

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

3
4 DOROTHY GAGE, and ASHCREEK)
5 NEIGHBORHOOD ASSOCIATION,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13 Respondent,)
14)
15 and)
16)
17 FP-35 PARTNERS,)
18)
19 Intervenor-Respondent.)

LUBA No. 93-030
FINAL OPINION
AND ORDER

20
21
22 On remand from the Oregon Supreme Court.

23
24 Edward J. Sullivan, Portland, represented petitioners.

25
26 Peter A. Kasting, Senior Deputy City Attorney,
27 Portland, represented respondent.

28
29 Jeff H. Bachrach, Portland, represented intervenor-
30 respondent.

31
32 SHERTON, Referee; HOLSTUN, Chief Referee, participated
33 in the decision.

34
35 REMANDED 11/23/94

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city hearings officer's decision
4 approving a minor amendment to Cedar Meadows, a previously
5 approved planned unit development (PUD).

6 **INTRODUCTION**

7 In Gage v. City of Portland, 24 Or LUBA 47, 48-49
8 (1992) (Gage I), we set out the relevant facts:

9 "The subject property is 6.37 acres in size,
10 currently undeveloped and zoned Medium Density
11 Single-Dwelling Residential (R7). The city zoning
12 map indicates the presence of a 'water feature' on
13 the eastern half of the property. A creek
14 traverses the eastern portion of the subject
15 property, and the property may contain wetlands
16 subject to the jurisdiction of the Division of
17 State Lands. * * *

18 "On June 9, 1981, the city approved a conditional
19 use permit and preliminary development plan for
20 the Cedar Meadows PUD. Final development plan
21 approval was granted on September 17, 1984. As
22 finally approved in 1984, the PUD included 35
23 multi-family dwelling units in six buildings,
24 three detached garage structures for 22 cars and
25 55 additional parking spaces. The development was
26 to be clustered on the western half of the
27 property. * * *

28 "On November 5, 1991, intervenor applied to the
29 city for what it characterized as a 'minor
30 amendment to the PUD development plan.' * * *
31 The proposed amendment does not alter the number
32 of dwelling units, but reduces the number of
33 residential structures from six to three. The
34 amended development plan also includes three
35 detached garage structures for 16 cars and 65
36 additional parking spaces. The locations of the
37 access street from S.W. Multnomah Blvd. and of
38 interior streets are not changed by the proposed

1 amendment, but the distance between the proposed
2 structures and the property boundaries and the
3 storm water detention easement on the eastern half
4 of the property are increased." (Record citations
5 and footnote omitted.)

6 In Gage I, we remanded the city's decision because it
7 failed to apply Portland City Code (PCC) chapter 33.299
8 (Temporary Prohibition on the Disturbance of Forests), which
9 was in effect when intervenor's application for a minor
10 amendment to the approved PUD development plan was filed.
11 PCC 33.299.030 provides that herbicide application and
12 burning, cutting, damaging or removing vegetation are
13 prohibited in certain designated forest areas. There is no
14 dispute that the subject property is within such a forest
15 area. However, PCC 33.299.040 provides that notwithstanding
16 the general prohibition of PCC 33.299.030, certain
17 activities are allowed, including the following:

18 "F. Any activity authorized by a land use
19 decision accepted and recorded before the
20 effective date of this ordinance[.]"

21 After the remand in Gage I, the hearings officer issued
22 a new decision, determining the activities allowed by the
23 proposed PUD development plan amendment are within the above
24 quoted exception to the general prohibition of
25 PCC 33.299.030:

26 "* * * City Council [approved the preliminary
27 development plan for the PUD] in Ordinance
28 No. 151914, which was accepted and recorded on
29 August 28, 1981, long before [PCC] chapter 33.299
30 was in effect. That approval permits disturbance
31 of a portion of the forested area for development

1 of the dwellings and garage units, as well as the
2 street and utilities. The area to be developed
3 under the amended [PUD development] plan includes
4 less of the forested area than under the
5 originally approved PUD [development plan]. Fewer
6 trees will be removed and the structures have been
7 consolidated to reduce the area disturbed. All
8 the development activity that will disturb forest
9 area was approved in that original approval.

