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

AKUM INVESTMENT GROUP, LLC,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2025-061

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Wendie L. Kellington represented petitioner.

Robert L. Taylor represented respondent.

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

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

DISMISSED 01/6/2026

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

Petitioner appeals a letter from the city interim permitting and development director determining that the nonconforming drive-through component of its restaurant would expire on October 11, 2025.

MOTION TO DISMISS

The city moves to dismiss this appeal for lack of jurisdiction on the basis that petitioner failed to exhaust all remedies available by right before petitioning the Board for review. ORS 197.825(2)(a). We grant the motion to dismiss for the reasons that follow.

A. Background

The city moved to dismiss and we suspended this appeal prior to the city transmitting a record. We take the following undisputed facts from the parties' pleadings. In 2017, petitioner purchased an existing Dairy Queen restaurant with a drive-through, on property zoned Commercial/Mixed Use 2 (CM2). The CM2 allows restaurants as an outright permitted use, but does not allow new drive-through facilities. Under Portland City Code (PCC) 33.130.260.C.2, however, existing drive-through facilities may continue, as a nonconforming use.[1]

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[1] PCC 33.130.260.C provides:

> "The following regulations apply to drive-through facilities in the CM1, CM2 and CM3 zones:
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> "1. New drive-through facilities are prohibited; and

In 2018, petitioner applied for a building permit to replace the existing restaurant with a new Dairy Queen restaurant with indoor seating and a drive-through. On October 14, 2019, the city issued, at petitioner's request, a permit to demolish the existing structure. Petitioner subsequently demolished the structure. Due to various delays, the city did not issue the building permit until October 11, 2022.

Prior to issuing the building permit, the city advised petitioner, in a July 28, 2022 email, that under PCC 33.130.260.C.2 the right to rebuild the drive-through as proposed in the building permit application will be lost if use of the drive-through is discontinued for more than three years. Response to Motion to Dismiss Ex 4, at 2. According to the email, the three-year period began on

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> "2. Existing drive-through facilities are allowed. Existing facilities can be rebuilt, expanded, or relocated on the site. The standards for drive-through facilities are stated in Chapter 33.224, Drive-Through Facilities. If the use with the drive-through facility is discontinued for 3 continuous years, reestablishment of the drive-through facility is prohibited. If the use ceases operation, even if the structure or materials related to the use remain, the use has been discontinued. A list of the standard evidence that can be provided to prove that the use has been maintained over time can be found in Subsection 33.258.038.B. If the applicant provides standard evidence from the list, the Director of [Portland Permitting and Development (PP&D)] will determine if the evidence is satisfactory. If the applicant provides evidence other than the standard evidence listed, a Determination of Legal Nonconforming Status is required."

October 14, 2019, the date the city issued the demolition permit, and would expire on October 14, 2022. *Id.* However, the city advised petitioner that if the building permit is issued and "picked up" by petitioner prior to October 14, 2022, then petitioner would retain the right to continue the drive-through use. *Id.* As noted, the city issued the building permit on October 11, 2022, and petitioner picked it up prior to October 14, 2022. The building permit itself has a three-year expiration period.

Again, various delays ensued, which petitioner attributes primarily to the city's actions or lack of action with respect to processing design changes requested by petitioner.

On September 17, 2025, the city interim director sent petitioner the letter challenged in this appeal. The September 17, 2025 letter states, in relevant part:

> "Subject: Notice of Expiration of Nonconforming Use – Drive-Through at 5605 SE Division.
>
> "Our records indicate that the nonconforming use for a drive-through at 5605 SE Division is set to expire on October 11, 2025.
>
> "According to Portland Zoning Code Title 33.258.060.B.2.a(l),[2]

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[2] As petitioner notes, the interim director's citation to PCC 33.258.060.B.2.a(1) is incorrect. That code provision does not, as the letter indicates, state that a nonconforming development loses its legal status if it remains unused for three continuous years. PCC 33.258.060.B.2.a(1) concerns discontinuance of nonconforming residential densities. The interim director presumably intended to cite PCC 33.130.260.C.2, quoted above, which concerns

