

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

MCDUGAL BROTHERS, INC.,
MELVIN MCDUGAL, LEELYNN, INC.,
and MCDUGAL BROTHERS INVESTMENTS,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

LANDWATCH LANE COUNTY,
Intervenor-Respondent.

LUBA Nos. 2020-046/047/048/049

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos represented petitioners.

No appearance by Lane County.

Sean Malone represented intervenor-respondent.

RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
Member, participated in the decision.

DISMISSED 04/13/2021

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

NATURE OF THE DECISION

In these consolidated appeals, petitioners challenge four county hearings official decisions denying four forest template dwelling applications.

BACKGROUND

Forest template dwellings, as described in ORS 215.750, are allowed in the county's Impacted Forest Lands (F-2) zone, which implements Statewide Planning Goal 4 (Forest Lands).¹ Lane Code (LC) 16.211(5) (Feb 15, 2016) provides that, in the F-2 zone,

“[o]ne single-family dwelling or manufactured dwelling is allowed subject to prior submittal of an application pursuant to LC 14.050, approval of the application pursuant to LC 14.100 with the options for the Director to conduct a hearing or to provide written notice of the decision and an opportunity for appeal, and compliance with the general provisions and exceptions in LC Chapter 16, LC 16.211(5)(a) through (f) and LC 16.211(8) below.”

On April 11, 2019, petitioners submitted their applications to establish four forest template dwellings on properties zoned F-2 and located east of the rural

¹ LC 16.211(1)(b) (Feb 15, 2016). Goal 4 is:

“To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.” OAR 660-015-0000(4).

1 unincorporated community of Noti, north of Highway 126, and nearly three miles
2 northwest of the city of Veneta's Urban Growth Boundary. Record 1232, 4361,
3 5108, 6013. On December 19, 2019, the planning director denied the four
4 applications. On December 27, 2019, petitioners appealed the planning director's
5 denials to the hearings official. On February 20, 2020, the hearings official issued
6 their decisions affirming the planning director's decisions and denying the
7 appeals. On March 3, 2020, petitioners filed applications for reconsideration by
8 the hearings official. On March 5, 2020, the hearings official granted the
9 applications for reconsideration. On April 10, 2020, the county mailed petitioners
10 copies of the hearings official's April 9, 2020 decisions on reconsideration,
11 affirming their February 20, 2020 decisions as modified.

12 These appeals followed.

13 **MOTION TO DISMISS**

14 ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to
15 those cases in which the petitioner has exhausted all remedies available by right
16 before petitioning [LUBA] for review." Intervenor moves to dismiss these
17 appeals, arguing that petitioners failed to exhaust all remedies available by right
18 prior to appealing to LUBA. Because resolution of this motion turns on which
19 specific local remedies were "available by right" to petitioners under the version
20 of the LC that was applicable on the date of the hearings official's final decisions,
21 we begin by discussing the recent history of LC amendments.

1 **A. Timing of County Amendments to LC Chapter 14**

2 LC chapter 14 governs application review and appeal procedures. The
3 parties agree that the version of LC chapter 14 adopted in Ordinance 14-09 was
4 in effect on April 11, 2019, the date on which petitioners filed their applications.
5 We refer to the version of the LC adopted in Ordinance 14-09 as the Old Code.
6 On October 29, 2019, six months after petitioners filed their forest template
7 dwelling applications, the county amended LC chapter 14 in Ordinance 19-03.
8 We refer to the version of the LC adopted in Ordinance 19-03 as the New Code.
9 Following its adoption, intervenor appealed Ordinance 19-03 to LUBA. On April
10 20, 2020, we remanded Ordinance 19-03. *Landwatch Lane County v. Lane*
11 *County*, ___ Or LUBA ___ (LUBA No 2019-128, Apr 20, 2020). Where LUBA
12 remands an ordinance, that ordinance is no longer in effect. Thus, the New Code
13 became ineffective on the date that we remanded the decision, April 20, 2020,
14 and the Old Code was then again in effect.²

15 **B. Local Appeal Procedures**

16 As explained above, on April 10, 2020, the county mailed the hearings
17 official's April 9, 2020 decisions on reconsideration, again denying the forest
18 template dwelling applications. On that date, the New Code was in effect.