10 "[Intervenor] will be developing under the amended
11 development plan, which was approved as a separate
12 land use permit from the original development.
13 However, the 'activity' that will include removing
14 vegetation and cutting trees was approved in the
15 original PUD development plan. * * * The amended
16 permit allows no activity that was not previously
17 approved. The fact that the minor amendment is
18 processed as a separate land use permit does not
19 change the fact that the 'activity' that includes
20 disturbing the forest was approved in 1981, before
21 [PCC] Chapter 33.299 was in effect." (Emphasis
22 added.) Remand Record 5.

23 The hearings officer's decision on remand is the
24 subject of this appeal. In Gage v. City of Portland, 25
25 Or LUBA 449 (1993) (Gage II), we affirmed the hearings
26 officer's interpretation that the activities allowed by the
27 proposed PUD final development plan amendment are within the
28 exception provided by PCC 33.299.040.F. In doing so, we
29 afforded the hearings officer's interpretation of the local
30 enactment the deference we thought was required by Clark v.
31 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).

32 Petitioners appealed Gage II to the Oregon Court of
33 Appeals, contending, among other things, that LUBA owes no
34 deference to an interpretation of a local enactment by a
35 local government hearings officer. The court of appeals

1 rejected petitioners' contention and affirmed LUBA on this
2 point. Gage v. City of Portland, 123 Or App 269, 860 P2d
3 282, on reconsideration 125 Or App 119, 866 P2d 466 (1993)
4 (Gage III). However, the Oregon Supreme Court agreed with
5 petitioners, holding that "an interpretation of a local land
6 use ordinance by a hearings officer is not subject to the
7 deference required by this court's decision in Clark." Gage
8 v. City of Portland, 319 Or 308, 317, ___ P2d ___ (1994)
9 (Gage IV). The supreme court remanded this matter to LUBA,
10 with instructions to determine "in the first instance, and
11 without according the deference required by Clark, whether
12 the hearings officer '[i]mproperly construed the applicable
13 law,' viz, PCC 33.299.040(F)." Gage IV, supra.

14 **DECISION**

15 **A. Scope of Review**

16 With regard to reviewing interpretations of local
17 enactments by local decision makers other than the local
18 governing body, Gage IV effectively requires that LUBA
19 employ the scope of review it used prior to Clark. This
20 standard was explained in McCoy v. Linn County, 90 Or App
21 271, 275-76, 752 P2d 323 (1988), where the court of appeals
22 stated:

23 "[T]he meaning of local legislation is a question
24 of law which must be decided by the courts and
25 other reviewing bodies to which it is presented.
26 Although the local interpretation must be
27 considered on review, the reviewing tribunal's
28 acceptance or rejection of the interpretation is
29 to be determined solely by whether, in the

1 tribunal's opinion, the interpretation is right or
2 wrong." (Footnote omitted.)

3 Petitioners argue the hearings officer's interpretation
4 of PCC 33.299.040.F, quoted above, is wrong because by its
5 terms the exception provided by PCC 33.299.040.F applies
6 only to tree-cutting activity carried out pursuant to a land
7 use decision accepted and recorded prior to the effective
8 date of PCC chapter 33.299. According to petitioners, any
9 tree cutting activity carried out pursuant to intervenor's
10 modified PUD development plan will, as a matter of law, be
11 authorized by the city's decision to approve the modified
12 PUD development plan, a decision made after the effective
13 date of PCC chapter 33.299.¹ Petitioners also argue that
14 PCC chapter 33.299 was adopted "as a remedial measure to

¹Petitioners also contend at least some tree cutting necessitated by the modified PUD development plan is newly approved, and was not included in the PUD development plan approved in 1981. According to petitioners, this additional tree cutting is necessitated by the building reconfiguration proposed as part of the 1991 PUD development plan modification application.

In Gage II, 25 Or LUBA at 461, we noted petitioners "do not challenge the evidentiary support for the [hearings officer's] findings the amended [PUD development] plan does not allow any forest disturbance that was not approved in the original approvals." (Emphasis in original.) Nothing in the appellate court opinions in Gage III or IV indicates petitioners appealed our determination in Gage II that they failed to challenge the hearings officer's factual finding that the modified PUD development plan does not allow any vegetation disturbing activity in addition to what was approved in 1981 as part of the PUD preliminary development plan. Because petitioners failed to raise this issue before LUBA in the proceedings leading to Gage II, and this issue is not a subject of the remand to this Board from the Oregon Supreme Court, petitioners have waived this issue and cannot raise it for the first time at this stage of the appeal process. See Beck v. City of Tillamook, 313 Or 148, 831 P2d 674 (1992) (statutory design of land use appeal process serves judicial economy by narrowing scope of issues to be considered in successive appeals).

