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

MICHAEL O'MALLEY and
O'MALLEY BROTHER'S CORPORATION,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2025-046

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Wendie L. Kellington represented petitioners.

Billy J. Williams represented respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; participated in the decision.

WILSON, Board Member, did not participate in the decision.

DISMISSED 10/21/25

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

Opinion by Bassham

NATURE OF THE DECISION

Petitioners appeal a July 28, 2025, "violation letter" issued by a county code enforcement officer.

MOTION TO CONSOLIDATE

Petitioners move to consolidate this appeal with two other appeals filed by petitioners, LUBA Nos. 2025-042 and 2025-052, described below. However, as explained below, we agree with the county that the present appeal is not within our jurisdiction. Accordingly, we must dismiss this appeal, which moots petitioners' motion to consolidate this appeal with LUBA Nos. 2025-042 and 2025-052. In separate orders issued this date, we also deny the motion to consolidate with respect to LUBA Nos. 2025-042 and 2025-052. *O'Malley v. Clackamas County*, LUBA No 2025-042 (Oct 21, 2025); *O'Malley v. Clackamas County*, LUBA No 2025-052 (Oct 21, 2025).

BACKGROUND

Petitioners operate a forest products business on their property, which is zoned Rural Residential Farm-Forest 5-acre (RRFF-5). Petitioners' business includes harvesting timber from forestlands, storing the harvested logs and logging vehicles and equipment on the property, and processing some of the timber into firewood that is then sold to campgrounds. As discussed below, the RRFF-5 zone allows certain "forest practices" as a permitted use, but requires a conditional use permit (CUP) for "commercial or [p]rocessing activities that are

in [c]onjunction with [f]arm or [f]orest uses." Clackamas County Zoning and Development Ordinance (ZDO) Table 316-1.

The Oregon Department of Environmental Quality (DEQ) advised petitioners that they require a stormwater permit for certain activities associated with the business conducted on the subject property. To obtain the DEQ permit, DEQ required petitioners to obtain a land use compatibility statement (LUCS) from the county. A request for a LUCS generally asks a local government to determine whether certain land uses on the property that require a state agency permit are compatible with the local government's comprehensive plan and land use regulations. To make that determination, the local government typically begins by categorizing the proposed land uses under its land use regulations, as permitted uses, conditionally allowed uses, prohibited uses, etc.

At a pre-application conference, county staff advised petitioners to submit a "Statement of Use" that describes the proposed land uses, presumably so that the county could have information necessary to categorize the proposed uses under its land use regulations. At the conference, county staff offered the opinion that the storage of logs and logging equipment was a permitted use on the property, but that firewood cutting was a "processing" use that would require a CUP. Petitioners advised the county that they would move the firewood cutting business elsewhere until the land use issues were worked out, in order to expedite the LUCS decision.

Petitioners subsequently submitted a Statement of Use, stating:

> "O'Malley Brothers owns the subject property. O'Malley's business is forestry in which they harvest timber and bring the harvested logs to the subject property. The logs are stored on the property until they are taken elsewhere to be used in stream restoration projects or to be processed into firewood. The vehicles and equipment that they use in their forestry operation are stored on the subject property. No employees work on the property. No customers come to the property. No logs are processed on the property. Cutting logs into firewood happens on other property." Corrected Petitioners' Response to Motion to Dismiss Ex 4, at 3.

A. LUBA No. 2025-042.

On June 25, 2025, a county planner sent an email to petitioners, concluding in relevant part that the storage of harvested logs, vehicles, and logging equipment on the property was not a permitted use in the RRFF-5 zone, and requesting that petitioners "modify the statement of use narrative accordingly." LUBA No 2025-042 Precautionary Notice of Intent to Appeal (NITA) Ex 1, at 2.

Petitioners attempted to file a local appeal of the June 25, 2025, email. On July 10, 2025, the county planning director sent petitioners an email reply, stating that the ZDO "does not provide for the appeal of an email response by county staff to a statement of use form." LUBA No 2025-042 NITA Ex 2, at 1. On July 15, 2025, petitioners filed a precautionary appeal of the June 25, 2025, email to LUBA, which is designated LUBA No. 2025-042. On the same date, the county and petitioners filed a stipulated motion to suspend LUBA No. 2025-042 until such time as either party requests, or the Board orders, the appeal to be reactivated.

