

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

3
4 MICHAEL O'MALLEY and
5 O'MALLEY BROTHER'S CORPORATION,
6 *Petitioners,*

7
8 vs.
9

10 CLACKAMAS COUNTY,
11 *Respondent.*

12 LUBA No. 2025-052

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Wendie L. Kellington represented petitioners.

20
21 Caleb Huegel represented respondent.

22
23 BASSHAM, Board Member; ZAMUDIO, Board Chair; participated in the
24 decision.

25
26 WILSON, Board Member, did not participate in the decision.

27
28 DISMISSED

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

32
33

Opinion by Bassham

NATURE OF THE DECISION

Petitioners appeal an August 12, 2025 email that rejects petitioners' attempt to file a local land use appeal of a July 28, 2025 "violation letter" issued by a county code enforcement officer.

MOTION TO FILE SUR-RESPONSE

Petitioners move for permission to file a sur-response to the county's reply to petitioners' response to the county's motion to dismiss. The county does not object to the motion.

10 LUBA’s rules do not provide for replies to responses to motions, or to
11 further responses to such replies, but LUBA’s practice is to consider such
12 secondary pleadings beyond the initial response to a motion, where further
13 pleadings would assist, and not unduly delay, LUBA’s review. *See Cedar Mill*
14 *Creek Corr. Comm. V. Washington County*, 37 Or LUBA 1011, 1017 (2000)
15 (allowing a sur-response to a reply to a response to a motion). We agree with
16 petitioners that the jurisdictional issues raised in this appeal are complex and the
17 parties’ positions have evolved from the initial round of pleadings. The current
18 appeal is suspended, so consideration of the county’s reply and petitioners’ sur-
19 response thereto would not unduly delay these proceedings. Petitioners’ motion
20 is granted. LUBA will consider both the county’s reply and petitioners’ sur-
21 response.

1 **BACKGROUND**

2 The decision challenged in this appeal is an August 12, 2025 email from
3 the county planning director rejecting a local appeal filed by petitioners. The
4 underlying decision that petitioners attempted to appeal to the county planning
5 director is a July 28, 2025 letter issued by the county code enforcement officer.
6 The July 28, 2025 letter initiates a code enforcement proceeding against
7 petitioners, alleging that petitioners have operated a forest products business on
8 their property without required land use permits, in violation of the county's
9 zoning ordinance. The subject property is zoned Rural Residential Farm-Forest
10 5-acre (RRFF-5), which requires a conditional use permit for certain commercial
11 or processing activities that are in conjunction with farm or forest uses.¹

¹ The present LUBA appeal is one of several interrelated appeals, and we do not attempt to provide here a complete chronology and roadmap of all related appeals. But it is worth noting that the July 28, 2025 code enforcement letter was prompted by an earlier June 25, 2025 planning staff decision concluding that petitioners' forest products operation required a conditional use permit. That June 25, 2025 decision was issued in response to an application petitioners submitted to the planning and zoning department, for a land use compatibility statement (LUCS). The LUCS application, in turn, was prompted by petitioners' application for certain state agency permits. Petitioners attempted to file a local appeal of the June 25, 2025 email. On July 10, 2025, the county planning director rejected the attempt to file a local appeal of the June 25, 2025 email. On July 15, 2025, petitioners filed a direct 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. That direct appeal of the June 25, 2025 email is still pending before LUBA. As we understand matters, petitioners have also filed (under protest) a conditional use permit application before the county, which is pending.

1 Petitioners filed two appeals of the July 28, 2025 code enforcement letter,
2 one appeal directly to LUBA and one local appeal to the county planning director.
3 We subsequently dismissed the direct appeal to LUBA, after concluding that
4 Clackamas County Code (CCC) chapter 2.07 provided petitioners with a local
5 remedy to challenge the July 28, 2025 code enforcement letter. Because
6 petitioners had not exhausted that local code enforcement remedy prior to
7 appealing the July 28, 2025 letter to LUBA, we concluded that under ORS
8 197.825(2)(a), we lacked jurisdiction over the direct appeal of that letter.²
9 *O'Malley v. Clackamas County*, LUBA No 2025-046 (Oct 21, 2025).

