

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

ZACHARY FORREST MARQUART,
Petitioner,

vs.

CITY OF SHANIKO,
Respondent.

LUBA No. 2023-036

FINAL OPINION
AND ORDER

Appeal from City of Shaniko.

Zachary Forrest Marquart filed the petition for review and reply brief and argued on behalf of themselves.

Jered Reid filed the respondent's brief and argued on behalf of respondent.

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

REMANDED 02/09/2024

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 city council decision denying petitioner’s single-family dwelling site plan application.

BACKGROUND

Petitioner explains that the city is located in the southern part of rural Wasco County and has a population of approximately 24 people. Petition for Review 3. The subject property is within the city limits, zoned Residential, and is an interior lot adjacent to an undeveloped city right of way for 3rd Street. Site Plan Map (Oversized Exhibit). The subject property is undeveloped and not yet accessed by a paved city street or served by water, sewer, or electricity. Record 17-19.

A single-family dwelling is an outright permitted use in the Residential zone. City of Shaniko Zoning Ordinance (CSZO) 3.1(1)(A); Record 62.¹ On February 22, 2023, petitioner submitted a single-family dwelling site plan to the city. Record 6. “Except as provided in subsection (6) of [ORS 197.307], a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing[.]” *Former* ORS 197.307(4) (2022), *amended by* Or Laws 2023, ch 533, § 1, *renumbered as* ORS 197A.400(1) (2023). At an April 10, 2023, city council

¹ All record citations are to the Second Supplemental Record.

1 meeting, the city council considered the site plan and decided that petitioner
2 needed to “make corrections and resubmit” the site plan. Record 3. On April 13,
3 2023, the city sent petitioner a letter rejecting the site plan stating as follows:
4 “Your plot/site plan has been rejected for the following reasons: * * * No setbacks
5 on plot/site plan, not on our form, not enough detail. Must pay for all System
6 Development fee per Ordinance 46.” Record 1. Petitioner filed this LUBA appeal
7 and filed the petition for review. In the respondent’s brief, respondent challenged
8 LUBA’s jurisdiction. We concluded that we have jurisdiction in an order dated
9 January 8, 2024. We proceed to the merits.

10 **ASSIGNMENTS OF ERROR**

11 The petition for review is not structured as required by our rules. Under
12 OAR 661-010-0030(4), the petition for review must:

- 13 “(a) State the facts that establish petitioner’s standing;
- 14 “(b) Present a clear and concise statement of the case, in the
15 following order, with separate section headings:
 - 16 “(A) The nature of the land use decision or limited land use
17 decision and the relief sought by petitioner;
 - 18 “(B) A brief summary of the arguments appearing under the
19 assignments of error in the body of the petition;
 - 20 “(C) A summary of the material facts. The summary shall be
21 in narrative form with citations to the pages of the
22 record where the facts alleged can be found. Where
23 there is a map in the record that helps illustrate the
24 material facts, the petitioner shall include a copy of that
25 map in the summary of the material facts or attach it as
26 an appendix to the petition.

1 “(c) State why the challenged decision is a land use decision or a
2 limited land use decision subject to the Board’s jurisdiction;

3 “(d) Set forth each assignment of error under a separate heading.
4 Each assignment of error must demonstrate that the issue
5 raised in the assignment of error was preserved during the
6 proceedings below. Where an assignment raises an issue that
7 is not identified as preserved during the proceedings below,
8 the petition shall state why preservation is not required. Each
9 assignment of error must state the applicable standard of
10 review. Where several assignments of error present
11 essentially the same legal questions, the argument in support
12 of those assignments of error shall be combined;

13 “(e) Contain a copy of the challenged decision, including any
14 adopted findings of fact and conclusions of law; and

15 “(f) Contain a copy of any comprehensive plan provision,
16 ordinance or other provision of local law cited in the petition,
17 unless the provision is quoted verbatim in the petition.”

18 The petition fails to comply with OAR 661-010-0030(4) in at least six
19 respects: (1) it does not state why the challenged decision is a land use decision
20 or a limited land use decision subject to the LUBA’s jurisdiction; (2) it does not
21 include a brief summary of arguments; (3) it does not include a summary of
22 material facts, in narrative form, with citations to the record; (4) it does not set
23 forth assignments of error under separate headings; (5) it does not state the
24 standard of review applicable to each issue raised; and (6) it does not demonstrate
25 that the issues raised were preserved during the proceedings below.