1 protect the City's dwindling urban forest patches."
2 Petitioners' Memorandum on Remand 5. Therefore, according
3 to petitioners, the exceptions established by PCC 33.299.040
4 to the general prohibition against tree cutting in
5 PCC 33.299.030 should be narrowly construed, which the
6 hearings officer did not do in the challenged decision.

7 Petitioners concede PCC 33.299.040.F would allow
8 intervenor to proceed with construction of a PUD pursuant to
9 the preliminary and final development plans approved by the
10 city in 1981 and 1984. Petitioners argue PCC 33.299.040.F
11 is properly interpreted not to allow any modification of
12 those plans (at least where the modified PUD involves any
13 vegetation disturbance in a forested area subject to
14 PCC chapter 33.299). Under petitioners' interpretation,
15 developers would be forced to proceed under previously
16 granted approvals, rather than to seek modifications of
17 those approvals, even if such modifications would have the
18 same or less impact on forested areas.

19 On the other hand, the hearings officer interprets
20 PCC 33.299.040.F as allowing vegetation disturbance
21 activities authorized by an amended PUD final development
22 plan, so long as those same vegetation disturbance
23 activities were authorized by an original PUD development
24 plan accepted and recorded prior to the effective date of
25 PCC chapter 33.299. The hearings officer's interpretation
26 of PCC 33.299.040.F would allow development approvals issued

1 prior to the effective date of PCC chapter 33.299 to be
2 amended, so long as no additional vegetation disturbance in
3 forested areas subject to PCC chapter 33.299 is approved.
4 We believe the hearings officer's interpretation of
5 PCC 33.299.040.F is reasonable and correct and, therefore,
6 must be affirmed under the scope of review set out in McCoy
7 v. Linn County, supra.

8 **B. ORS 197.829(4)**

9 On November 4, 1993, after LUBA's Gage II opinion and
10 the court of appeals' Gage III opinion were issued, but
11 before the supreme court's Gage IV opinion was issued, the
12 following statute concerning LUBA's review of local
13 government interpretations of local comprehensive plans and
14 land use regulations went into effect:

15 "[LUBA] shall affirm a local government's
16 interpretation of its comprehensive plan and land
17 use regulations, unless [LUBA] determines that the
18 local government's interpretation:

19 "(1) Is inconsistent with the express language of
20 the comprehensive plan or land use
21 regulation;

22 "(2) Is inconsistent with the purpose for the
23 comprehensive plan or land use regulation;

24 "(3) Is inconsistent with the underlying policy
25 that provides the basis for the comprehensive
26 plan or land use regulation; or

27 "(4) Is contrary to a state statute, land use goal
28 or rule that the comprehensive plan or land
29 use regulation implements." ORS 197.829.

30 Petitioners contend PCC 33.299.040.F was designed to

1 implement Statewide Planning Goal 5 (Open Space, Scenic and
2 Historic Areas, and Natural Resources). Petitioners quote
3 portions of the ordinance that adopted PCC chapter 33.299,
4 contending these provisions demonstrate that
5 PCC chapter 33.299 was adopted to give interim protection to
6 existing urban forest resources while the city carried out
7 the planning process required by Goal 5.² According to
8 petitioners, the hearings officer's interpretation of
9 PCC 33.299.040.F is inconsistent with Goal 5 and must be
10 remanded under ORS 197.829(4).

11 It is extremely doubtful that ORS 197.829(4) applies to
12 our review of the hearings officer's interpretation of
13 PCC 33.299.040.F. Although the supreme court observed that
14 ORS 197.829 "for the most part, appears to codify this
15 court's decision in Clark," the supreme court concluded
16 ORS 197.829 did not apply in Gage IV, because ORS 197.829
17 "went into effect only after LUBA's review of the [city]
18 decision [challenged] in this case." Gage IV, 319 Or at 317
19 n 7. Further, the supreme court instructed LUBA simply to
20 "determine in the first instance, and without according the
21 deference required by Clark, whether the hearings officer

²The provisions of Ordinance No. 163727 cited by petitioners provide that resources listed as requiring protection in Goal 5 were being lost because the absence of interim protection frustrated the city's ability to carry out the duties required by Goal 5 and the city's comprehensive plan. The ordinance also states that interim cutting and clearing of forests was "harming fish and wildlife values, natural area values, scenic values and water quality values provided by forests." Petitioners' Memorandum on Remand 6.

