

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

3
4 JAI B. LEVY,
5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent.*

11
12 LUBA No. 2017-025

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Jackson County.

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19 Ross Day, Portland, represented petitioner.

20
21 Joel C. Benton, County Counsel, Medford, represented respondent.

22
23 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board
24 Member, participated in the decision.

25
26 DISMISSED 06/13/2017

27
28 You are entitled to judicial review of this Order. Judicial review is
29 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a decision by the county planning director denying petitioner’s application for nonconforming use verification for a medical marijuana production facility on land zoned Rural Residential–5(A) (RR-5(A)).

JURISDICTION

On February 10, 2017, the county’s planning director issued a decision denying petitioner’s application for verification of a nonconforming use for medical marijuana production in the RR-5(A) zone. Jackson County Land Development Ordinance (LDO) 11.8 provides that applications for verification of nonconforming uses are processed in accordance with the county’s “Type 2” procedures. Those procedures are set out in LDO 2.7.5 and LDO 3.1.3. The challenged decision provides in relevant part:

“Notice of this decision is being sent to property owners in the vicinity of the property. They or the property owner have the right to appeal the decision within 12 days of the date this decision is mailed. This decision will be final on the 13th day, provided an appeal hearing has not been requested.” Record 8.

The “Notice of Tentative Staff Decision on Application for a Land Use Permit” that was mailed to petitioner along with a copy of the challenged decision additionally provides:

“You have the right to appeal this tentative Departmental decision. If appealed, the County’s final decision will be made by the hearings body following a public hearing on the matter.

1 “If you wish to appeal this decision, your written request, *in*
2 *conformance with and pursuant to [LDO] Section 2.7.5(D)(2)(c)*,
3 must be received by the Department at the address listed below no
4 later than February 21, 2017 @ 4 pm, and you must pay an appeal
5 fee of \$250.00.” Record 1 (emphases in original).

6 On March 16, 2017, petitioner filed a notice of intent to appeal (NITA) the
7 decision with LUBA. The NITA takes the position that the appealed decision
8 became final on February 23, 2017. Motion to Dismiss, Exhibit A, page 1.

9 The county moves to dismiss the appeal. The county argues that
10 petitioner’s direct appeal to LUBA from a tentative staff decision by the
11 planning director is precluded under ORS 197.825(2)(a). ORS 197.825(2)(a)
12 limits LUBA’s jurisdiction to “those cases in which the petitioner has
13 exhausted all remedies available by right before petitioning the board for
14 review.” According to the county, the LDO provides petitioner with the right to
15 appeal the staff decision to a hearings officer, and having failed to appeal the
16 decision to the hearings officer, ORS 197.825(2)(a) precludes appeal of the
17 challenged decision directly to LUBA.

18 Petitioner responds that LDO 2.7.5(D)(1) makes appeal of a decision by
19 the planning director permissive, not mandatory, and therefore petitioner was
20 not required to file a local appeal of the decision before appealing the decision
21 directly to LUBA.¹ Petitioner also responds that the notice of decision that was

¹ LDO 2.7.5(D)(1) provides:

“D) Appeal of a Decision

1 sent to petitioner and others fails to include the language that is required by the
2 last sentence of ORS 215.416(11)(a)(C). ORS 215.416(11)(a) provides:

3 “(11)(a)(A) The hearings officer or such other person as the
4 governing body designates may approve or deny an
5 application for a permit without a hearing if the hearings
6 officer or other designated person gives notice of the
7 decision and provides an opportunity for any person who is
8 adversely affected or aggrieved, or who is entitled to notice
9 under paragraph (c) of this subsection, to file an appeal.

10 “(B) Written notice of the decision shall be mailed to those
11 persons described in paragraph (c) of this subsection.

12 “(C) Notice under this subsection shall comply with ORS
13 197.763 (3)(a), (c), (g) and (h) and shall describe the nature
14 of the decision. In addition, the notice shall state that any
15 person who is adversely affected or aggrieved or who is
16 entitled to written notice under paragraph (c) of this
17 subsection may appeal the decision by filing a written
18 appeal in the manner and within the time period provided in
19 the county’s land use regulations. A county may not
20 establish an appeal period that is less than 12 days from the
21 date the written notice of decision required by this
22 subsection was mailed. The notice shall state that the
23 decision will not become final until the period for filing a
24 local appeal has expired. **The notice also shall state that a**

“1) Decisions made without first holding an initial
evidentiary hearing may be appealed by any person or
entity who:

“a) Is entitled to notice under this Section; or

“b) Is adversely affected or aggrieved by the decision,
whether or not they received notice.”

1 **person who is mailed written notice of the decision**
2 **cannot appeal the decision directly to the Land Use**
3 **Board of Appeals under ORS 197.830.”** (Emphasis
4 added.)

