

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

THRIVE HOOD RIVER,
Petitioner,

vs.

HOOD RIVER COUNTY,
Respondent.

LUBA No. 2022-084

FINAL OPINION
AND ORDER

Appeal from Hood River County.

Jesse A. Buss represented petitioner.

Christopher D. Crean represented respondent.

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

DISMISSED

07/14/2023

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

NATURE OF THE DECISION

Petitioner appeals a planning commission order affirming a county planning director decision approving a conditional use permit (CUP) authorizing operation of a bed and breakfast in an existing structure in the Forest (F-1) zone.

FACTS

The pertinent facts are undisputed.¹ Meadows North, LLC (Meadows), applied for a CUP to operate a bed and breakfast in an existing structure in the F-1 zone. The planning director approved the application without a hearing. Petitioner appealed the planning director's decision to the planning commission. The planning commission held a *de novo* hearing on the application. At the conclusion of the initial hearing, the planning commission continued the hearing and kept the record open for new evidence and rebuttal. At the conclusion of the continued hearing, a planning commissioner moved to reverse the planning director's decision. Three planning commissioners voted in favor of the motion, and two planning commissioners voted against the motion.

Section G(1) of the planning commission's bylaws provides:

"Four members of the Planning Commission shall constitute a

¹ The county did not transmit a record in this appeal. the parties refer to the record in *Thrive Hood River v. Hood River County*, ____ Or LUBA ____ (LUBA No 2022-104, July 14, 2023), in their pleadings. We will consider evidence outside the record in evaluating jurisdiction. *Vaccher v. City of Eugene*, 80 Or LUBA 10, 14, *aff'd*, 300 Or App 217, 450 P3d 600 (2019).

1 quorum. *No action of the Planning Commission shall be valid unless*
2 *there is an affirmative vote of at least 4 members.* In cases of a tie
3 vote, the decision shall be deemed a denial of the motion before the
4 Planning Commission.” (Emphasis added.)

5 Because the motion to reverse the planning director’s decision did not receive an
6 affirmative vote from at least four planning commissioners, the planning
7 commission chair signed an order affirming the planning director’s decision (the
8 Order). This appeal followed.

9 **REQUEST FOR TELEPHONE CONFERENCE**

10 In its response to the motion to dismiss, and again in its surreply, petitioner
11 requests a telephone conference to allow it to orally address the arguments in the
12 county’s motion. OAR 661-010-0065(3) provides, in part, “A party that desires
13 a telephone conference on a motion shall include a request for a telephone
14 conference in its motion or response. The Board may, at its discretion, conduct a
15 telephone conference with the parties to consider any motion.” The county does
16 not join in petitioner’s request.

17 We do not believe that a telephone conference is necessary to address the
18 county’s motion or petitioner’s response. Therefore, the request for a telephone
19 conference is denied.

20 **JURISDICTION**

21 The county moves to dismiss and argues that LUBA lacks jurisdiction over
22 this appeal because petitioner did not exhaust local appeals and the Order is not
23 the county’s final decision in this matter. For the reasons explained below, we

1 agree with the county that the planning commission decision is not the county's
2 final decision. Thus, we dismiss this appeal because we lack jurisdiction.

3 Petitioner has the burden to establish LUBA's jurisdiction. *Billington v.*
4 *Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). ORS 197.825(1) provides
5 that LUBA has exclusive jurisdiction to review "land use decisions." ORS
6 197.015(10)(a)(A) defines "land use decision," in relevant part, as "[a] *final*
7 decision or determination made by a local government." (Emphasis added.) OAR
8 661-010-0010(3) provides, in relevant part, that "[a] decision becomes *final* when
9 it is reduced to writing and bears the necessary signatures of the decision
10 maker(s)[.]" (Emphasis added.) ORS 197.825(2)(a) limits LUBA's jurisdiction
11 to "those cases in which the petitioner has exhausted all remedies available by
12 right before petitioning the board for review[.]" We have explained that "the
13 statutory requirement for 'finality' is governed primarily by the form of the
14 decision and whether all local appeals have been exhausted regarding that
15 decision." *Curl v. City of Bend*, 48 Or LUBA 530, 543, *aff'd*, 199 Or App 628,
16 113 P3d 990 (2005). Local remedies are considered exhausted only if there are
17 no more local methods available to challenge a local decision. *Lyke v. Lane*
18 *County*, 70 Or App 82, 688 P2d 411 (1984).