10 As noted, petitioners also attempted to file a local *land use* appeal of the
11 July 28, 2025 code enforcement letter, and the planning director rejected that
12 attempt, in an email dated August 12, 2025. That August 12, 2025 email is the
13 subject of the present appeal. In the email, the planning director stated:

14 “I am in receipt of a ‘precautionary’ appeal submitted at the
15 Planning and Zoning counter yesterday. The item that is being
16 appealed is a code violation letter. This violation letter was issued
17 by the Code Enforcement program, not the Planning and Zoning
18 program. As the notices at the back of the letter explain, if you
19 dispute the existence of the violations, you may request a hearing
20 before the Code Enforcement Compliance Hearings Officer. If you
21 have questions about that process, please contact the Code

² 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[.]”

1 Enforcement Specialist who issued the letter.” Motion to Dismiss
2 Ex C, at 1.

3 Petitioners appealed the August 12, 2025 email to LUBA, and the county
4 subsequently filed a motion to dismiss, arguing that the August 12, 2025 email is
5 not a land use decision subject to LUBA’s jurisdiction. The parties stipulated to
6 suspend this appeal pending resolution of the county’s motion to dismiss. We
7 now resolve the motion. We grant the motion and dismiss the appeal for the
8 reasons explained below.

9 JURISDICTION

10 As relevant here, ORS 197.825(1) limits LUBA’s jurisdiction to review of
11 “land use decisions.” ORS 197.015(10)(a) defines “land use decision,” in
12 relevant part, as a final decision by a local government that concerns the
13 application of, among other things, a “land use regulation.”³ In turn, ORS
14 197.015(11) defines “land use regulation” to include

³ ORS 197.015(10)(a)(A) defines “land use decision” to include:

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

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

1 “any local government zoning ordinance, land division ordinance
2 adopted under ORS 92.044 or 92.046 or similar general ordinance
3 establishing standards for implementing a comprehensive plan.”

4 The county argues that its land use regulations are codified in the county’s
5 zoning ordinance, known as the Clackamas County Zoning and Development
6 Ordinance (ZDO). The county contends that, in rejecting petitioners’ attempt to
7 file a local land use appeal of the July 28, 2025 code enforcement letter, the
8 planning director did not apply any ZDO land use regulation, and that the email
9 itself did not concern the application of any ZDO land use regulation.

10 A decision “concerns” the application of a land use regulation if the
11 decision actually applies the regulation, or the local government was required by
12 law to apply the regulation in making the decision, but failed to do so. *Jaqua v.*
13 *City of Springfield*, 46 Or LUBA 566, 574 (2004). The county argues that the
14 August 12, 2025 email refers to no local code provisions at all, much less any
15 ZDO land use regulations, but instead only observes that the appealed decision is
16 a code enforcement letter issued under the “Code Enforcement program, not the
17 Planning and Zoning program.” Motion to Dismiss Ex C, at 1. The planning
18 director further observed that, as the notices on the back of the code enforcement
19 letter explain, the alleged violations set out in the letter can be disputed by
20 requesting a hearing before the code enforcement hearings officer. The county
21 argues that the notices on the back of the code enforcement letter are based on
22 CCC chapter 2.07, a code chapter that sets out the county’s code enforcement
23 procedures. The county argues that the August 12, 2025 email did not actually

1 apply any CCC chapter 2.07 provisions but, to the extent it did, or to the extent
2 those provisions applied as a matter of law, those CCC chapter 2.07 provisions
3 do not constitute “land use regulations” as defined at ORS 197.015(11), because
4 they do not “establish[] standards for implementing a comprehensive plan.”