B. LUBA No. 2025-046 and LUBA No. 2025-052.

As explained below, the county has a code enforcement process, regulated under Clackamas County Code (CCC) chapter 2.07, that is separate from its land use process. The code enforcement process generally involves building code or similar code violations, but in some cases that process can involve alleged violations of the ZDO, which embodies the county's land use regulations. The code enforcement process under CCC chapter 2.07 involves a separate set of county staff and procedures than the county planning staff and procedures that govern land use applications.

On July 28, 2025, a county code enforcement officer sent petitioners a "violation letter," alleging in relevant part that petitioners were in violation of ZDO 316.03, specifically by "operating a log storage yard and firewood processing without land use approval[.]" LUBA No 2025-046 NITA Ex 1, at 1 (underscoring and boldface omitted). That allegation was based, apparently, on the county planner's June 25, 2025, email that is the subject of LUBA No. 2025-042, which concluded that storage of logs, vehicles, and logging equipment is a conditional use in the RRFF-5 zone, as is firewood processing. The violation letter states that "I have been informed in the most recent email chain that both the storage of wood and processing of firewood require land use approval[,]" and required that, no later than August 30, 2025, petitioners must either (1) discontinue the use, (2) move the use to an approved parcel, or (3) obtain land use approval. *Id.* For option three, the violation letter states that if petitioners

"pause the use and begin the land use process, we will pause the enforcement of this file." *Id.* at 2. Petitioners had previously moved the firewood processing operation to a different site and, after receipt of the violation letter, petitioners advised enforcement staff that they would (under protest) file a conditional use permit application with the county, and in the meantime also move the log and equipment storage aspects of their business off-site. Petitioners state that they have thus abated the two aspects of their operation that, according to county planning staff, require conditional use permit approval. As we understand matters, county code enforcement staff have therefore paused further enforcement action under CCC chapter 2.07.

On August 11, 2025, petitioners attempted to file a local appeal of the July 28, 2025, violation letter with the county planning director. On August 12, 2025, the county planning director responded by email, stating:

> "The item that is being appealed is a code violation letter. This violation letter was issued by the Code Enforcement program, not the Planning and Zoning program. As the notices at the back of the letter explain, if you dispute the existence of the violations, you may request a hearing before the Code Enforcement Compliance Hearings Officer. If you have questions about that process, please contact the Code Enforcement Specialist who issued the letter." LUBA No 2025-052 NITA Ex 1.

On August 14, 2025, petitioners appealed the July 28, 2025, violation letter to LUBA, which designated the appeal LUBA No. 2025-046. That July 28, 2025, violation letter is the subject of the present appeal.

On August 28, 2025, petitioners appealed to LUBA the planning director's August 12, 2025, email rejecting their attempt to file a local planning appeal of the violation letter. LUBA designated that appeal LUBA No. 2025-052. On September 23, 2025, the parties stipulated to suspend LUBA No. 2025-052, pending resolution of the county's motion to dismiss the appeal of the code violation letter in LUBA No. 2025-046.

On August 29, 2025, the county filed a motion to dismiss LUBA No. 2025-046, the appeal of the violation letter, arguing that under CCC chapter 2.07 the violation letter simply initiates the code enforcement process, but is not a "final" decision, in part because the enforcement code provides the opportunity to request a hearing before the compliance hearings officer, who is authorized to make the county's final decision on code enforcement matters. Because petitioners failed to request such a hearing and obtain a final decision prior to appealing to LUBA, the county argues, LUBA lacks jurisdiction over this appeal, pursuant to ORS 197.825(2)(a).

For the following reasons, we agree with the county that we lack jurisdiction over the appeal of the July 28, 2025, violation letter.

JURISDICTION

Under ORS 197.825(1), LUBA has exclusive jurisdiction over appeals of "land use decisions," which ORS 197.015(10)(a) defines as "[a] final decision or determination made by a local government that concerns" the application of, *inter alia*, a "land use regulation[.]" ORS 197.015(10)(a)(A)(iii). Relatedly, ORS

197.825(2)(a) limits LUBA's jurisdiction to "cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]"

The "finality" requirement of ORS 197.015(10)(a) and the "exhaustion" requirement of ORS 197.825(2)(a) work in tandem to ensure that, prior to invoking LUBA's jurisdiction and review, a petitioner has pursued all local appeals and remedies that are available by right, resulting in a decision by the local government's final land use decision-maker, as designated under the local government's regulations. Conversely, ORS 197.015(10)(a) and ORS 197.825(2)(a) together preclude LUBA from exercising jurisdiction over intermediate decisions and determinations made by initial decision-makers. *See Tarjoto v. Lane County*, 29 Or LUBA 408, 413, *aff'd*, 137 Or App 305, 904 P2d 641 (1995) (the purpose of the exhaustion requirement is to assure that the challenged decision is reviewed by the highest level local decision-making body the local code makes available).