19 The New Code, LC 14.030(1)(b)(iii) (Oct 29, 2019), provides:

20 *"A Type II decision becomes final 12 days after the date the Director*

² Intervenor did not move to stay Ordinance 19-03 during the pendency of the appeal to LUBA, and it remained in effect during the appeal.

1 *mails the notice of decision unless the decision is appealed in*
2 *accordance with LC 14.080.* If the decision is appealed, the effective
3 date of the decision will be the date on which all County appeals are
4 finalized or withdrawn. The effective date of a Hearings Official
5 decision will be the date on which all County appeals or
6 reconsideration requests are withdrawn or 12 days after the Director
7 mails written notice of the Hearings Official decision unless further
8 appealed to the Board. If the Director requests on-the-record review
9 by the Board, the effective date of the decision will be the date on
10 which the request is withdrawn or a final County decision by the
11 Board is issued.” (Emphasis added.)

12 In addition, LC 14.030(1)(b)(iv) (Oct 29, 2019) provides, “Appeals of the final
13 County decision by the Hearings Official or Board may be appealed to [LUBA]
14 in accordance with ORS 197, as further described at LC 14.080(7).” Thus, under
15 the New Code, petitioners cannot appeal the hearings officer’s decisions on
16 reconsideration to the board of commissioners.

17 However, following our April 20, 2020 remand of Ordinance 19-03, the
18 New Code became ineffective. The then-effective provisions of the Old Code
19 afforded petitioners the right to appeal to the board of commissioners. LC
20 14.500(2) (Dec 4, 2009) provides:

21 “Decisions by the Hearings Official pursuant to LC 14.300 or
22 14.400 above may be appealed to the Board. Upon Director
23 acceptance of such an appeal, the Board may elect to hear or not
24 hear the appeal, and shall follow LC 14.600 below in deciding
25 whether or not to hear the appeal. Appeals heard by the Board shall
26 be reviewed according to LC 14.400 above. A decision on any
27 application appealed to the Board shall become final upon signing
28 of an order by the Board to not hear the appeal or specifying the final
29 decision in an appeal the Board elected to hear. A decision not to
30 hear an appeal shall affirm the appealed decision pursuant to LC
31 14.600(2)(d) below.

1 LC 14.500(3) (Dec 4, 2009) provides, “Unless appealed, a decision on any
2 application shall be final upon expiration of the period provided by this chapter
3 for filing an appeal.” LC 14.510 (Dec 4, 2009) provides, in relevant part, “A
4 decision by the director or Hearings Official, once reduced to writing and signed,
5 shall be appealed as provided in LC 14.500 above, within 12 days of the date of
6 signing of the decision provided notice of the decision occurs as required by law.”

7 Intervenor argues that the date on which the hearings official’s decisions
8 on reconsideration became final was April 22, 2020, and, on that date, the Old
9 Code applied to petitioners’ appeals and petitioners were required to exhaust
10 available local remedies and appeal to the board of commissioners prior to
11 appealing to LUBA. Intervenor maintains that petitioners’ failure to do so
12 requires that we dismiss the appeals. We agree.

13 In *Bielefeld v. Lane County*, we addressed the question of which version
14 of the LC applied to a county decision on an application, and we concluded that
15 the pertinent date for determining the applicable version of a local code is the
16 date on which the local government’s decision became final. ____ Or LUBA ____,
17 ____ (LUBA No 2019-027, Oct 31, 2019) (slip op at 7).