5 ~~and, and~~ In any case, the county argues that in the August 12, 2025 email the
6 planning director looked only at the face and reverse of the July 28, 2025 code
7 enforcement letter, and was not required to apply, and did not in fact apply, any
8 ZDO land use regulation. Accordingly, the county argues, the August 12, 2025
9 email is not a land use decision as defined at ORS 197.015(10)(a). ~~because~~

10 ~~and, and~~ Petitioners do not argue that CCC chapter 2.07 includes any land use
11 regulations, that is, regulations adopted in a general ordinance that is “similar” to
12 a zoning ordinance or subdivision ordinance, and that establishes standards for
13 implementing a comprehensive plan. However, petitioners argue that the
14 planning director necessarily applied the ZDO in determining that the ZDO does
15 not provide for a local land use appeal of the July 28, 2025 code enforcement
16 letter. Petitioners cite to several ZDO provisions that, petitioners argue, could be
17 applied or interpreted to apply in order to answer the question of whether
18 petitioners have a right to file a local land use appeal of the July 28, 2025 code
19 enforcement letter. Petitioners contend that in order to determine whether
20 petitioners had a right to file a local land use appeal under the ZDO, the planning
21 director either applied or was required to apply the cited ZDO provisions.

1 It is clear that the planning director did not actually *apply* any ZDO
2 provisions in the August 12, 2025 email. The email does not cite or mention any
3 ZDO provisions. Nothing in the email indicates that the planning director
4 considered any ZDO provisions at all. Thus, the jurisdictional question turns on
5 whether the planning director was *required* to apply some ZDO provision, but
6 failed to do so, in rejecting petitioners' attempt to file a local land use appeal.

7 As petitioners observe, most decisions regarding whether a local land use
8 appeal is available will turn on whether the land use code provides a local land
9 use appeal process for a specific type of underlying land use decision. Whether
10 the ultimate answer is yes or no, the decision-maker will necessarily have to
11 consult the land use code to determine whether a local land use appeal process is
12 available for the type of underlying decision at issue. Thus, in most
13 circumstances, the resulting decision will likely concern the application of one or
14 more land use regulations and thus fall within the statutory land use decision,
15 unless some exclusion to that definition applies (*see* ORS 197.015(10)(b) for a
16 list of statutory exclusions to the ORS 197.015(10)(a) definition of land use
17 decision). *See, e.g., Wells v. Yamhill County*, 51 Or LUBA 659, 663 (2006) (letter
18 rejecting local appeal is a final decision that applies a land use regulation and
19 hence is a land use decision); *Hoschek v. Tillamook County*, 52 Or LUBA 793,
20 797 (2006) (decision rejecting local appeal is a land use decision because it
21 concerns the application of a land use regulation, and no exceptions to ORS
22 197.015(10)(a) apply); *Marick v. City of Lake Oswego*, LUBA Nos 2022-

1 016/017/028/040/043 (Nov 1, 2022) (same).⁴ The present case appears to
2 constitute the relatively rare case where determining whether a local land use
3 appeal is available for the underlying decision did not *require* any application of
4 the land use code, in this case the ZDO.

5 The premise for petitioners' jurisdictional argument is that the county code
6 provides two independent pathways to seek local review of a code enforcement
7 letter that alleges a violation of the ZDO: (1) an explicit pathway under the code
8 enforcement program pursuant to CCC 2.07 (as we held in *O'Malley*, LUBA No
9 2025-046 (Oct 21, 2025)), and (2) an implicit pathway under the land use
10 program, pursuant to interpretations of several ZDO provisions that petitioners
11 proffer in this appeal.

12 Briefly, petitioners argue that ZDO 1308.01 authorizes the planning
13 director to interpret the ZDO.⁵ From that starting point, petitioners argue that the

⁴ Nonetheless, as petitioners also observe, there are actually few reported cases where a petitioner appeals to LUBA a decision that determines that no local land use appeal is available under the land use code. Presumably, that reflects the fact that most petitioners before LUBA wish to reach the merits of the underlying decision, are not motivated to vindicate the right of a local appeal, and thus are willing to accept at face value a local determination that no right of local appeal exists for the underlying decision. *See Tallman v. Clatsop County*, LUBA No. 2004-018 (Apr 7, 2004) (a petitioner is entitled to rely upon a facially valid determination that there is no right of local appeal, whether or not that decision is in fact correct, and need not appeal that local appeal rejection decision to LUBA, in order to satisfy the exhaustion requirement at ORS 197.825(2)(a)).