In the present case, the county argues that the challenged July 28, 2025, violation letter is, under the CCC chapter 2.07 code enforcement scheme, only an initial determination by a county code enforcement officer that petitioners are operating certain land uses on the subject property without required land use authorizations, and not a final decision of any kind. *See Robson v. Polk County*, 75 Or LUBA 343, 347 (2017) (a preliminary decision by a county code enforcement officer is not a final decision for purposes of LUBA's jurisdiction).

According to the county, a "final determination" that petitioners are in violation of county regulations (in this case, the ZDO) can only be made by the county compliance hearings officer:

> "The county's code enforcement process is set out at [CCC] chapter 2.07. The process is complaint-driven. If a complainant alleges to the county that a respondent is in violation of the code, then code enforcement staff sends the respondent a letter informing them of the allegation, called an 'allegation letter.' CCC 2.07.030(A)(1). If, upon further investigation, code enforcement staff concludes for themselves that the respondent is in violation, then they send the respondent another letter informing them of that conclusion, called a 'violation letter.' CCC 2.07.030(A)(3). At that point, the county begins assessing the respondent an 'administrative compliance fee' every month until the violation is abated. CCC 2.07.030(E). If the violation continues, then code enforcement staff may issue the respondent a citation, which may include a fine. CCC 2.07.030(D)(1).
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> "If the respondent wishes to challenge the assessment of the administrative compliance fee, then they may request a hearing before the county's Compliance Hearings Officer (CHO). CCC 2.07.030(E); CCC 2.07.040(A). Code enforcement staff may also request a hearing. CCC 2.07.040(A). Regardless of who requests the hearing, code enforcement staff must file a complaint with the CHO. *Id.* The purpose of the hearing is to determine 'whether a violation has occurred.' CCC 2.07.070(A). After conducting the hearing, the CHO must issue a 'final order' accompanied by findings of fact and conclusions of law. CCC 2.07.100. If the CHO concludes that the respondent is in violation, then, in addition to the administrative compliance fee and any fine included in a citation, the final order may require the respondent to pay a 'civil penalty.' CCC 2.07.090(A)(5). The CHO's decision is 'the [c]ounty's final determination.' CCC 2.07.020. The final order may be challenged by writ of review or, in some cases, appealed to LUBA. CCC 2.07.130." Motion to Dismiss 1-3.

Because petitioners have the right to request a hearing on the alleged code violation before the compliance hearings officer, the county argues, the July 28, 2025, violation letter is not a "final" decision, and hence it does not qualify as a "land use decision" as defined in ORS 197.015(10)(a).[1] Stated differently, the country argues that CCC chapter 2.07 offers a local remedy that is available by right to petitioners, and their failure to invoke that local remedy prior to appealing to LUBA deprives the Board of jurisdiction over the appeal, under ORS 197.825(2)(a).

Petitioners dispute that the right to request a hearing before the compliance hearings officer under CCC chapter 2.07 represents a "remedy" that petitioners must exhaust as a precondition for appealing the violation letter to LUBA, for purposes of ORS 197.825(2(a). Petitioners contend that a "remedy" for purposes of ORS 197.825(2)(a) necessarily refers to a right of appeal or similar form of relief offered under the local government's *land use regulations*, not the local government's separate code enforcement regulations.[2]

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[1] The county does not dispute that the July 28, 2025, violation letter concerns the "application" of a "land use regulation" within the meaning of ORS 197.015(10)(a), and that, with the exception of finality, the letter would otherwise meet the statutory definition of a "land use decision."

[2] Petitioners note that they attempted to file a local appeal of the violation letter under the county's land use regulations, and were told that no local appeal is available under those regulations for a violation letter issued under the code enforcement track. As noted, the decision rejecting that attempted local appeal under the county's land use regulations is the subject of LUBA No. 2025-052.

Petitioners also note that the "remedy" provided under CCC chapter 2.07 differs significantly from the typical local appeal available under most land use regulatory schemes. Specifically, petitioners argue that a request for a hearing under CCC 2.07.040 is the "initiation" of the code enforcement proceeding, not an "appeal" of the violation letter. Petitioners contend that nothing in ORS 197.825(2)(a) requires a petitioner to initiate a code enforcement action *against themselves*, in order to satisfy the exhaustion requirement.