18 The application in *Bielefeld* was filed on April 3, 2018. On July 10, 2018,
19 while that application was pending, the county adopted Ordinance 18-02,
20 amending the procedures for local appeals. Ordinance 18-02 provided for the first
21 time that LC provisions specifying the contents of local appeal submissions were
22 jurisdictional and that failure to comply with those requirements would result in

1 dismissal of the local appeal. On September 19, 2018, a local appeal in *Bielefeld*
2 was filed. In November 2018, the hearings official issued their decision and
3 determined that the local appellant had failed to include the required appeal
4 materials. The hearings official proceeded to address the merits of the appeal,
5 notwithstanding their determination that they lacked jurisdiction over it. The
6 local appellant appealed the hearings official's decision to the board of
7 commissioners. On February 5, 2019, the board of commissioners made its
8 decision adopting the hearings official's November 2018 decision which, again,
9 determined that the appellant had failed to perfect their appeal.

10 We issued our decision in *Landwatch Lane County v. Lane County*, 79 Or
11 LUBA 96 (2019), remanding Ordinance 18-02, on January 31, 2019. On that
12 date, Ordinance 18-02 was no longer in effect. When the board of commissioners
13 adopted its decision on February 5, 2019, the pre-Ordinance 18-02 version of the
14 LC was in effect, which did not provide that the required materials for an appeal
15 were jurisdictional. Thus, we concluded that the board of commissioners'
16 February 5, 2019 decision, which adopted the hearings official's November 2018
17 decision concluding that the appeal to the hearings official was not perfected,
18 erred to the extent that it applied and relied on the jurisdictional limitations in
19 Ordinance 18-02 to dismiss the appeal.

20 Here, the parties dispute when the hearings official's decisions became
21 final. Intervenor argues that, pursuant to the New Code, LC 14.030(1)(b)(iii) (Oct
22 29, 2019), the decisions became final 12 days after mailing of the hearings

1 official's decisions. Motion to Dismiss 5. Petitioners maintain that *the deadline*
2 *to appeal to LUBA* began to run earlier, on the date that the hearings official made
3 the challenged decisions, April 9, 2020. Response to Motion to Dismiss 4. In
4 support of their argument, petitioners cite OAR 661-010-0010(3), which defines
5 "final decision" for purposes of LUBA's rules of procedure.³ Petitioners may or
6 may not be correct that the deadline to appeal to LUBA began to run on April 9,
7 2020. However, the deadline to appeal to LUBA is not relevant to the question
8 presented here because intervenor is not challenging the timeliness of petitioners'
9 appeals to LUBA. Rather, intervenor alleges that petitioners failed to satisfy ORS
10 197.825(2)(a) when they failed to exhaust a local appeal remedy available by
11 right and that LUBA lacks jurisdiction over the appeals for that reason.

12 Under the New Code, a Type II decision is final 12 days after it is mailed.
13 LC 14.030(1)(b)(iii) (Oct 29, 2019). Thus, under the New Code, the decisions
14 would have become final on April 22, 2020. With our remand of the New Code
15 on April 20, 2020, however, the Old Code became effective, provided petitioners
16 with the ability to appeal to the board of commissioners, required that those
17 appeals be filed within 12 days of the date on which the decisions were signed,

³ OAR 661-010-0010(3) provides:

"A decision becomes final when it is reduced to writing and bears the necessary signatures of the decision maker(s), unless a local rule or ordinance specifies that the decision becomes final at a later date, in which case the decision is considered final as provided in the local rule or ordinance."

1 and provided that the decisions would become final if not appealed within that
2 period. LC 14.510 (Dec 4, 2009); LC 14.500(3) (Dec 4, 2009); *Bielefield*, ____ Or
3 LUBA at ____ (slip op at 7). Because the decisions were signed on April 9, 2020,
4 they would have become final on April 21, 2020, unless petitioners appealed to
5 the board of commissioners. Petitioners did not, however, appeal to the board of
6 commissioners. ORS 197.825(2)(a) provides that we do not have jurisdiction
7 where the petitioner has not “exhausted all remedies available by right before
8 petitioning [LUBA] for review.” Accordingly, unless some other reason excuses
9 petitioners’ failure to seek those available local appeals, ORS 197.825(2)(a)
10 precludes our review.