26 As the party seeking relief from LUBA, the petitioner bears the burden of
27 establishing error in the land use decision on review. *See Morse Bros., Inc. v.*
28 *Clackamas County*, 18 Or LUBA 188, 215 n 25 (1989) (“It is petitioner’s

1 responsibility to explain the basis upon which we may grant relief.”). A petitioner
2 establishes error by assigning error, demonstrating that the issue was preserved,
3 identifying the applicable standard of review, and providing substantive
4 argument supporting the assignments of error. Our review function is hindered
5 by petitioner’s failure to conform the petition to the requirements of OAR 661-
6 010-0030(4). *See Vanderberg v. City of Albany*, ___ Or LUBA ___, ___ (LUBA
7 No 2022-082, Jan 5, 2023) (slip op at 8-9) (addressing similar petition
8 deficiencies). For example, because petitioner did not provide a statement of
9 material facts with citations to the record, we cannot tell whether the facts alleged
10 by petitioner in the petition for review are contained in the record. Respondent
11 does not, however, object to the form or substance of the petition for review,
12 other than to allege that the petition for review “provides a significant amount of
13 superfluous allegations and facts that are not relevant to this proceeding.”
14 Respondent’s Brief 2-3.

15 With limited exceptions that do not apply here, our review is confined to
16 facts and evidence in the record and to issues raised before the local government.
17 ORS 197.835(2)(a), (3). Petitioner’s failure to state assignments of error and
18 applicable standards of review and to establish preservation makes it difficult for
19 us to determine what error petitioner alleges and whether petitioner has
20 established a basis for relief. “It is not our function to supply petitioner with legal
21 theories or to make petitioner’s case for petitioner.” *Deschutes Development v.*
22 *Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). We limit our review to petitioner’s

1 arguments that are directed at the challenged decision and the bases for denial set
2 out in the decision.

3 The challenged decision states three bases for denial: (1) “no setbacks on
4 plot/site plan,” (2) “not on our form,” and (3) “not enough detail.”² Record 1.
5 Petitioner challenges all of the stated reasons for denial. For the reasons explained
6 below, we agree with petitioner that respondent erred in denying the site plan.

7 **A. Missing Information**

8 Petitioner argues that respondent improperly denied the site plan because
9 it did not contain enough detail. Petitioner argues “[t]his is, itself, * * * not
10 enough detail on what they [are] seeking. There was no context provided as to
11 what [r]espondent claimed was missing, nothing at all.” Petition for Review 17.

² The decision also refers to system development fees “per Ordinance 46.” Record 1. Ordinance No. 46 provides, in part: “Where the municipal water system is available or can be made available to any parcel of property within the city limits of the City of Shaniko, the owner of such parcel of property shall make connection to the municipal water system.” Record 52. The comment in the decision referencing system development fees does not appear to us to be a basis for denial. Respondent refers to that information as “additional information regarding possible System Development Charges and potential improvements required.” Respondent’s Brief 5. If respondent denied the site plan based on nonpayment of service connection and system development charges, then we would agree with petitioner that is an improper basis for denial. Respondent points to no land use criterion that requires advance or contemporaneous payment of service connection and system development charges as a precondition for site plan approval.

1 We assume for purposes of this decision that the challenged decision is a
2 land use decision or a limited land use decision. ORS 227.178(2) provides:

3 “If an application for a permit, limited land use decision or zone
4 change is incomplete, *the governing body or its designee shall notify*
5 *the applicant in writing of exactly what information is missing*
6 *within 30 days of receipt of the application and allow the applicant*
7 *to submit the missing information. The application shall be deemed*
8 *complete for the purpose of subsection (1) of this section or [former]*
9 *ORS 197.311[(2021), renumbered as ORS 197A.470 (2023)] upon*
10 *receipt by the governing body or its designee of:*

11 “(a) All of the missing information;

12 “(b) Some of the missing information and written notice from the
13 applicant that no other information will be provided; or

14 “(c) Written notice from the applicant that none of the missing
15 information will be provided.” (Emphasis added).

16 Petitioner does not cite ORS 227.178(2), but his argument invokes its
17 substance. Respondent’s “not enough detail” reason for denying the site plan fails
18 to notify petitioner “of exactly what information is missing.” Record 1; ORS
19 227.178(2). We agree with petitioner that is an improper basis for denial. In so
20 concluding, we reiterate that a single-family dwelling is an outright permitted use
21 in the Residential zone and may be subject only to “clear and objective standards,
22 conditions and procedures.” *Former* ORS 197.307(4) (2022). Thus, the city must,
23 on remand, identify for petitioner the applicable clear and objective standards,
24 conditions, and procedures and then apply them to petitioner’s site plan.