Petitioners also argue that, if they do not prevail before the compliance hearings officer, and the hearings officer finds them in violation, the hearings officer could potentially impose civil penalties and other fines, pursuant to CCC 2.07.090. Differently, petitioners argue that in a local appeal under the county's land use regulations, a non-prevailing party would not be potentially subject to civil penalties or fines. Petitioners argue:

> "The process that the county demands, penalizes [p]etitioners for seeking LUBA's review, which is not remotely the purpose of ORS 197.825(2)(a). No one in their right mind will seek LUBA's review if in order to do so they have to initiate the county's draconian code enforcement process against themselves and risk its daunting penalties.
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> "Applicants are entitled to pose discrete land use questions to local land use authorities as here, and have those land use questions answered in a land use forum for which they are not penalized for the ask." Petitioners' Corrected Response to Motion to Dismiss 9.

The county replies, and we agree, that the ORS 197.825(2)(a) requirement that a petitioner exhaust all remedies prior to appealing to LUBA is not limited

to remedies that arise out of the local government's land use code. ORS 197.825(2)(a) refers broadly to "all" remedies, and nothing in its text suggests its mandate is limited to remedies found in land use codes. Where, as here, the challenged decision arises out of the county's code enforcement proceedings, and those proceedings can result in a land use decision subject to LUBA's jurisdiction, *i.e.*, a final decision that concerns the application of a land use regulation, rendered by the highest review body authorized in the code provisions governing those proceedings, we see no basis in ORS 197.825(2)(a) or elsewhere to conclude that the exhaustion requirement does not apply to require that all remedies available under the code enforcement track be exhausted. The statutory purpose of the exhaustion requirement seems as well served when applied to code enforcement proceedings that result in land use decisions, as it is when applied to proceedings under the county's land use code.

Further, we disagree with petitioners that requesting a hearing before the hearings compliance officer under CCC 2.07.040 represents the *initiation* of the code enforcement proceeding, or otherwise would result in petitioners initiating an enforcement proceeding against themselves. The code enforcement proceeding was clearly initiated when the code enforcement officer served petitioners with the violation letter, pursuant to CCC 2.07.030. It is true that that enforcement proceeding was paused when petitioners immediately abated the alleged violation, and filed an application for a conditional use permit that would authorize the two disputed uses. But as we understand it, the enforcement

proceeding initiated by the code enforcement officer remains in place, only paused. Petitioners are incorrect in arguing that there is no current code enforcement proceeding that could be the subject of a hearing before the compliance hearings officer, and hence that a request for a hearing would "initiate" an enforcement proceeding.

It is true that enforcement proceedings under CCC chapter 2.07 have multiple off-ramps and may be resolved prior to reaching the compliance hearings officer. That is consistent with the stated philosophy of CCC chapter 2.07, to first encourage voluntary compliance and use enforcement only as a last resort. CCC 2.07.010. In this way the code enforcement process is little different from the local appeal process under the county's land use regulations. A party is not required to file a local appeal, even if they disagree with an initial staff decision. But if the party seeks to invoke LUBA's jurisdiction to resolve that disagreement, the party must exhaust all available local remedies, prior to filing the appeal with LUBA. Similarly, if the recipient of a violation letter seeks to challenge the allegations in that letter, the recipient has at least one available remedy under the code: request a hearing before the compliance hearings officer pursuant to CCC 2.07.040. Such a hearing potentially offers a complete remedy: the hearings officer may agree with the respondent that no violation exists. In any case, the compliance hearings officer's decision would result in a final decision by the highest decision-maker for an enforcement decision under the applicable county code, consistent with ORS 197.825(2)(a). CCC 2.07.130.

Under CCC 2.07.070(A), county enforcement staff have the burden of proof and persuasion at an enforcement hearing, and of course it is possible that staff could convince the hearings officer that a violation exists, or existed. If so, the hearings officer has the discretion under CCC 2.07.100 to take various measures to correct the violation, including potential assessment of civil penalties and other fines. But contrary to petitioners' argument, any measures imposed or penalties assessed under CCC 2.07.100 would not be for requesting a hearing or for seeking a final determination on whether the disputed land use constitutes a violation. As the county argues:

> "To the extent [p]etitioners are potentially subject to a penalty in connection with the code enforcement letter, it is because [p]etitioners were, at the time of that letter's issuance, *already engaged* in uses that code enforcement staff determined, in consultation with planning staff, required land use approval. They are not being penalized for the *ask*. To the extent that they are subject to a potential penalty, it is because [of what] they *did* before asking." Reply to Response to Motion to Dismiss 8 (emphases in original).

