. Lang. As such,*
32 while the Council find that the appeal fails to meet the requirements for an
33 appeal on the record as detailed in [ALUO] 18.108.110.A.2 and is therefore
34 rejected on that basis, the Council also believes that it is appropriate to make
35 specific findings addressing the five issues [petitioner] references in his
36 appeal request, and Council review of the Planning Commission’s decision
37 will be limited to these five issues.” (Underlining and italics added.) Record
38 7-8.

39 Although the city council does not expressly state that it is adopting alternative
40 findings, that is what the city did. In the underlined findings, the city council interpreted
41 ALUO 18.108.110.A to impose a jurisdictional requirement that the notice of local appeal

1 must include a clear and distinct identification of the specific grounds for appeal and that the
2 clear and distinct identification of the specific grounds for appeal must be set out in the
3 notice of local appeal itself or in a document that is attached to the notice of local appeal.
4 Because petitioner's notice of local appeal did not comply with this jurisdictional
5 requirement, the city council rejected petitioner's local appeal in the underlined findings. In
6 the italicized findings, the city council appears to express some uncertainty that LUBA will
7 agree with its interpretation of ALUO 18.108.110.A, since the March 8, 2011 letter that
8 petitioner relies on to set out his grounds of appeal is included in the record. In the interest
9 of avoiding possible delay, the italicized findings then conclude that the city council will
10 therefore address the issues set out in the March 8, 2011 letter. The balance of the city
11 council's decision is devoted to addressing the issues identified in petitioner's March 8, 2011
12 letter, under each of the five numbered headings.

13 Petitioner contends that his April 23, 2011 local notice of appeal adequately
14 incorporated his March 8, 2011 letter by reference, and the city council's conclusion that the
15 incorporation was inadequate to comply with ALUO 18.108.110.A was error. Petitioner also
16 faults the city for not advising him that it considered his notice of local appeal defective, as
17 petitioner requested in his notice of local appeal. Finally, petitioner contends the city waived
18 any issue it might have raised regarding his notice of local appeal, by proceeding with the
19 local appeal and addressing the issues raised in his March 8, 2011 letter.

20 LUBA's review of the city council's interpretation in this matter is governed by ORS
21 197.829(1).¹ Although the parties do not specifically address the statute, LUBA must affirm

¹ ORS 197.829(1) provides:

“The Land Use Board of Appeals 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:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1 the city council’s interpretation of ALUO 18.108.110.A under ORS 197.829(1) unless the
2 interpretation is inconsistent with the “express language” of ALUO 18.108.110.A or its
3 “purpose” or “underlying policy.”² Intervenor contends the city council’s interpretation is
4 well within the deference LUBA is required to give city council interpretations of city land
5 use legislation. *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010) (citing
6 with approval *Foland v. Jackson County*, 215 Or App 157, 168 P3d 1238 (2007) for the
7 proposition that LUBA must defer to local governing body’s interpretation of its own land
8 use legislation unless the interpretation is not “plausible”).

9 The city council’s interpretation of ALUO 18.108.110.A to require a clear statement
10 of the grounds for appeal in the notice of appeal document itself or its attachments may be
11 unnecessarily strict in this case, since the city council knew that petitioner was relying on his
12 March 8, 2011 letter and the letter was in the record. But the city council’s interpretation is
13 not inconsistent with the apparent purpose or underlying policy of assuring that the grounds
14 for appeal are clearly stated. And the city council’s interpretation is certainly not
15 inconsistent with the text of ALUO 18.108.110.A. The text of ALUO 18.108.110.A
16 expressly states that compliance with all of the requirements of ALUO 18.108.110.A is
17 “jurisdictional.” The text of ALUO 18.108.110.A requires that the notice of local appeal
18 must “include” “a clear and distinct identification of the specific grounds” for appeal. It is
19 not inconsistent with that language to require that the grounds for appeal be set out in the

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- “(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; or
 - “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

² We are aware of no statute, statewide planning goal or administrative rule that governs the required content or manner of perfecting local notices of land use appeals or the consequences of failing to file a local notice of appeal with the content and in the manner required. Therefore, ORS 197.829(1)(d) does not apply here.

1 notice itself or in documents that are attached to and filed with the notice of local appeal. It
2 is not inconsistent with that language to find that petitioner’s attempt to rely on a letter that
3 was prepared before the planning commission adopted the decision that petitioner sought to
4 appeal and not attached to the notice of local appeal was inadequate to comply with ALUO
5 18.108.110.A.³

6 The Court of Appeals has held that where a land use regulation makes it clear that
7 requirements to perfect a local appeal are mandatory, those requirements must be given
8 effect and appeals may be dismissed where a local appellant deviates from a mandatory
9 requirement. *Breivogel v. Washington County*, 114 Or App 55, 58-59, 834 P2d 473 (1992).
10 That ALUO 18.108.110.A specifies that its requirements are “jurisdictional” is sufficient to
11 make them mandatory. *Id.* at 57 n 2. This is not a case where the local government failed to
12 make it clear that a local appeal would be dismissed if the notice of local appeal omitted
13 required information. *Golden v. City of Silverton*, 58 Or LUBA 399, 406-07 (2009). There
14 is nothing implausible about the city council’s interpretation of ALUO 18.108.110, and
15 under *Siporen* we are bound to defer to that interpretation.

16 Finally, we address two remaining issues. First, petitioner faults the city for not
17 advising him that it might ultimately find his notice of local appeal deficient and advising
18 him of how to correct the local notice of appeal. Second, petitioner correctly points out that
19 ALUO 18.108.110 provides that if a local notice of appeal does not comply with ALUO
20 18.108.110 the appeal “will not be heard or considered.” Petitioner argues that because the
21 city elected to proceed with the appeal, despite its misgivings about the adequacy of the local
22 notice of appeal under ALUO 18.108.110, it waived any right it may have to dismiss his

³ The city council’s findings quoted earlier in this opinion state that the March 8, 2011 letter itself clearly sets out issues petitioner wished to raise and the city council attempted to limit itself to the issues raised in that letter. However, the scope of the issues set out in the letter that predated the planning commission’s decision is not clear. And even a cursory review of Record 10-19, where the city council attempted to identify and respond to the issues raised in the March 8, 2011 letter, makes it clear that the city council had a difficult time identifying and limiting its review to the grounds set out in that letter.

1 appeal for failure to adequately specify the grounds for his appeal. Regarding the first point,
2 petitioner may not shift to the city the responsibility for filing a timely local notice of appeal
3 that complies fully with ALUO 18.108.110.A. Under ALUO 18.108.110.A, that is
4 petitioner's responsibility. And we also reject petitioner's waiver argument. It is common
5 for local governments to encounter uncertainty about one or more of its bases for a decision
6 and to adopt alternative findings in the event one of those bases is found wanting on appeal.
7 *See Columbia Riverkeeper v. Clatsop County*, 238 Or App 439, 455-56, 243 P3d 82 (2010)
8 (discussing the requirement to assign error to all alternative independent bases for a
9 decision). The city in this case did not waive its right to dismiss petitioner's appeal because
10 it was uncertain about how LUBA would view its interpretation of ALUO 18.108.110.A and
11 alternatively considered petitioner's appeal on the merits.

12 Petitioner's first assignment of error is denied.

13 Because we deny petitioner's first assignment of error, it follows that the city did not
14 err by rejecting petitioner's local appeal and that part of the city council's decision must be
15 affirmed. We do not consider the balance of the city council's decision or petitioner's
16 challenges to the balance of the city council's decision.

17 The city's decision is affirmed.