

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MARIPOSA TOWNHOUSES
5 and SOUTHERN OREGON PEDIATRICS,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF MEDFORD,
11 *Respondent,*

12 and

13
14 CRC HEALTH OREGON, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2013-046

18
19 ORDER

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22 **MOTION TO INTERVENE**

23 CRC Health Oregon, Inc. moves to intervene on the side of respondent. No party
24 opposes the motion, and it is granted.

25 **FACTS**

26 Intervenor operates a methadone clinic in the City of Medford. Intervenor wishes to
27 relocate that methadone clinic to a new site that is zoned Service Commercial and
28 Professional Office (C-S/P). The Medford Land Development Code (LDC) identifies
29 permitted uses and conditional uses in its commercial and industrial zoning districts based on
30 the Standard Industrial Classification (SIC) manual. LDC 10.337.¹ The SIC manual uses a

¹ LDC 10.337 provides, in part:

“The uses allowed within each commercial and industrial zoning district are based on the Standard Industrial Classification (SIC) Manual, 1987 Edition. This chapter classifies uses by Industry Group Number (3 digits) of the SIC Manual. When necessary to resolve any ambiguity in defining a use classification as per this chapter the Industry Number (4 digit) classification contained in the SIC Manual shall be used as the acceptable reference source.”

1 two-, three- and four-digit identification system to provide increasingly detailed descriptions
 2 of uses. Among the two-digit “Major Group” of uses allowed in the C-S/P zone are “Health
 3 Services.” A table from the LDC is set out below:

4 “**80 HEALTH SERVICES.** This major group includes establishments
 5 primarily engaged in furnishing medical, surgical, and other health services to
 6 persons.

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		C-S/P	C-N	C-C	C-R	C-H	I-L	I-G	I-H
801	Offices of Doctors of Medicine	P	P	P	P	P	X	X	X
802	Offices of Dentists	P	P	P	P	P	X	X	X
803	Offices of Osteopathic Physicians	P	P	P	P	P	X	X	X
804	Offices of Other Health Practitioners	P	P	P	P	P	X	X	X
805	Nursing and Personal Care Facilities	P	X	P	P	P	X	X	X
806	Hospitals	Cs	X	X	X	X	X	X	X
807	Medical and Dental Laboratories	P	P	P	P	P	P	X	X
808	Home Health Care Services	P	P	P	P	P	X	X	X
809	Health and Allied Services, nec	P	P	P	P	P	X	X	X
	- Occupational Health Facility	P	P	P	P	P	P	P	P

1 Among the identified three-digit “Industry Groups” listed under the Health Services is
2 809, “Health and Allied Services,” which is listed as a “P” or permitted use.² The four-digit
3 SIC classifications further refine the three-digit “Health and Allied Services” industry groups.
4 One of those four-digit classifications is 8093 “Specialty Outpatient Facilities, Not Elsewhere
5 Classified.” The Occupational Safety & Health Administration (OSHA) description of that
6 classification is included as Exhibit D of the city’s motion to dismiss this appeal and set out
7 below:

8 “8093 Specialty Outpatient Facilities, Not Elsewhere Classified

9 “Establishments primarily engaged in outpatient care of a specialized nature
10 with permanent facilities and with medical staff to provide diagnosis,
11 treatment, or both for patients who are ambulatory and do not require inpatient
12 care. * * *

- 13 “● Alcohol treatment, outpatient clinics
- 14 “● Biofeedback centers
- 15 “● Birth control clinics (family planning)
- 16 “● Drug treatment, outpatient clinics
- 17 “● Outpatient detoxification centers
- 18 “● Outpatient mental health clinics
- 19 “● *Outpatient treatment clinics for alcoholism and drug addiction*
- 20 “● Rehabilitation centers, outpatient (medical treatment)
- 21 “● Respiratory therapy clinics” City’s Motion to Dismiss, Exhibit D
22 (emphasis added).

23 The upshot of the above trip through the LDC and SIC manual is that “Outpatient
24 Treatment clinics for alcoholism and drug addiction” are permitted uses in the C-S/P zone,
25 and we do not understand any party to dispute that interpretation of the LDC.

² The letter C means the use is allowed as a conditional use, the letter X means the use is “specifically prohibited.” LDC 10.337.

1 In a March 22, 2013 letter to the planning department, intervenor explained that the
2 city and intervenor had been working together to find “a more suitable location” for its
3 existing methadone clinic. Record 5. The letter explains that a C-S/P zoned site located
4 close to other “medical-related” uses had been located. *Id.* The letter asks the city to confirm
5 that its methadone clinic is a permitted use in the C-S/P zone. The text of the city’s short
6 March 26, 2013 letter in response is set out below:

7 “I would like to respond to your letter to me dated March 22, 2013, in which
8 you requested information regarding the above-referenced property. We have
9 researched our files and determined that the zoning of the property is Service
10 Commercial and Professional Office, C-S/P. In accordance with the Standard
11 Industrial Classification manual, we concur with you that the use referenced in
12 your letter is classified as follows:

13 “8093 Specialty Outpatient Facilities, Not Elsewhere Classified

- 14 “● Outpatient treatment clinics for alcoholism and drug
15 addition

16 “That use is a permitted use in the C-S/P zone.” Record 1.

17 Petitioners, a neighboring residential development and pediatric clinic, seek LUBA’s
18 review of the March 26, 2013 letter in this appeal.