> nonconforming exterior development loses its legal status if it remains unused for three continuous years. Once this period passes, the nonconforming development may not be re-established.
>
> "The last known operation of a business utilizing the drive-through at this location was in October 2019. On October 11, 2022, permit 18-210965-CO was issued to construct a Dairy Queen with a drive-through at the site. At that time, the City determined that issuance of the building permit was sufficient to preserve the nonconforming use rights for an additional three years.
>
> "However, as of today, no drive-through has been constructed or placed into operation. Unless the drive-through is constructed and operational before October 11, 2025, the nonconforming rights associated with this use will expire and cannot be re-established.
>
> "To allow additional time to revise the project, your permit-originally set to expire on October 14, 2025-has been granted a final six-month extension. This extension is intended to give you time to submit and receive approval for a Revision removing the drive-through elements.
>
> "Important: If the Revision is not approved by April 14, 2026, the permit will expire on that date, and no further extensions will be granted." NITA Ex 1 (boldface omitted).

On October 10, 2025, petitioner filed with LUBA a notice of intent to appeal (NITA), challenging the September 17, 2025 letter. The NITA states that the appeal is "precautionary," because petitioner "also filed a local appeal and it is unknown whether the City will process that local appeal before the deadline for filing this LUBA appeal expires." NITA 1.

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discontinuance of nonconforming drive-through facilities in mixed commercial zones.

The "local appeal" referenced in the NITA apparently refers to a local appeal filed by petitioner in response to the September 17, 2025 letter. On October 1, 2025, petitioner filed a "Type II and IIX Decision Appeal Form" seeking a local appeal of the September 17, 2025 letter. Motion to Dismiss, Dec Talent, at 1. The city later advised petitioner that no local appeal of the September 17, 2025 letter is available under city land use regulations. Response to Motion to Dismiss Ex A, at 1.

On October 10, 2025, petitioner filed an application for a Legal Nonconforming Status Review, pursuant to PCC 33.258.075.[3] On the same date,

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[3] PCC 33.258.075 provides:

"Determination of Legal Nonconforming Status Review

"A. Purpose. This review will determine if a use or site has legal nonconforming situation rights. In addition, it will determine what the current legal use is, based on the use categories in Chapter 33.920.

"B. When this review is required. Determination of Legal Nonconforming Status Review is required where a land use review or building permit is requested, and the applicant does not provide standard evidence or the Director of PP&D does not find the evidence to be satisfactory. (See 33.258.038). This review also may be requested by an applicant when it is not required.

"C. Procedure. Determination of Legal Nonconforming Status Reviews are processed through a Type II procedure.

"D. Approval criteria.

petitioner filed an application for Nonconforming Situation Review, pursuant to PCC 33.258.080.[4]

On October 24, 2025, the city advised petitioner that a Nonconforming Situation Review under PCC 33.258.080 is not an appropriate vehicle to resolve the nonconforming use status of the drive-through, and suggested that petitioner withdraw that application, with a full refund. The city suggested that petitioner

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> "1. The legal status of the nonconforming situation will be certified if the review body finds that:
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> "a. The nonconforming situation would have been allowed when established; and
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> "b. The nonconforming situation has been maintained over time.
>
> "2. The review body will determine, based on the evidence, what the current legal use is, using the definitions in Chapter 33.910 and the use categories in Chapter 33.920." (Boldface omitted.)

[4] On or around October 22, 2025, petitioner learned that, on September 29, 2025, and October 13, 2025, a building permit supervisor entered comments into the city building permit database that had the effect of blocking petitioner from scheduling any inspections on the building permit, until the permit is revised to exclude the drive-through component. Petitioner subsequently appealed the September 29, 2025 and October 13, 2025 decisions to LUBA. In a final opinion issued this date, we agree with the city that the September 29, 2025 and October 13, 2025 decisions to block inspections are not "land use decisions" subject to our jurisdiction. We grant petitioner's motion to transfer the appeals to circuit court, pursuant to ORS 34.102 and OAR 661-010-0075(9) (Jan 15, 2025). *Akum Investment Group, LLC v. City of Portland*, LUBA Nos 2025-067/068 (Jan 6, 2026).

instead proceed with the application for Legal Nonconforming Status Review, pursuant to PCC 33.258.075, which the city stated would allow petitioner to "prove that the rights for a drive-through facility have been maintained." Motion to Dismiss Ex 1, at 2.