11 Petitioners argue that the Old Code should not be applied to their appeals
12 because,

13 “where the law governing exhaustion changes during the local
14 appeal process in a way that affects Petitioners’ substantive rights
15 (by requiring a further local appeal when it is too late to actually
16 effect a further local appeal) LUBA and the Courts apply the change
17 in the law prospectively, not retrospectively to appeals already in the
18 pipeline.” Response to Motion to Dismiss 2.

19 Two of the cases cited by petitioners in support of this position, *Ramsay v. Linn*
20 *County*, 30 Or LUBA 283 (1996), and *Schultz v. City of Grants Pass*, 22 Or
21 LUBA 457 (1991), are inapposite because they concerned new legislation that
22 was enacted after an appeal had been filed at LUBA. During the pendency of the
23 LUBA appeal in *Ramsay*, the legislature amended what is now ORS 197.835(4),
24 the statute which allows petitioners to raise new issues to LUBA, and the county

1 argued that, under the newly enacted version of ORS 197.835(4), we lacked
2 jurisdiction because petitioner had failed to raise the issues below. We concluded:

3 “When petitioner filed her notice of intent to appeal, she was entitled
4 to rely on [the version of ORS 197.835(4) then in effect]. Assuming
5 the county failed to follow the procedural requirements of ORS
6 197.763, petitioner had the right under ORS 197.835[(4)] * * * to
7 raise any issue, whether or not it was raised at the local level.”
8 *Ramsay*, 30 Or LUBA at 287.

9 In *Schultz*, we explained:

10 “LUBA lacked review jurisdiction over the urban subdivision and
11 partition decisions described in ORS 197.015(10)(b)(B) between
12 October 3, 1989 and September 28, 1991. Beginning September 29,
13 1991, LUBA’s review jurisdiction includes urban subdivision and
14 partition on decisions.

15 The challenged partition decision became final July 24, 1991. The
16 notice of intent to appeal was filed on August 14, 1991. * * * Each
17 of these events occurred prior to September 29, 1991, when Oregon
18 Laws 1991, chapter 817 became effective and LUBA was granted
19 jurisdiction over limited land use decisions (including urban
20 partitions).” 22 Or LUBA at 460-61.

21 We concluded that the law did not apply retroactively to give LUBA jurisdiction
22 over a pending appeal. Here, the county did not adopt new legislation during the
23 pendency of an application. Instead, the applicable procedural provisions
24 changed by operation of law.

25 On February 20, 2020, the hearings official issued their decisions affirming
26 the planning director’s decisions and denying the appeals. On that date, both the
27 Old Code and the New Code provided that a party could seek reconsideration of
28 a hearings official decision. On March 3, 2020, petitioners submitted their

1 requests for reconsideration by the hearings official. Record 214-20, 1778-84,
2 3490-96, 4982-88. The reconsideration application forms, completed and signed
3 by petitioners, included the following notice that the New Code was under appeal
4 at LUBA and that the Old Code would take effect if LUBA remanded Ordinance
5 19-03:

6 “• Lane County Ordinance No. 19-03, the adopting Ordinance
7 for [LC] Chapter 14 that regulates the Hearings Official
8 decision and appeals process is under appeal to the [LUBA].
9 In the event that an appeal to LUBA results in a remand or
10 reversal, the Ordinance will no longer be effective and the
11 applicable version of [LC] Chapter 14 will revert back to Lane
12 County Ordinance No. 14-09 (December 2014).

13 “• An appeal of a Hearings Official decision to the Lane County
14 Board of Commissioners is no longer allowed per the
15 regulations of Lane Code Chapter 14 (Lane County
16 Ordinance No. 19-03).” Record 215, 1779, 3491, 4983.

17 The Old Code, the code that the reconsideration application forms notified
18 petitioners would be in effect if the New Code was remanded, provided a right to
19 appeal the hearings official’s decisions to the board of commissioners. LC
20 14.500(2) (Dec 4, 2009).

