

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

3
4 STEVEN SMITH,
5 *Petitioner,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2022-034

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Douglas County.

18
19 Steven Smith filed the petition for review and reply brief and argued on
20 behalf of themselves.

21
22 Paul E. Meyer filed the respondent's brief and argued on behalf of
23 respondent.

24
25 ZAMUDIO, Board Member; RYAN, Board Chair, participated in the
26 decision.

27
28 RUDD, Board Member, did not participate in the decision.

29
30 AFFIRMED

10/25/2022

31
32 You are entitled to judicial review of this Order. Judicial review is
33 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county counsel decision that denies petitioner’s local appeal of a county planning director decision that tentatively approves a partition of land.

FACTS

On February 4, 2022, the county planning director issued a decision (director decision) that tentatively approves a partition of land. The county mailed notice of that approval to petitioner. The last page of the director decision includes a statement that interested parties may appeal the decision “by filing a timely written statement with the Director and submitting the required fee. Any person who is mailed written notice of this decision cannot appeal the decision directly to [LUBA] under ORS 197.830.” Record 26.

The notice of the director decision included an information sheet that “is designed to assist those who wish to appeal a decision of the Planning Director regarding a land use matter.” Record 27. The information sheet explains, “The Douglas County Land Use and Development Ordinance [(LUDO)] Section 2.400, provides a strict procedure which must be followed to appeal a Planning Director decision regarding land use matters. This procedure must be followed or an appeal cannot be accepted.” *Id.* The information sheet reflects the requirements for a local appeal that are set out in LUDO 2.400(3) and (4). LUDO 2.400(3) requires that an appeal “be filed with the Director no later than ten (10)

1 days following the date the decision was sent” and include a notice of appeal.

2 The notice of appeal must include:

3 “(a) A reference to the application sought to be appealed;

4 “(b) A statement as to how the petitioner qualifies as a party;

5 “(c) The specific grounds relied upon in the petition request for
6 review; and

7 “(d) The date of the final decision on the action.” LUDO 2.400(4).

8 The appeal must be accompanied by the required fee. *Id.*

9 On February 12, 2022, petitioner filed with LUBA a motion (LUBA
10 motion) requesting that LUBA suspend the statutory deadline for filing a notice
11 of intent to appeal the director decision and stating that petitioner intended for
12 the motion to also satisfy the county provisions governing a local appeal of the
13 director decision. Record 10. The cover letter for the LUBA motion indicates that
14 the motion was copied to county counsel with enclosures and includes the
15 following note addressed to county counsel: “Please note that I request that you
16 accept this as satisfying local notice of appeal requirements. If not please let me
17 know and allow me some time to send a separate one.” *Id.*

18 Petitioner sent county counsel a letter dated February 23, 2022, inquiring
19 whether the county accepted the “LUBA motion as satisfying local notice of
20 appeal requirements.” Record 6. On March 7, 2022, petitioner sent county
21 counsel a check for \$250. After further correspondence, county counsel sent
22 petitioner a letter dated March 23, 2022 (county counsel decision) in which

1 county counsel concluded that petitioner had not filed a timely local appeal of the
2 director decision and denied petitioner’s local appeal of the director decision.
3 Record 1.

4 County counsel set out three reasons for denying petitioner’s local appeal.
5 First, county counsel concluded that it was “not clear” that the documents that
6 petitioner sent to LUBA and county counsel on February 12, 2022, constitute a
7 local notice of appeal. Second, county counsel concluded that mailing copies of
8 the LUBA motion to county counsel did not constitute filing those documents
9 with the director. Third, the February 12, 2022 mailing did not include an appeal
10 fee, as required by LUDO 2.400(4).¹ *Id.*

¹ The county counsel decision states:

“Dear Mr. Smith:

“I am in receipt of your March 7, 2022 letter and check number 6246 (for \$250). The Information Sheet you received in the mail with the planning director’s February 4, 2022 decision is specific as to the requirements of a local appeal. Among those requirements are that you timely file a Notice of Appeal with the planning director and that your Notice of Appeal be accompanied by a fee of \$250. However, first, it’s not clear to me that the documents you sent to LUBA on February 12, 2022 and copied to me constitute a local Notice of Appeal. Second, mailing your LUBA documents to me does not constitute ‘filing with the planning director.’ Third, your check to the county did not ‘accompany’ your February 12, 2022 documents. For these three reasons, you have not filed a timely local appeal of the planning director’s February 4, 2022 decision and your local appeal is denied. Thus, I am returning your original, uncashed check to you by enclosing it with this letter.” Record 1.

1 On April 11, 2022, the Board received petitioner’s original notice of intent
2 to appeal (NITA). The original NITA attempted to appeal both the director
3 decision and the county counsel decision. On April 13, 2022, we issued an order
4 instructing petitioner to either (1) notify the Board in writing that they elect to
5 appeal only one decision, and identify which decision, pursuant to OAR 661-010-
6 0015(1)(d), or (2) submit a new, separate NITA and separate filing fee for the
7 appeal of the additional decision. On April 25, 2022, the Board received
8 petitioner’s corrected NITA, in which petitioner appeals only the county counsel
9 decision. Thus, the county counsel decision is the decision challenged in this
10 appeal.