On October 28, 2025, the city filed a motion to dismiss this appeal for lack of jurisdiction, arguing that because petitioner is actively pursuing one or more remedies available under the city code, petitioner has not exhausted all remedies available by right, and therefore petitioner has not established that LUBA has jurisdiction under ORS 197.825(2)(a).

B. Jurisdiction

Under ORS 197.825(2)(a), LUBA's jurisdiction is "limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]" The city argues that the pending Legal Nonconforming Status Review that petitioner applied for represents a remedy available by right for purposes of ORS 197.825(2)(a), and therefore that LUBA should dismiss this appeal, and allow petitioner to pursue that remedy.

The city argues:

> "Consistent with the underlying purposes of the exhaustion doctrine, LUBA should dismiss this appeal and allow the City to proceed with the Legal Nonconforming Status review. In requiring a petitioner to pursue an available local remedy, LUBA permits the local decision-making process to run its course without interruption; makes it possible for the local jurisdiction to clarify and determine factual and policy issues presented by land use controversies; and promotes the opportunity for development of a more complete, well-organized

> record. *Lyke v. Lane County*, 70 Or App [82, 87, 688 P2d 411 (1984)]. Allowing petitioner to proceed with a LUBA appeal while simultaneously requesting a review below would result in unnecessary duplication of efforts and already scarce government resources." Motion to Dismiss 4.

In *Lyke*, the court held that the petitioner must seek the governing body's review of a hearings officer's decision prior to appealing to LUBA, even if under the county code the governing body may elect to hear or not to hear the local appeal. The court found that requiring the petitioner to seek the governing body's review, even if that review is not granted, promoted the purposes underlying the exhaustion requirement. The court quoted, with approval, LUBA's summary of those purposes:

> "First, by requiring a petitioner to pursue an available local remedy, we permit the county decision-making process to run its course without interruption. Second, we make it possible for the governing body, which is the legislative source of the ordinances initially applied by the hearings officer, to clarify and determine factual and policy issues presented by land use controversies. Third, we open the door to the increased possibility of compromise and the avoidance of land use litigation. Finally, by our approach under ORS 197.825(2)(a), we promote the opportunity for development of a more complete, well-organized record." *Id.* at 87.

Subsequently, the court distinguished *Lyke*, holding that the exhaustion requirement did not require that the petitioner seek discretionary rehearing of the challenged decision before the same decision-maker, the governing body. *Portland Audubon Society v. Clackamas Co.*, 77 Or App 277, 712 P2d 839 (1986). According to the court, one hallmark of an available remedy for purposes of ORS 197.825(2)(a) is that the remedy is before a superior decision-making

body. *Id.* at 281; *see also Colwell v. Washington Co.*, 79 Or App 82, 91, 718 P2d 747, *rev den*, 301 Or 338 (1986) (ORS 197.825(2)(a) does not require pursuit of remedies that serve no purpose but redundancy).

Petitioner responds that *Portland Audubon Society* is dispositive, and that the city is incorrect that filing an application for Legal Nonconforming Status Review, under PCC 33.258.075, is an available "remedy" for purposes of ORS 197.825(2)(a), because the initial decision-maker for an application under PCC 33.258.075 is the same interim director that issued the September 17, 2025 letter. According to petitioner, interpreting ORS 197.825(2)(a) to require that petitioner file an application for Legal Conforming Status Review for a decision by the interim director is tantamount to requiring petitioner to seek a "rehearing" of the September 17, 2025 letter before the same decision-maker, contrary to *Portland Audubon Society*.

Portland Audubon Society is informative, but does not resolve the question posed here. First, filing a land use application under PCC 33.285.075 to allow petitioner to present evidence and argument regarding whether petitioner has maintained a lawful nonconforming use of the drive-through is not a simple "rehearing" of the interim director's September 17, 2025 letter. That letter, in relevant part, (1) advises petitioner that the right to the nonconforming drive-through will expire if the building permit expires without finalization, and (2) extends the building permit expiration date by six months, so petitioner can submit appropriate revisions to the building permit application. The letter clearly

assumes that petitioner has done nothing to maintain the right to the nonconforming drive-through. However, the letter evaluates no evidence or arguments on that point. Legal Nonconforming Status review would allow petitioner to present, and the city to evaluate, evidence or argument on whether the nonconforming use right has been maintained throughout all relevant periods of time. Conducting a land use proceeding on that issue would be far from redundant.