5 Accordingly, we understand petitioner to argue that, because the county’s
6 notice did not include a statement that a recipient of the mailed notice of
7 decision cannot appeal the decision directly to LUBA, petitioner’s direct appeal
8 to LUBA is allowed, notwithstanding the exhaustion requirement at ORS
9 197.825(2)(a). For the reasons explained below, we agree with the county that
10 we lack jurisdiction over the appeal.

11 ORS 197.825(2)(a) provides that LUBA’s jurisdiction is limited to cases
12 in which the petitioner has “exhausted all remedies available by right before
13 petitioning the board for review.” Whether the LDO provisions for appealing a
14 planning director decision are permissive or mandatory, they are “remedies”
15 that are “available by right” to petitioner, within the meaning of ORS
16 197.825(2)(a). *See Lyke v. Lane County*, 70 Or App 82, 86, 688 P 2d 411
17 (1984) (“[t]he critical issue is not whether a procedure is required by the
18 county or whether the county must accept review, but whether there is a
19 procedure available to ask for local review and the right to ask is
20 unconditionally granted.”) Because petitioner failed to exhaust the remedy of
21 appeal of the decision to a hearings officer, ORS 197.825(2)(a) precludes
22 LUBA’s jurisdiction over this appeal.

23 Additionally, there is a second reason that LUBA lacks jurisdiction over
24 the appeal. The specific provisions for appealing to LUBA a “land use decision

1 [made] without a hearing pursuant to ORS 215.416(11) * * *” are set out in
2 ORS 197.830(4).² Because the challenged decision is a decision on an
3 application for a permit made without a hearing pursuant to ORS 215.416(11),

² ORS 197.830(4) provides:

“(4) If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):

“(a) A person who was not provided notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.

“(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).

“(c) A person who receives notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the notice of the decision did not reasonably describe the nature of the decision.

“(d) Except as provided in paragraph (c) of this subsection, a person who receives notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the board under this section.”

1 appeal of the challenged decision directly to LUBA falls within the rubric
2 enacted by the legislature in ORS 197.830(4).

3 Under ORS 197.830(4), there are three circumstances under which
4 petitioner may appeal the planning director's decision directly to LUBA.³
5 First, if petitioner was not provided notice of the decision as required under
6 ORS 215.416(11)(c), she may appeal the decision to LUBA within 21 days of
7 receiving actual notice of the decision. Petitioner was provided notice of the
8 decision as required under ORS 215.416(11)(c), so ORS 197.830(4)(a) does
9 not provide petitioner with an avenue for appeal of the decision directly to
10 LUBA.

11 Second, if petitioner was not entitled to notice of the decision but is
12 "adversely affected or aggrieved by the decision," she may appeal the decision
13 to LUBA within 21 days after expiration of the period for filing a local appeal
14 of the decision established by the county under ORS 215.416(11)(a). Petitioner
15 as the applicant was entitled to notice of the decision under ORS
16 215.416(11)(c)(A) and in fact received notice, so ORS 197.830(4)(b) does not
17 provide petitioner with an avenue for appeal of the decision directly to LUBA.

18 Third, if petitioner received notice of the decision, she may appeal the
19 decision to LUBA within 21 days of receiving actual notice of the decision if

³ Read in context with ORS 197.825(2)(a), it is clear that when one of the three circumstances described in ORS 197.830(4) is present, the ORS 197.825(2)(a) requirement to exhaust local administrative remedies, as a precondition to invoking LUBA's jurisdiction, does not apply.

1 “the notice did not reasonably describe the nature of the decision.” Petitioner
2 received notice of the decision, and she does not allege that the notice of the
3 decision did not reasonably describe the nature of the decision, so ORS
4 197.830(4)(c) does not provide petitioner with an avenue for appeal of the
5 decision directly to LUBA.

6 ORS 197.830(4)(d) drives home that the only way for persons who
7 received notice of a decision made without a hearing pursuant to ORS
8 215.416(11) or 227.175(10) to appeal that decision directly to LUBA is under
9 the single circumstance set out in ORS 197.830(4)(c):

10 “Except as provided in paragraph (c) of this subsection, a person
11 who receives notice of a decision made without a hearing under
12 ORS 215.416 (11) or 227.175 (10) may not appeal the decision to
13 [LUBA] under this section.”

14 The failure of the county’s notice of decision to include one of the statements
15 required by ORS 215.416(11)(a)(C)—that the decision may not be appealed
16 directly to LUBA—does not fall within the single circumstance the legislature
17 identified in ORS 197.830(4)(c) for appeal directly to LUBA by a person who
18 received notice of a decision on a permit made without a hearing. Accordingly,
19 because petitioner received notice of the decision, and does not allege that the
20 notice did not “reasonably describe the nature of the decision,” petitioner is
21 precluded under ORS 197.830(4)(d) from appealing the decision directly to
22 LUBA. Petitioner was therefore required by ORS 197.825(2)(a) to exhaust the
23 local appeal available to her. Petitioner failed to do so, and therefore LUBA
24 lacks jurisdiction over this appeal.

1 The appeal is dismissed.