11 **JURISDICTION**

12 LUBA has “exclusive jurisdiction to review any land use decision or
13 limited land use decision of a local government.” ORS 197.825(1). A petitioner
14 must state, in the petition for review, “why the challenged decision is a land use
15 decision or a limited land use decision subject to the Board’s jurisdiction.” OAR
16 661-010-0030(4)(c). In the petition for review, petitioner states simply that “[t]he
17 Board has jurisdiction pursuant to ORS 197.825.” Petition for Review 10.

18 In the respondent’s brief, the county responds that the jurisdictional
19 statement in the petition for review is “inadequate” and requests, generally, that
20 the appeal be dismissed. Respondent’s Brief 5, 9. The county does not develop
21 any argument that the challenged decision is not a land use decision subject to

1 our review. If the county intends to challenge the Board’s jurisdiction, then that
2 challenge is undeveloped.

3 Land use decisions over which we exercise exclusive review jurisdiction
4 include:

5 “A final decision or determination made by a local government or
6 special district that concerns the adoption, amendment or
7 application of:

8 “* * * * *

9 “(iii) A land use regulation[.]” ORS 197.015(10)(a)(A).

10 As explained in further detail below, the challenged decision is a county
11 counsel decision denying a local appeal because petitioner did not follow the
12 process set out in LUDO 2.400. Thus, the challenged decision is a final decision
13 that concerns the application of a land use regulation and is a land use decision
14 over which we have exclusive review jurisdiction.

15 **FIRST ASSIGNMENT OF ERROR²**

16 In arguments under subsection (a) of the petition for review, petitioner
17 argues that the county counsel decision denying their local appeal is erroneous
18 for the following five reasons: (1) county counsel lacked authority to deny

² Petitioner does not set out separate assignments of error. Instead, petitioner sets out multiple arguments under lettered subheadings. We analyze each group of arguments as four separate assignments of error according to the legal questions presented. *See* OAR 661-010-0030(4)(d) (providing that arguments should be combined and organized according to the legal questions presented).

1 petitioner's local appeal, (2) county counsel had a conflict of interest that
2 prohibited them from deciding whether petitioner could proceed with a local
3 appeal, (3) county counsel's actions denied petitioner due process, (4) county
4 counsel's actions denied petitioner equal protection, and (5) the county
5 prejudiced petitioner's substantial right to a hearing.

6 **A. County Counsel Authority**

7 Petitioner argues that county counsel lacked authority to deny their local
8 appeal. LUDO 2.400 provides that administrative decisions made by the director
9 are subject to review by the hearings officer or planning commission.³ Petitioner

³ LUDO 2.400 provides, in part:

- "1. Administrative Actions taken by the Director shall be subject to review by the Hearings Officer or Commission, pursuant to §2.060.3 and 4, respectively.
- "2. Any person or entity who files a timely written statement may appeal a decision of the Director relative to an Administrative Action. In the conduct of a hearing, the Approving Authority shall establish the appellant as a party or the appeal shall not be heard and the contested decision shall become final.
- "3. The Planning Commission or Hearings Officer shall review the Administrative Action of the Director upon receipt of a Notice of Appeal. For the purpose of this section, an Appeal shall be filed with the Director no later than ten (10) days following the date the decision was sent. Any decision of the Director may also be reviewed by the Commission upon its own motion passed within twelve (12) days of the written decision sought to be reviewed if no appeal is filed."

1 argues that LUDO 2.400 provides that only the hearings officer or planning
2 commission may conduct an appeal of a director decision. Thus, petitioner
3 argues, county counsel had no authority to decide whether petitioner had filed a
4 valid local appeal and whether that appeal could proceed to a hearing and
5 decision.

6 The county responds, and we agree, that the hearings officer and planning
7 commission have review authority over local appeals filed *with the director*.
8 LUDO 2.400(3) (“For the purpose of this section, an Appeal shall be filed with
9 the Director no later than ten (10) days following the date the decision was
10 sent.”); see n 3. Petitioner did not file a local appeal with the director. Instead,
11 petitioner attempted to file a local appeal with county counsel. County counsel
12 did not conduct an appeal of the director decision or make any substantive
13 decision on petitioner’s attempted local appeal. Instead, county counsel denied
14 petitioner’s attempt to file a local appeal *with county counsel*. LUDO 2.400(1)
15 does not specify which county actor may decide whether an attempt to file a local
16 appeal outside the procedure prescribed by LUDO 2.400 may proceed. LUDO
17 2.400 does not limit county counsel’s authority. Petitioner has cited no other
18 source of law that limits county counsel’s authority or prohibits county counsel
19 from deciding whether an attempt to file a local appeal that is addressed to county
20 counsel may proceed.