Second, while the initial decision on an application for Legal Nonconforming Status review would be made by the interim director, the same person who issued the September 17, 2025 letter, the decision on the application may be appealed to the hearings officer, who is the city's final decision-maker on Type II land use decisions. PCC 33.258.075.C (Legal Nonconforming Status Review is processed through a Type II procedure); PCC 33.720.020.B (all appeals of Type II land use decision reviews are assigned to the hearings officer). Thus, conducting a Legal Nonconforming Status Review is likely to result in a final decision by a different, and superior, decision-maker, furthering one purpose of the exhaustion requirement.

A decision on petitioner's application for Legal Nonconforming Status Review would also further two other purposes of the exhaustion requirement, to "promote the opportunity for development of a more complete, well-organized record," and to "clarify and determine factual and policy issues presented by land use controversies." *Lyke*, 70 Or App at 87. We have not received the record in

the present appeal, but it is highly unlikely that the record of the September 17, 2025 letter, if transmitted to LUBA, would be as complete as the record compiled by the interim director and hearings officer in conducting a Legal Nonconforming Status Review. Similarly, the final decision on an application for Legal Nonconforming Status Review is far more likely to clarify and determine the relevant factual, legal, and policy issues than the September 17, 2025 letter. LUBA's review would be greatly assisted if the controversy between the parties were resolved in a Type II land use proceeding conducted by the city's highest decision-maker, based upon a more complete record, and a thorough evaluation of the factual and legal issues presented.

Petitioner also argues that a "remedy" for purposes of ORS 197.825(2)(a) does not include filing a completely separate land use application, but is limited to filing a local appeal or similar local legal challenge as part of a unitary scheme to provide for review of lower body decisions by a higher review authority. On this point, petitioner cites to *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996), where we held that, in an appeal of a city council subdivision approval to LUBA, ORS 197.825(2)(a) does not require the applicant to first apply to the city council for a variance from subdivision approval standards, in order to appeal the city council decision to LUBA and challenge the conditions of approval imposed.[5]

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[5] In *Reeves*, we ultimately dismissed the appeal, after concluding that federal ripeness doctrine *does* require petitioner to first seek a variance, prior to

We disagree with petitioner that a "remedy" for purposes of ORS 197.825(2)(a) is limited to local appeals where the code expressly provides for review of a lower-body's decision by a higher-level decision-maker. ORS 197.825(2)(a) refers to "remedies available by right," which is a broader reference than to the standard example of a local appeal. We agree, however, that a "remedy" must be capable of correcting or reversing an adverse determination in the initial decision. That is why, in *Reeves*, we concluded that filing an application for a variance is not a "remedy" for purposes of ORS 197.825(2)(a). A variance would not challenge, correct, or reverse an adverse ruling in the earlier decision. It would simply provide for modification of the applicable approval standards to allow the proposed development, without at all challenging, correcting, or reversing an earlier determination that the development did not meet the unmodified standards.

In the present case, a decision on petitioner's application for Legal Nonconforming Status Review seems entirely capable of challenging, correcting and effectively reversing the adverse determinations in the September 17, 2025 letter, that petitioner's nonconforming drive-through has not been maintained over the relevant period, and the right to continue the drive-through would expire on October 11, 2025, three years after the building permit issued, and six years since the drive-through was demolished. Indeed, the Legal Nonconforming

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challenging conditions of approval under the Takings Clause of the Fifth Amendment to the United States Constitution. 31 Or LUBA at 24.

Status Review process seems particularly well suited for providing a definitive local resolution to the nonconforming use issues discussed in the September 17, 2025 letter.