1 **B. City Forms**

2 Respondent rejected petitioner’s site plan because it was “not on our
3 form.” Record 1. The decision does not identify which city form is required for a
4 dwelling site plan or explain what information required to satisfy applicable
5 criteria is set out on the city form that is not included in petitioner’s submissions.
6 In its brief, respondent points to CSZO 8.3, which provides that “[a]ll petitions,
7 applications, and appeals provided for in this Ordinance shall be made on the
8 forms outlined in Appendix II of this Ordinance.” Record 75; *see* Respondent’s
9 Brief 5. Respondent points out that the record contains an application form at
10 Record 79.³ However, that form is expressly for a “plan change/zone
11 change/variance/conditional use.” Record 79. A single-family dwelling is an
12 outright permitted use in the Residential zone and the form at Record 79 appears
13 to be inapplicable to petitioner’s requested dwelling site plan.

14 It is unclear to us from CSZO 8.3 and the record what form respondent
15 requires and what form respondent concluded that petitioner failed to submit as
16 applicable to petitioner’s site plan. We doubt whether the CSZO 8.3 requirement
17 that an application be on a specific form is a standard or criterion that could
18 provide a proper basis for denial. *See* ORS 227.178(3) (providing that “approval
19 or denial of the application shall be based upon the standards and criteria that

³ The city’s site plan form is at Record 41. It appears to be nearly identical to the Wasco County site plan form that petitioner submitted. Record 14; Site Plan Map (Oversized Exhibit).

1 were applicable at the time the application was first submitted”); *Davenport v.*
2 *City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993) (“The role that the
3 terms [‘standards and criteria’] play * * * is to assure both proponents and
4 opponents of an application that the substantive factors that are actually applied
5 and that have a meaningful impact on the decision permitting or denying an
6 application will remain constant throughout the proceedings.”).

7 The finding that the application is not on the city’s form is inadequate to
8 tell petitioner what information is missing—namely, which form is required or
9 what information on that form is required for the city’s site plan review that
10 petitioner has not already provided.

11 **C. Setbacks**

12 Respondent denied the site plan because “no setbacks on plot/site plan.”
13 Record 1. Petitioner argues, and we agree, the submitted site plan *does* depict
14 setbacks, which are 10 feet from the street front and 10 feet from the side property
15 line.⁴ Site Plan Map (Oversized Exhibit). These are visible on the oversized
16 exhibit, drawn in pencil, and not visible on the scanned site plan copy at Record

⁴ Petitioner does not assert that the 10-foot setbacks meet the CSZO standards. At oral argument, respondent’s attorney argued for the first time that respondent denied the site plan because the 10-foot front-yard setback fails to satisfy the 20-foot front-yard setback required by CSZO 3.1(5)(A). That argument is not in the challenged decision or the respondent’s brief and we do not address issues raised for the first time at oral argument. *Crowley v. City of Hood River*, 81 Or LUBA 490, 498, *rev’d and rem’d on other grounds*, 308 Or App 44, 480 P3d 1007 (2020).

1 14. Respondent’s finding that there are “no setbacks on [the] plot/site plan” is not
2 supported by the evidence in the record and, thus, is an improper basis for denial.
3 ORS 197.835(9)(a)(C).

4 **D. Access to Planning Documents**

5 Petitioner asserts that the city failed to provide petitioner access to a copy
6 of the CSZO and purported city forms prior to petitioner submitting their site
7 plan. Petitioner complains that the city has not published the CSZO and does not
8 maintain open hours at city hall. Petition for Review 7-8. Petitioner states that “in
9 the winter of 2023” petitioner submitted “public records requests to view a copy
10 of any and all [C]ity of Shaniko ordinances[.]” Petition for Review 7-8.
11 Respondent does not dispute those allegations.

12 We have no reason to disbelieve those allegations and accept them as true
13 for purposes of this decision. Petitioner does not, however, set out a basis for
14 reversal or remand based on those allegations. ORS 227.187 provides: “A city
15 shall maintain copies of its comprehensive plan and land use regulations, as
16 defined in ORS 197.015, for sale to the public.” Petitioner does not assert that
17 they requested to purchase a copy of the CSZO from the city prior to submission
18 of petitioner’s site plan or that the city failed to maintain a copy for sale.

19 **DISPOSITION**

20 We remand for the city to provide petitioner written notice of “exactly
21 what information is missing” from petitioner’s site plan application, including
22 any information required by applicable clear and objective criteria that is not

1 provided in petitioner's submissions and any required forms. ORS 227.178(2);
2 *former* ORS 197.307(4) (2022). The city must allow petitioner to submit the
3 missing information. The city must also consider the setbacks as depicted on the
4 site plan or any revised site plan that petitioner submits on remand.

5 The city's decision is remanded.