

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

3  
4                                   LARRY KAPLOWITZ and KARIN MARCUS,  
5   *Petitioners,*

6  
7   vs.

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9   LANE COUNTY,  
10   *Respondent,*

11   and

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14   CHARLES WIPER III,  
15   *Intervenor-Respondent.*

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17   LUBA No. 2016-029

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19   CHARLES WIPER III,  
20   *Petitioner,*

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22   vs.

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24   LANE COUNTY,  
25   *Respondent,*

26  
27   and

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29   LARRY KAPLOWITZ and KARIN MARCUS,  
30   *Intervenors-Respondents.*

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32   LUBA No. 2016-030

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34   ORDER DENYING MOTION TO DISMISS

35                                   Larry Kaplowitz and Karin Marcus applied for a land use compatibility  
36 statement (LUCS) that was approved by the county. For simplicity we will

1 refer to them as the “applicants.” Charles Wiper III opposes the LUCS. For  
2 simplicity we will refer to him as the “opponent.” The LUCS was initially  
3 approved by the planning director. Opponent appealed the planning director’s  
4 decision to the hearings officer, who also approved the LUCS. Opponent  
5 appealed the hearing officer’s decision to the board of commissioners, which  
6 also approved the LUCS. The applicants and opponent both appealed the  
7 board of county commissioners’ decision to LUBA. Since the applicants’ and  
8 the opponent’s LUBA appeals challenge the same board of commissioners’  
9 decision they have been consolidated for LUBA review. OAR 661-010-0055.

10 Applicants move to dismiss opponent’s LUBA appeal (LUBA No. 2016-  
11 030), arguing that opponent’s appeal of the hearings officer’s decision to the  
12 board of commissioners failed to comply with certain mandatory county  
13 requirements for perfecting an appeal of the hearings officer’s decision within  
14 12 days of the hearings officer’s decision.

15 “Petitioner’s failure to perfect the appeal within the time  
16 prescribed is not a technical violation of the code. Because  
17 [opponent] failed to perfect the appeal within the 12-day period set  
18 out in LC 15.515(1), and that period had already expired, LUBA  
19 lacks jurisdiction over this matter and should dismiss the appeal.”  
20 Motion to Dismiss 4 (footnote omitted).

21 Applicants made that same argument to the board of county  
22 commissioners. Record 73-75. The board of commissioners refused to dismiss

1 opponent' appeal, concluding that the planning director had discretion to  
2 accept opponent's local appeal.<sup>1</sup>

3 Applicants' legal theory for moving to dismiss opponent's LUBA appeal  
4 is less than clear. Following the above quoted argument, applicants cite three  
5 cases in support of their motion to dismiss: *Breivogal v. Washington County*,  
6 114 Or App 55, 834 P2d 473 (1992); *Siuslaw Rod and Gun Club v. City of*  
7 *Florence*, 48 Or LUBA 163 (2004); *Tipton v. Coos County*, 29 Or LUBA 474  
8 (1995), *aff'd* 137 Or App 633, 904 P2d 1094 (1995). As relevant here, those  
9 cases all stand for the proposition that where local appeal requirements are  
10 mandatory, and a local appellant fails to comply with one or more of those  
11 mandatory requirements, the local government must reject or dismiss the local  
12 appeal.

13 Applicants and opponent arguments regarding the motion to dismiss  
14 focus exclusively on whether the local appeal requirements that apply to  
15 opponent's local appeal are mandatory.<sup>2</sup> However those arguments are  
16 premature and have nothing to do with whether the board of commissioners'

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<sup>1</sup> The board of commissioners adopted the following finding:

“\* \* \* The Board finds that Lane Code 14.520 gives the Director discretion in accepting or rejecting appeals. The Board elects not to dismiss the appeal as requested by the applicant.” Record 6.

<sup>2</sup> Opponent request a hearing via telephone conference call to provide oral argument on the motion. OAR 661-010-0065(3). We do not believe oral argument is necessary, and the request is therefore denied.

1 decision on appeal is a “land use decision,” over which LUBA has jurisdiction.  
2 LUBA has exclusive jurisdiction to review “land use decisions” as that term is  
3 defined by ORS 197.015(10). ORS 197.825(1). The challenged decision is a  
4 final decision by the board of commissioners that applies land use regulations  
5 and appears to be a land use decision.<sup>3</sup> Applicants do not really argue  
6 otherwise.

7 Although applicants do not make the argument in their motion to  
8 dismiss, their legal theory may be that opponent failed to exhaust an available  
9 remedy. ORS 197.825(2)(a).<sup>4</sup> If that is applicants’ legal theory, we reject it.  
10 As far as the decision before us is concerned, opponent did exhaust his  
11 available remedy when he filed his local appeal and the planning director, and  
12 later the board of commissioners, accepted it. If applicants believe the county  
13 erred in accepting that local appeal, they may (1) assign error to the county’s  
14 decision to accept opponent’s local appeal in applicants’ LUBA appeal of the  
15 board of county commissioners’ decision in this matter, (2) file a cross-petition

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<sup>3</sup> As defined by ORS 197.015(10)(a), “[a] final decision or determination by a local government \* \* \* that concerns the \* \* \* application of” “[a] land use regulation” is a “land use decision.

<sup>4</sup> ORS 197.825(2) provides, in part:

“The jurisdiction of [LUBA]:

- (a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review[.]”

1 for review to challenge that aspect of the board of county commissioners’  
2 decision in opponent’s LUBA appeal, or (3) file both. If applicants make that  
3 challenge in either or both of the pending appeals and we agree with it, the  
4 board of commissioners’ decision may be reversible for that reason. But there  
5 was no failure on opponents’ part to exhaust available administrative remedies  
6 that would deprive LUBA of jurisdiction to review the board of county  
7 commissioners’ decision in this matter.

8 Applicants’ motion to dismiss is denied.

9 The record in these consolidated appeals has already been transmitted.  
10 We indicated in our May 17, 2016 order that we would establish a briefing  
11 schedule if the motion to dismiss was denied.

12 The deadline for filing the petition for review is 21 days from the date of  
13 this order. The deadline for filing the response briefs is 42 days from the date  
14 of this order. The deadline for LUBA to issue its final opinion and order shall  
15 be 77 days from the date of this order.

16 Dated this 8<sup>th</sup> day of July, 2016.

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Michael A. Holstun  
Board Chair