21 On April 10, 2020, the county mailed the hearings official’s April 9, 2020
22 decisions on reconsideration, again denying the appeals. Those decisions advised
23 the parties that they could seek additional reconsideration from the hearings
24 official or file an appeal directly with LUBA. Record 2, 1738, 3276, 4770. Citing
25 *Mountain West Investment v. City of Silverton*, 39 Or LUBA 788, 791 (2001),
26 and *Friends of Clean Living v. Polk County*, 36 Or LUBA 544, 550-51 (1999),

1 petitioners argue that they filed their appeals consistent with the instructions in
2 the April 9, 2020 decisions and should be able to rely on those instructions.

3 In *Mountain West Investment*, the notice of the planning commission's
4 decision provided that the decision was final and not subject to a local appeal to
5 the city council, stating, "An appeal of the City's decision may be filed with
6 [LUBA] within twenty-one (21) days of the date of this notice. The applicant or
7 any other person or agency who testified either orally or in writing may file an
8 appeal in accordance with ORS 197.830 and 197.845." 39 Or LUBA at 788. The
9 petitioner appealed the planning commission's decision to LUBA, following the
10 directive in the notice of the planning commission's decision that that decision
11 could be appealed directly to LUBA. The intervenor moved to dismiss, arguing
12 that the petitioner had failed to exhaust local remedies by failing to appeal the
13 planning commission's decision to the city council.

14 We denied the motion to dismiss, concluding that the applicable language
15 in the city's code governing appeals to the city council could be read to provide
16 either that (1) a planning commission decision may only be appealed to the city
17 council if the planning commission is the initial decision maker or (2) all planning
18 commission decisions were appealable to the city council. Because the local code
19 was ambiguous regarding whether a local appeal was available, we determined
20 that we could not say that the local code provided a right to appeal the planning
21 commission's decision to the city council. Consequently, we concluded that the
22 intervenor had not established that a further local appeal was available to

1 petitioner. Differently, here, the language of the county's codes is not ambiguous.
2 The New Code provided for appeal to LUBA directly from the hearings official's
3 decision. LC 14.030(1)(b)(iv) (Oct 29, 2019). The Old Code provided for a right
4 of appeal to the board of commissioners. LC 14.500(2) (Dec 4, 2009). There is
5 no ambiguous code language at issue here. Any ambiguity that exists here is in
6 the question of which of the two codes applied to the county's final decisions.

7 In *Friends of Clean Living*, we rejected a motion to dismiss based on
8 failure to exhaust local appeals where "the challenged decision [gave] no hint
9 that it [was] a 'land use determination' for which there [was] a right appeal to the
10 board of county commissioners." 36 Or LUBA at 550. The planning director's
11 decision said that a land use compatibility statement was an administrative matter
12 for which no notice or hearing was required and we found that the decision was
13 fairly read to state that there was no right of local appeal.

14 Here, the hearings official's decisions dated April 9, 2020, and mailed
15 April 10, 2020, advised parties of the option to file a request for reconsideration
16 within 12 days or file an appeal at LUBA within the statutory timeframe. Like
17 the decision in *Friends of Clean Living*, the hearings official's decisions here did
18 not mention a right to appeal to the board of commissioners. However, in the
19 reconsideration application forms provided with the hearings official's February
20 20, 2020 decisions and signed by petitioners, the county provided notice to
21 petitioners that the New Code was on appeal and might become ineffective and
22 that the Old Code would apply. The county again provided such notice by

1 including with the April 9, 2020 decisions on reconsideration additional copies
2 of the reconsideration application form, which included the same language. For
3 that reason, *Friends of Clean Living* does not assist petitioners.

4 Finally, petitioners note the short timeframe that they were given in which
5 to file an appeal by right to the board of commissioners pursuant to the Old Code,
6 given our April 20, 2020 decision remanding Ordinance 19-03 and rendering the
7 New Code ineffective and the April 21, 2020 deadline to appeal the hearings
8 official's decisions to the board of commissioners. Petitioners argue that they
9 were not aware of LUBA's April 20, 2020 decision remanding the New Code
10 until after April 21, 2020, and that requiring petitioners to exhaust their right to a
11 local appeal under the Old Code in this case results in a "jurisdictional
12 mousetrap." Response to Motion to Dismiss 7. As compelling as petitioners'
13 argument may be, petitioners are really arguing that LUBA should deny the
14 motion to dismiss based on equitable considerations.