Relatedly, petitioner argues that because the September 17, 2025 letter was issued without a hearing or following any land use process, it can be appealed directly to LUBA pursuant to ORS 197.830(3).[6] According to petitioner, in circumstances where ORS 197.830(3) provides a direct appeal to LUBA, the exhaustion requirement at ORS 197.825(2)(a) does not apply, citing *Comrie v. City of Pendleton*, 45 LUBA 758 (2003), and *Beveled Edge Machines Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

Both *Comrie* and *Beveled Edge Machines, Inc.* involved decisions on an application for a discretionary land use approval, subject to procedures that require a hearing, but the local government failed to provide notice to the petitioner in a manner that interfered with the petitioner's ability to participate in the proceedings, specifically to file a timely local appeal. *Beveled Edge*

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[6] ORS 197.830(3) provides, as relevant:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416(11) or 227.175(10) * * * a person adversely affected by the decision may appeal the decision to the [B]oard under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Machines, Inc. predates 1999 changes to ORS 197.830(3) and reflects older caselaw that has largely been superseded. *Comrie* is more current, but involves complicated circumstances where the petitioner in fact filed a local appeal that, we held, the city erred in rejecting. Nonetheless, both cases stand for the general proposition cited, that where ORS 197.830(3) applies, the exhaustion requirement at ORS 197.825(2)(a) does not apply.

That general proposition, like all general propositions, has exceptions. One of them, noted by petitioner, is where the local government in fact makes a local remedy available to the petitioner. In *Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995), the court addressed a similar circumstance to *Comrie* and *Beveled Edge Machines, Inc.*, involving procedural error that interfered with the petitioner's ability to file a timely local appeal. Differently, the county in *Tarjoto* chose to provide petitioner with a belated local appeal. Both we and the court held that, in such circumstances, the local appeal must be exhausted instead of appealing the underlying decision directly to LUBA under ORS 197.830(3).

In the present case, *Tarjoto* is more instructive than *Comrie* and *Beveled Edge Machines, Inc. Tarjoto* suggests that the scope of remedies for purposes of ORS 197.825(2)(a) is not limited to the standard example of local appeals, where the code prescribes that a decision of a lower land use decision-maker can be appealed to a higher level land use decision-maker within a certain timeline and framework. Rather, in unusual circumstances, remedies can include unorthodox

forms of relief, such as the impromptu local appeal offered by the county in *Tarjoto*.

In a recent opinion, we dismissed an appeal of a letter from a county code enforcement officer that initiated a land use code enforcement proceeding against the petitioner, on the grounds that the petitioner had failed to exhaust all remedies available by right, including applying for a hearing before the code enforcement hearings officer, as allowed under the enforcement code. *O'Malley v. Clackamas County*, LUBA No 2025-046 (Oct 21, 2025). Although *O'Malley* involves the code enforcement context, it bears some similarities to the present case. Both cases involve an initial land use determination arising from a non-land use context, and the question of whether local remedies are available to challenge that determination, as required by ORS 197.825(2)(a).

In the present case, as in *O'Malley*, the decision-maker, here the interim director, made an initial determination regarding a land use regulation, in the context of a non-land use proceeding that can, but typically does not, concern land use regulations. Specifically, the interim director concluded that the right to the nonconforming drive-through would expire on the date the October 11, 2022 building permit expired. The interim director suggested that the imminent violation of PCC 33.130.260.C could be remedied by removing the drive-through from the building permit application, and provided a six-month extension for petitioner to submit and receive approval for a building permit revision removing the drive-through elements. Petitioner, however, chose to invoke the Legal

Nonconforming Status Review process under PCC 33.258.075 in order to challenge the interim director's determination, and the city accepted that land use application as an appropriate means of resolving the nonconforming use issue addressed in the September 17, 2025 letter. As in both *Tarjoto* and *O'Malley*, the remedy available is not a typical local land use appeal, but it is a remedy that is available by right, and appears capable of providing complete relief to petitioner, potentially correcting or reversing the adverse determination made in the letter. We conclude that petitioner must exhaust that remedy prior to invoking LUBA's jurisdiction under ORS 197.830(3), as required by ORS 197.825(2)(a).

Accordingly, we agree with the city that because petitioner has not exhausted all remedies available by right, prior to filing this appeal with LUBA, this appeal must be dismissed.

The appeal is dismissed.