19 **JURISDICTION**

20 LUBA has exclusive jurisdiction to consider appeals of land use decisions and limited
21 land use decisions. ORS 197.825(1).³ As defined by ORS 197.015(10)(a), a “[l]and use
22 decision” includes “[a] final decision or determination made by a local government * * * that
23 concerns the * * * application of” “[a] land use regulation.” Because the LDO is a land use
24 regulation and because the March 26, 2013 letter was a final decision that applied the LDO,
25 the March 26, 2013 letter appears to fall within the reach of ORS 197.015(10)(a). However,
26 the ORS 197.015(10)(a) definition of “land use decision” is followed by a number of

³ ORS 197.825(1) provides in relevant part that LUBA has “exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

1 exclusions that are set out at subsection (b) of ORS 197.015(10). One of those exclusions is
2 ORS 197.015(10)(b)(A) which provides that the ORS 197.015(10)(a) definition of land use
3 decision does not include a decision “[t]hat is made under land use standards that do not
4 require interpretation or the exercise of policy or legal judgment.” The city and intervenor
5 contend the city’s March 26, 2013 letter is not a limited land use decision and falls within the
6 ORS 197.015(10)(b) exclusion from the statutory definition of land use decision. Relying on
7 ORS 197.015(10)(b), the city and intervenor move to dismiss this appeal.

8 **A. Motions**

9 Before turning to the parties’ jurisdictional arguments, we consider some pending
10 motions. Petitioners filed a motion requesting that LUBA consider extra-record evidence
11 under ORS 197.835(2)(b) and OAR 661-010-0045 in determining whether LUBA has
12 jurisdiction to continue with this appeal. A motion to consider extra-record evidence under
13 ORS 197.835(2)(b) and OAR 661-010-0045 is not necessary for LUBA to consider extra-
14 record evidence in determining whether it has jurisdiction to review a decision. *Home*
15 *Builders Association v. City of Eugene*, 54 Or LUBA 692, 700 (2007). We have considered
16 the extra-record evidence cited by petitioners.

17 Citing OAR 661-010-0039, petitioners move to strike the city’s and intervenor’s reply
18 to petitioners’ response to the city’s and intervenor’s motion to dismiss. As the city and
19 intervenor point out, the limitation set out in OAR 661-010-0039 that a reply brief must be
20 limited to new matters in response briefs does not apply to replies to responses to motions.
21 *DLCD v. Clatsop County*, 58 Or LUBA 714, 718-19 (2009). Since our rules do not expressly
22 prohibit replies to responses to motions, and the replies in this case help clarify the
23 jurisdictional question, we exercise our discretion in this case and allow the replies. *Id.*

24 **B. ORS 197.015(10)(b)(A)**

25 The ORS 197.015(10)(b)(A) exclusion would apply in this case if the decision fell
26 within the ORS 197.015(10)(a) definition of “land use decision” but was “made under land

1 use standards that do not require interpretation or the exercise of policy or legal judgment.”
2 The city and intervenor argue that the decision was “made under land use standards that do
3 not require interpretation or the exercise of policy or legal judgment.” Petitioners contend
4 that it was not. Because the jurisdictional question appears to be resolved by statutes the
5 parties neither cite nor discuss, and not by ORS 197.015(10)(b)(A), we turn directly to those
6 statutes and express no view on the parties arguments regarding ORS 197.015(10)(b)(A).

7 **C. ORS 227.175(11)(b)**

8 ORS 227.160(2) defines the term “permit” and sets out some exceptions:

9 “(2) ‘Permit’ means discretionary approval of a proposed development of
10 land, under ORS 227.215 or city legislation or regulation. ‘Permit’
11 does not include:

12 “(a) A limited land use decision as defined in ORS 197.015;

13 “(b) *A decision which determines the appropriate zoning*
14 *classification for a particular use by applying criteria or*
15 *performance standards defining the uses permitted within the*
16 *zone, and the determination applies only to land within an*
17 *urban growth boundary[.]” (Emphasis added.)*

18 ORS 227.175(11) then provides, in part:

19 “A decision described in ORS 227.160(2)(b) shall:

20 “(a) Be entered in a registry available to the public setting forth:

21 “(A) The street address or other easily understood geographic
22 reference to the subject property;

23 “(B) The date of the decision; and

24 “(C) A description of the decision made.

25 “(b) *Be subject to the jurisdiction of the Land Use Board of Appeals in the*
26 *same manner as a limited land use decision.*

27 “(c) Be subject to the appeal period described in ORS 197.830(5)(b).”
28 (Emphases added.)”

1 The challenged decision appears clearly to qualify as a “decision described in ORS
2 227.160(2)(b).” The subject property is located within the city’s urban growth boundary.
3 The decision applies the LDC and SIC to determine that the C-S/P zone is appropriate for
4 intervenor’s methadone clinic. ORS 227.175(11)(b) expressly provides that such decisions
5 are reviewable by LUBA as limited land use decisions. Based on ORS 227.160(2)(b) and
6 227.175(11)(b), we conclude that we have jurisdiction to review the March 26, 2013 letter.

7 Although ORS 227.160(2)(b) and 227.175(11)(b) appear to clearly provide that
8 LUBA has jurisdiction to review the March 26, 2013 letter, we decide the city’s motion to
9 dismiss based on statutes that are not mentioned in the motion to dismiss or petitioners’
10 responses to the motion to dismiss. The parties are therefore free to present additional
11 jurisdictional arguments in their briefs on the merits.

12 The motions to dismiss are denied.

13 Petitioners shall have 21 days from the date of this order to file their petition for
14 review. The city and intervenor-respondent shall have 42 days from the date of this order to
15 file their response briefs. The Board shall have 77 days from the date of this order to issue its
16 final opinion and order.

17 Dated this 5th day of September, 2013.

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Michael A. Holstun
Board Chair