We agree with the county that the enforcement process at CCC chapter 2.07 is generally focused on actions at the time of enforcement, and perhaps continuing violations if the respondent chooses not to abate the alleged violations. It does not punish respondents for raising legal or other challenges to code enforcement. On the contrary, it provides a forum for respondents to advance those challenges and, if meritorious, those challenges could obviate any potential penalties, even for past actions.

Because the code provisions at issue in the present code enforcement proceeding are part of the ZDO, petitioners also have the option of pausing the code enforcement proceeding and pursuing resolution under the county's land use process. As we understand matters, petitioners have exercised, or are in the process of exercising, various attempts to resolve the underlying legal issue under the land use track. In our view, the availability of local remedies under the ZDO renders it even less appropriate for LUBA to directly review the July 28, 2025, violation letter from the code enforcement officer. Not only is the violation letter not, in its enforcement context, a final decision of any kind, the letter was issued by a code enforcement officer, who presumably is less familiar with the ZDO than are planning staff and the planning director, and potentially a land use hearings officer or planning commission, who are all experienced with implementing and interpreting the ZDO. One secondary purpose of the exhaustion requirement at ORS 197.825(2)(a) is to facilitate LUBA's review, by ensuring our review is limited to decisions made by the highest, and most authoritative, decision-makers available under the applicable code, under a process that is designed to render a decision that is adequate for review, and based upon a developed record. That purpose would not be served by LUBA's direct review of the July 28, 2025, violation letter, as petitioners request in this appeal.

In this respect, we note that the July 28, 2025, violation letter includes no discussion or analysis of the ZDO, but refers only to an unspecified "email chain." LUBA No 2025-046 NITA Ex 1, at 1. Petitioners presume that the

reference to an "email chain" includes the June 25, 2025, email from planning staff requesting a modification of the Statement of Use, an email that is the subject of LUBA No. 2025-042. That presumption may be correct, but as far as we can tell the violation letter does not attach or incorporate any of the unspecified emails. Consequently, the violation letter itself does not discuss, or even identify, the pertinent ZDO provisions in ZDO Table 316-1. If petitioners' intent in appealing the violation letter to LUBA is to resolve the underlying question of whether the two disputed uses of the property require a conditional use permit, a direct appeal of the violation letter to LUBA is a poor vehicle to resolve that issue. The initiatory and inchoate nature of the violation letter reinforces our conclusion that any reviewable (as well as final) determination regarding the meaning of the applicable ZDO provisions would likely have to come either from the compliance hearings officer under the code enforcement track, or from a final decision-maker under the land use track.

The parties discuss *Recovery House VI v. City of Eugene*, 150 Or App 382, 946 P2d 342 (1997), which involved a conditional use permit proceeding in which the applicant argued that no conditional use permit approval was needed. The city and LUBA initially concluded that the applicant had essentially waived that argument by filing, under protest, the application for a conditional use permit. The Court of Appeals held, however, that the applicant was entitled to advance that argument in the proceeding on the conditional use permit application. Petitioners cite *Recovery House VI* for the proposition that an

applicant need not await or trigger a code enforcement proceeding as a precondition to advancing an argument, in a permit proceeding, that no permit is required for the proposed use. *See* 150 Or App at 386 n 3 (noting that the petitioner could have waited for the city to commence an enforcement action, but rejecting the city's suggestion that the petitioner was obligated to do so, or that code enforcement was the "exclusive remedy.")

However, as the county argues, *Recovery House VI* did not involve exhaustion of local remedies under ORS 197.825(2)(a), and its relevance here is not clear to us. Petitioners have filed (under protest) a conditional use permit, in which they are presumably advancing the argument that no permit is required, and under *Recovery House VI* county land use decision-makers will have to address that argument. *Recovery House VI* says nothing about whether, once a code enforcement action has been initiated, the petitioner may appeal that initiatory document directly to LUBA without first exhausting local remedies available under the code enforcement process.

In sum, we hold that where a petitioner seeks to appeal a code enforcement decision to LUBA, the petitioner must show that they first exhausted all remedies available by right under the applicable enforcement code. For the reasons set out above, petitioners have not demonstrated that they exhausted all available local remedies under CCC chapter 2.07 prior to appealing the violation letter to LUBA, as ORS 197.825(2)(a) requires. Accordingly, we lack jurisdiction over this appeal.

This appeal is dismissed.