15 We have previously concluded that we will not consider a request for
16 equitable relief unless a party first establishes that it is within our statutory
17 authority to grant such relief. In *Macfarlane v. Clackamas County*, 70 Or LUBA
18 126 (2014), the county determined that that the petitioners had violated the
19 zoning ordinance by constructing two dwellings on a property where the zoning
20 ordinance allowed only one dwelling. The petitioners argued that they had owned
21 the property for 35 years before the county acted to enforce the code provision or
22 advised the petitioners of the violation and that the doctrine of equitable estoppel

1 should preclude the county's determination that a violation existed. We
2 explained:

3 "We have questioned on a number of occasions whether we have
4 statutory authority to apply equitable principles in reviewing a land
5 use decision on appeal. *Lamar Outdoor Advertising Co. v. City of*
6 *Tigard*[], 69 Or LUBA 391 (2014). *See also Chaves v. Jackson*
7 *County*, 56 Or LUBA 643, 645 (2008); *Heidgerken v. Marion*
8 *County*, 35 Or LUBA 313, 323 (1998); *Mazeski v. Wasco County*,
9 30 Or LUBA 442, 446 n 4 (1995); *Pesznecker v. City of Portland*,
10 25 Or LUBA 463, 466 (1993); *Lemke v. Lane County*, 3 Or LUBA
11 11, 15 n 2 (1981). We have never had to resolve that question,
12 because in none of the many cases where a party has invoked
13 equitable estoppel or other equitable doctrines have the elements of
14 the doctrines been met. That is certainly the case here. Petitioner
15 does not address the elements of estoppel, much less attempt to
16 demonstrate that all or even one of those elements are met.

17 "Over the many years that we have questioned our authority to
18 reverse or remand a land use decision based on equitable doctrines,
19 no party has advanced a remotely convincing argument that LUBA
20 has that authority. LUBA is an administrative agency, part of the
21 executive branch, and entirely a creature of statute. Our review
22 authority is prescribed, and limited, by those statutes, particularly
23 the scope of review set out in ORS 197.835. With the possible
24 exception of ORS 197.805, nothing in ORS 197.805 to 197.845, the
25 statutes governing LUBA, suggests that LUBA has authority to
26 reverse or remand a decision based on equitable doctrines that,
27 traditionally, only Courts have the authority to apply. However,
28 ORS 197.805 merely directs that LUBA ensure that its decisions are
29 'made consistently with sound principles governing judicial
30 review.' We believe that if the legislature wished that LUBA apply
31 equitable principles to decide cases differently than required by
32 applicable land use laws, it would have said so more directly. And
33 we believe the legislature would have said so in ORS 197.835,
34 which sets out LUBA's scope of review.

1 “Perhaps the present case is as good as any to determine that LUBA
2 will no longer entertain, even hypothetically, an argument that
3 LUBA should reverse or remand a decision based on equitable
4 principles, unless the proponent first provides a sufficient basis to
5 conclude that the legislature granted LUBA that authority. Absent
6 such a demonstration, LUBA will not consider any argument for
7 reversal or remand based on equitable principles.” *Macfarlane*, 70
8 Or LUBA at 130-31 (footnote omitted).

9 Petitioners have not demonstrated that we have the authority to deny the
10 motion to dismiss for lack of jurisdiction under ORS 197.825(2)(a) based on
11 equitable considerations and, accordingly, we will not consider an argument that
12 petitioners were not required to exhaust their remedies because of the
13 undisputedly short length of time between our remand of the New Code and the
14 deadline to appeal to the board of commissioners. For the foregoing reasons,
15 intervenor’s motion to dismiss is granted.

16 The appeals are dismissed.