19 "The exhaustion requirement, as interpreted, requires that
20 petitioners use all available local remedies before invoking state
21 jurisdiction, furthering the legislative goal of resolving land use
22 issues at the local level whenever possible. The critical issue is not
23 whether a procedure is *required* by the county or whether the county
24 must accept review, but whether there is a procedure available to ask

1 for local review and the right to ask is unconditionally granted.” *Id.*
2 at 86 (emphasis in original).

3 The planning commission issued the order on August 31, 2022. On
4 September 15, 2022, before filing the notice of intent to appeal in this appeal,
5 petitioner appealed the Order to the board of commissioners (the board). On
6 September 20, 2022, while that local appeal was pending, petitioner filed the
7 notice of intent to appeal in this appeal. On October 7, 2022, the parties filed a
8 stipulated motion to suspend this appeal. On October 17, 2022, the board held a
9 public hearing on the application, considered existing evidence in the record, did
10 not accept new evidence, and did accept new argument. On November 23, 2022,
11 the board issued a decision approving the application. On December 13, 2022,
12 petitioner filed the notice of intent to appeal the board’s decision. In a final
13 opinion and order issued this same day, we remand the board’s decision. *Thrive*
14 *Hood River v. Hood River County*, ___ Or LUBA ___ (LUBA No 2022-104, July
15 14, 2023).

16 Notwithstanding that local appeal and decision, petitioner argues that
17 LUBA has jurisdiction to review the order because (1) the order is not a “valid
18 decision” of the planning commission and (2) no ordinance or statute provided
19 petitioner an “absolute right” to appeal the order to the board. Petitioner’s
20 Opposition to Respondent’s Motion to Dismiss 12.

21 Hood River County Zoning Ordinance (HRCZO) 60.05 provides, “The
22 Planning Commission shall be the hearings body and make decisions on the
23 following actions: * * * Appeal of Director’s Decision[.]” HRCZO 61.06(A)

1 provides, “Any ‘party’ having ‘standing’ as provided by this section may appeal
2 to the Board of Commissioners an action or ruling of the initial hearings body or
3 officers.” Petitioner submitted evidence and testimony to the planning
4 commission and appealed the Order to the board. The board considered and
5 rejected petitioner’s allegations of error.

6 Petitioner argues that the board lacked jurisdiction to review the Order
7 because, according to petitioner, that Order is a unilateral action of the planning
8 commission chair. Petitioner argues that the board may review actions of an
9 “initial hearings body” (*e.g.*, the planning commission), not actions of individual
10 members of such a body (*e.g.*, the planning commission chair). HRCZO
11 61.06(A). Petitioner observes that no planning commissioner moved to affirm
12 the planning director’s decision and the Order is signed only by the planning
13 commission chair. Because the Order is a unilateral action of the planning
14 commission chair, and not an action of the planning commission, petitioner
15 argues that the board lacked jurisdiction to review it.

16 Petitioner does not accurately characterize the Order. The transcript of the
17 planning commission’s August 24, 2022 meeting provides the following, which
18 took place immediately after a motion to uphold the appeal, three yes votes, and
19 two no votes.

20 “[Planning Commission Chair]:

21 “* * * We do not have four affirmative votes. Is there another
22 motion in the opposite? (*Hearing none.*) Okay, with not having four
23 affirmative votes the Director’s decision stands. Hearing is closed.

1 “[Planning Director]:

2 “Mr. Chair, Staff will prepare an order reflecting tonight’s decision.
3 We’d like to get the commissions okay for the Chair to sign the
4 order.

5 “[Planning Commission Chair]:

6 “Are we needing a motion to that?

7 “[County Counsel]:

8 “No. Are there any objections to having the * * * Chair sign the
9 order?

10 “[Planning Commission Chair]:

11 “* * * Is there any problem with me signing for that? (*Hearing*
12 *none.*) Thank you.” 2022-104 Amended Record 266 (*italics and*
13 *underscoring in original*).

14 The order is not a unilateral or *ultra vires* action of the planning
15 commission chair. We therefore reject petitioner’s argument that relies on that
16 mischaracterization of the Order.