1 '[i]mproperly construed the applicable law,'" making no
2 reference to application of ORS 197.829 by LUBA on remand.
3 Gage IV, 319 Or at 317.

4 Also, in Watson v. Clackamas County, 129 Or App 428,
5 431-32, ___ P2d ___ (1994), the court of appeals stated it
6 interprets ORS 197.829 the same as the supreme court
7 interpreted Clark in Gage IV -- i.e. as requiring LUBA to
8 afford deference only to interpretations of local
9 comprehensive plans and land use regulations made by the
10 local governing body. However, the hearings officer code
11 interpretations at issue in Watson were not challenged on
12 the basis of subsection (4) of ORS 197.829. Also, whereas
13 subsections (1) through (3) of ORS 197.829 basically codify
14 Clark, subsection (4) is not included in the scope of review
15 of local government interpretations of their own enactments
16 set out in Clark. Therefore, perhaps in an overabundance of
17 caution, we consider whether the hearings officer's
18 interpretation of PCC 33.299.040.F would be affirmed under
19 ORS 197.829(4).

20 Goal 5 establishes a comprehensive planning process
21 that requires a local government to (1) inventory the
22 location, quality and quantity of listed resources within
23 its territory; (2) identify conflicting uses for the
24 inventoried resources; (3) determine the ESEE consequences
25 of the conflicting uses; and (4) develop programs to achieve
26 the goal of resource protection. Gonzalez v. Lane County,

1 24 Or LUBA 251, 256-57 (1992); Blatt v. City of Portland, 21
2 Or LUBA 337, aff'd 109 Or App 259 (1991).

3 Petitioners do not contend any part of the subject
4 property is inventoried as a Goal 5 resource in the city's
5 acknowledged comprehensive plan, or that PCC chapter 33.299
6 is a program to protect inventoried Goal 5 resources adopted
7 as a result of the planning process required by Goal 5.³
8 Rather, petitioners contend PCC chapter 33.299 provides
9 interim resource protection to property not on the city's
10 acknowledged resource inventories, until the Goal 5 process
11 can be carried out. However, such interim protection of
12 possible Goal 5 resources is neither required nor
13 recommended by Goal 5 or the administrative rule
14 implementing Goal 5.⁴ Consequently, PCC chapter 33.299 does
15 not implement Goal 5 and, therefore, city interpretations of
16 PCC chapter 33.299 provisions are not subject to reversal
17 under ORS 197.829(4).

18 The hearings officer's interpretation of
19 PCC 33.299.040.F is affirmed.

³At all times relevant to the city's approval of intervenor's application to modify its PUD development plan, the city's comprehensive plan and land use regulations were acknowledged under ORS 197.251 as being in compliance with the statewide planning goals.

⁴OAR 660-16-000(5)(b) specifically provides that where the information available on a possible Goal 5 resource site is inadequate to allow completion of the Goal 5 planning process, a local government must adopt a plan policy requiring it to complete the Goal 5 planning process for that resource site in the future, but that implementing measures to protect such a site "are not appropriate or required for Goal 5 compliance purposes * * *."

1 The city's decision is remanded.⁵

⁵In addition to the interpretive issue concerning PCC 33.299.040.F discussed supra, petitioners also appealed our decision in Gage II to the court of appeals on the ground that under certain other applicable PCC provisions, the city's original PUD approval had expired prior to approval of the challenged minor development plan amendment. The hearings officer's decision challenged in this appeal does not interpret the code provisions relied on in petitioners' argument. The court of appeals reversed and remanded our decision in Gage II with instructions to remand the challenged hearings officer's decision to the city "to interpret the [relevant] code provisions and, if indicated by the interpretation, to apply them." Gage III, 123 Or App at 276. This issue was not contested before the supreme court. In Gage IV, 319 Or at 317-18, the supreme court notes that if our decision on remand concerning the interpretation of PCC 33.299.040.F "does not result in reversal of the hearings officer's decision, the matter must be remanded to the city, so that the city can address the expiration issue * * *."