⁵ ZDO 1308.01 provides:

1 planning director either delegated their ZDO interpretative authority to the code
2 enforcement officer who issued the July 28, 2025 code enforcement letter, or that
3 officer unlawfully assumed that authority.⁶ Building on that premise, petitioners
4 next note that ZDO Table 1307-1 describes different types of land use permits by
5 procedure type. One type of land use permit is “Interpretation, Zoning and
6 Development Ordinance,” which is subject to the county’s Type II process. The
7 Type II process for a code interpretation requires submittal of an application
8 pursuant to ZDO 1308.01, public notice, and an initial decision by the planning
9 director, with potential for appeal to the county land use hearings officer.
10 Petitioners then characterize the LUCS application they submitted to the county

“The Planning Director has the authority to interpret the Comprehensive Plan and this Ordinance and their applicability to specific properties, except where such authority is specifically granted by this Ordinance to the Hearings Officer, or to the Planning Commission or Board of County Commissioners on appeal.”

⁶ Petitioners note that ZDO 1307.03(B) describes the role of the planning director as follows:

“Planning Director: Pursuant to Oregon Revised Statutes (ORS) 215.042, the Planning Director is the County official designated to administer land use planning in the County. In this role, the Planning Director administers the Comprehensive Plan and this Ordinance, issues decisions on certain land use permit applications, and provides administrative support to other review authorities. As used in this Ordinance, the term Planning Director includes any County staff member authorized by the Planning Director to fulfill the responsibilities assigned to the Planning Director by this Ordinance.”

1 (or perhaps their request for a local land use appeal of the July 28, 2025 code
2 enforcement letter) as somehow constituting an application for a code
3 interpretation under ZDO 1308.01, pursuant to the Type II process.
4 Consequently, petitioners argue, the planning director's decision to reject their
5 land use appeal of the code enforcement letter concerned the application of at
6 least ZDO 1308.01, and was thus a land use decision.

7 We need not resolve the merits of these arguments, although we tend to
8 agree with the county that petitioners have not demonstrated that at any relevant
9 point petitioners ever submitted an application for a code interpretation under
10 ZDO 1308.01, pursuant to the county's Type II land use permit process. That is
11 because, even if we assume without deciding that petitioners have identified a
12 pathway under the ZDO pursuant to which the planning director could,
13 theoretically, review the July 28, 2025 code enforcement letter, that would not
14 assist petitioners' jurisdictional argument. And that is because the gist of the
15 August 12, 2025 email is that the underlying decision stems from the code
16 enforcement program, and is therefore subject to the code enforcement review
17 process. Implicit in that determination is that the code enforcement review
18 process has, at the very least, *primacy* over any other theoretically available local
19 review process, simply because the underlying decision arose from the code
20 enforcement process. That determination does not depend upon any reference to
21 or consultation of the ZDO, even if, as petitioners argue, the ZDO could be

1 interpreted to authorize the planning director to review, in some circumstances,
2 a code enforcement letter.

3 Stated differently, even if petitioners are correct that there are two
4 theoretically available local review processes under the county code for a code
5 enforcement decision that involves alleged violations of the ZDO, the fact that
6 the underlying decision is a code enforcement decision means that the code
7 enforcement review process under CCC 2.07 is, for all practicable purposes, the
8 exclusive pathway to local review.

9 Petitioners bear the ultimate burden of demonstrating that LUBA has
10 jurisdiction over this appeal. *Billington v. Polk County*, 299 Or 471, 475, 703
11 P2d 232 (1985). In the present case, that means petitioners must demonstrate
12 that the planning director was required to apply some ZDO provision in order to
13 resolve petitioners' request for a local land use appeal of the July 28, 2025 code
14 enforcement letter. As explained, the planning director neither applied, nor was
15 required to apply, any ZDO provision in rejecting petitioners' request. The
16 planning director's decision to reject the local appeal was based solely on the
17 face and reverse of the July 28, 2025 letter, which plainly specified that (1) the
18 letter was a code enforcement document, (2) for which the applicable review
19 process is via a hearing before the code enforcement hearings officer. Making
20 that determination did not require the application of any ZDO provision, or
21 otherwise concern the application of any land use regulation, for purposes of

1 ORS 197.015(10)(a). Accordingly, petitioners have not demonstrated that the
2 challenged decision is a land use decision subject to our jurisdiction.

3 The county's decision is dismissed.