21 This subassignment of error is denied.

1 **B. Conflict of Interest**

2 Petitioner next argues that county counsel had a conflict of interest that
3 prohibited them from deciding whether petitioner could proceed with a local
4 appeal. Petitioner argues that, because county counsel is an attorney for the
5 county, county counsel should have disqualified themselves from acting as a final
6 decision-maker. In support of that argument, petitioner cites “common sense”
7 and the Code of Ethics for Administrative Law Judges of the Office of
8 Administrative Hearings. Petition for Review 12-13.

9 The county responds, and we agree, that petitioner’s argument provides no
10 basis for a remedy at LUBA. *See* ORS 197.835(9) (providing bases on which
11 LUBA will reverse or remand a land use decision); OAR 661-010-0071 (same).

12 This subassignment of error is denied.

13 **C. Due Process, Equal Protection, and Procedural Rights**

14 Petitioner next argues that county counsel’s actions denied petitioner due
15 process and equal protection under the United States Constitution.

16 The county responds, and we agree, that petitioner’s constitutional
17 arguments are undeveloped for review. Petitioner does not set out the legal
18 standards for due process and equal protection under the United States
19 Constitution. Petitioner cites *Goldberg v. Kelly*, 397 US 254, 90 S Ct 1011, 25 L
20 Ed 2d 287 (1970), in support of their due process argument and *Loving v.*
21 *Virginia*, 388 US 1, 87 S Ct 1817, 18 L Ed 2d 1010 (1967), in support of their
22 equal protection argument. Petitioner does not describe those cases or apply the

1 holdings of those cases to the facts of this case. We will not consider claims of
2 constitutional violations where the parties raising such claims do not supply legal
3 argument in support of those claims. *Joyce v. Multnomah County*, 23 Or LUBA
4 116, *aff'd*, 114 Or App 244, 835 P2d 127 (1992); *see also Deschutes*
5 *Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) (“It is not our
6 function to supply petitioner with legal theories or to make petitioner’s case for
7 petitioner.”).

8 Petitioner also cites OAR 661-010-0071 and argues that the county denied
9 them an opportunity to be heard prior to the county counsel decision and that that
10 denial prejudiced their substantial right to a hearing. ORS 197.835(9)(a)(B)
11 provides that the Board shall reverse or remand the land use decision under
12 review if the Board finds that the local government “[f]ailed to follow the
13 procedures applicable to the matter before it in a manner that prejudiced the
14 substantial rights of the petitioner.” OAR 661-010-0071(2)(c) provides that
15 LUBA will remand a land use decision for further proceedings when “[t]he
16 decision is flawed by procedural errors that prejudice the substantial rights of the
17 petitioner(s).” Petitioner has not established that any applicable LUDO provision
18 or any other source of law required the county to provide petitioner a hearing
19 before denying petitioner’s attempt to file a local appeal outside the procedure
20 provided in LUDO 2.400.

21 These subassignments of error are denied.

22 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In three arguments under subsections (b), (c), and (d) of the petition for
3 review, petitioner argues that the Board should conclude that county counsel’s
4 denial of petitioner’s local appeal should be reversed or remanded based on
5 equitable principles of estoppel by conduct, estoppel by silence, and estoppel by
6 actual concealment.

7 The county responds, and we agree, that petitioner’s arguments and claims
8 for relief are not within LUBA’s scope of review. *Macfarlane v. Clackamas*
9 *County*, 70 Or LUBA 126, 131 (2014) (explaining that LUBA will not consider
10 any argument for reversal or remand based on equitable principles “unless the
11 proponent first provides a sufficient basis to conclude that the legislature granted
12 LUBA that authority”).

13 The second assignment of error is denied.

14 **THIRD ASSIGNMENT OF ERROR**

15 In subsection (e) of the petition for review, petitioner argues that county
16 counsel applied an improper legal standard. Petitioner argues that county counsel
17 applied the information sheet included with the notice of the director decision
18 instead of LUDO 2.400. The county responds, and we agree, that the information
19 sheet cites and is based on LUDO 2.400 and county counsel’s denial in the
20 challenged decision applies LUDO 2.400. The county did not apply an improper
21 legal standard.

22 The third assignment of error is denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 In subsection (f) of the petition for review, petitioner argues that county
3 counsel's denial of petitioner's local appeal upheld clear violations of law in the
4 director decision. Petitioner argues that we should review the director decision
5 under the plain error doctrine. The plain error doctrine is an exception to the
6 requirement that an issue be preserved for appellate review in appellate courts.
7 ORAP 5.45(1); *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d
8 956 (1991) (establishing a two-step test to determine whether an appellate court
9 may correct unpreserved error and whether it will exercise its discretion to do
10 so).

11 In response, the county observes that no prior LUBA case has applied the
12 plain error doctrine. More importantly, the plain error doctrine is an exception to
13 preservation. That doctrine does not purport to permit an appellate body to review
14 a decision that has not been appealed and, thus, is not before that body, which is
15 a jurisdictional defect. Petitioner did not appeal the director decision to LUBA,
16 and that decision is not before us in this appeal. Accordingly, we do not have
17 jurisdiction to decide the merits of petitioner's arguments that the director
18 decision contains legal errors. We do not decide the merits of the fourth
19 assignment of error.

20 The county's decision is affirmed.