17 Petitioner also argues that the board lacked jurisdiction to review the Order
18 because the Order is not a “valid” action of the planning commission. HRCZO
19 61.06(A) provides that the board may review “an *action* or ruling of the initial
20 hearings body.” (Emphasis added.) As set out above, section G(1) of the planning
21 commission bylaws provides, in relevant part, “No *action* of the Planning
22 Commission shall be valid unless there is an affirmative vote of at least 4
23 members.” (Emphasis added.) Petitioner argues that the Order is not an “action”
24 of the planning commission subject to board review under HRCZO 61.06(A)

1 because planning commission actions require four affirmative votes to be “valid”
2 and because no planning commissioner moved to affirm the planning director’s
3 decision.

4 Although actions of the planning commission require four affirmative
5 votes to be “valid,” HRCZO 61.06(A) does not provide that the board may review
6 only *valid* actions of the planning commission. As the county points out, HRCZO
7 61.10(G) provides, in relevant part:

8 “The Board may modify, affirm, reverse or remand the hearings
9 body’s order. The Board shall reverse or remand the initial hearings
10 body’s order only if it finds:

11 “1. The order to be unlawful in substance or *procedure*, but error
12 in procedure shall not be cause for reversal or remand unless
13 the Board shall find that substantial rights of the petitioning
14 party were prejudiced thereby and defects in the content of
15 the notice required by this section but not asserted at or prior
16 to the commencement of the hearing before the Planning
17 Commission[.]” (Emphasis added.)

18 We understand petitioner to argue that the order is “unlawful in * * *
19 procedure” because the decision that the director’s decision stands did not receive
20 four affirmative votes, as required by section G(1) of the planning commission’s
21 bylaws. HRCZO 61.10(G)(1) specifically provides that the board may reverse or
22 remand orders of the planning commission that are unlawful in procedure.
23 Accordingly, we reject petitioner’s argument that the board lacked jurisdiction to
24 review the Order because the Order did not receive four affirmative votes, as
25 required by section G(1) of the planning commission’s bylaws. The board may

1 review a planning commission order to consider an allegation that the Order is
2 invalid because of a procedural error. Under petitioner's argument, many
3 allegedly erroneous actions of the planning commission would be directly
4 appealable to LUBA without local review. That interpretation is inconsistent with
5 the HRCZO appeal provisions set out above and it violates "the legislative goal
6 of resolving land use issues at the local level whenever possible." *Lyke*, 70 Or
7 App at 86.

8 As we explained above, the Order does not reflect unilateral action of the
9 planning commission chair. We also doubt whether actual unilateral action of a
10 planning commission chairperson would be directly reviewable by LUBA. The
11 legislative policies enacted in the exhaustion requirement would not be served by
12 such actions bypassing local review. As we have explained:

13 "It is sometimes the case that errors made at intermediate stages of
14 a multi-step local government proceeding are rendered harmless by
15 later stages or decisions, or otherwise become a non-issue, but if that
16 is not the case, such errors can generally be challenged on appeal of
17 the local government's final decision." *Setniker v. Polk County*, 58
18 Or LUBA 87, 91 (2008).

19 Because a procedural error in an intermediate stage of a multi-step local
20 government process can be cured at a later stage, the legislature authorizes LUBA
21 to review only final land use decisions, not a decision made at an intermediate
22 level, even if that intermediate decision is procedurally flawed. ORS
23 197.015(10)(a)(A); ORS 197.835(9).

1 We agree with the county that the order is not a “final decision” for
2 purposes of ORS 197.015(10)(a)(A). For those reasons, we lack jurisdiction. In
3 so concluding we note, as petitioner did, that when a petitioner is uncertain about
4 whether there is a right to a local appeal, the prudent approach is to file a
5 precautionary LUBA appeal while pursuing a local appeal “and request that the
6 appeal to LUBA be suspended until there is a determination whether the
7 petitioner has a right of local appeal.” *Broderson v. City of Ashland*, 66 Or LUBA
8 369, 376 (2012). If, as in this case, the local appeal proceeds, then the petitioner
9 should voluntarily dismiss the precautionary LUBA appeal.

10 The appeal is dismissed.