

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 BOB GARRARD and MARIE GARRARD,  
5 *Petitioners,*  
6

7 vs.  
8

9 CITY OF NEWPORT,  
10 *Respondent.*  
11

12 LUBA No. 2001-070  
13

14 FINAL OPINION  
15 AND ORDER  
16

17 Appeal from City of Newport.  
18

19 Bob Garrard and Marie Garrard, Newport, filed the petition for review and argued on  
20 their own behalf.  
21

22 Robert W. Connell, Newport, filed the response brief and argued on behalf of  
23 respondent. With him on the brief was Minor, Bandonis and Connell.  
24

25 BASSHAM, Board Member; HOLSTUN, Board Member, participated in the  
26 decision.  
27

28 TRANSFERRED 07/18/2001  
29

30 You are entitled to judicial review of this Order. Judicial review is governed by the  
31 provisions of ORS 197.850.  
32

**NATURE OF THE DECISION**

Petitioners appeal a city decision interpreting a development permit condition.

**FACTS**

The subject property is the site of a bed and breakfast called Ocean House, owned by petitioners. Immediately adjacent to petitioners' property is another bed and breakfast owned by the McConnells.

In 1986, petitioners and the McConnells' predecessor-in-interest entered into an agreement that, *inter alia*, specifies that any fence built between their properties shall have a maximum height of three feet, so as not to impair the view from either parcel. In January 1999, petitioners applied to the city for a conditional use permit to expand Ocean House from five to eight bedrooms. The city planning commission approved the requested expansion, subject to 11 conditions. Condition 11 states:

“There shall be constructed an adequate and substantial privacy fence along the westerly portion of the north line of the Garrard property to accomplish two purposes:

- “a. Shield the view onto the Garrard property from the McConnell property.
- “b. Prevent the headlights from the Garrard guests shining northerly onto the McConnell property.” Record 135.

Pursuant to this condition, petitioners constructed a fence on the specified property line. Part of this fence is six feet high, and part of the fence is approximately three feet high. The McConnells complained to the city, claiming that the three-foot portion of the fence was too low to satisfy condition 11. The complaint was referred to the planning commission, which held a hearing to determine whether the three-foot portion satisfied the “adequate and substantial privacy fence” required by condition 11. The planning commission concluded that the fence must be at least six feet high along its entire length. Petitioners appealed this

1 decision to the city council, which upheld the planning commission’s interpretation of  
2 condition 11.

3 This appeal followed.

#### 4 **JURISDICTION**

5 At oral argument, the Board raised the issue of whether the challenged decision is a  
6 land use decision subject to LUBA’s jurisdiction.<sup>1</sup> The Board invited the parties to submit  
7 supplemental briefs or appropriate motions within 10 days of oral argument, addressing  
8 whether the challenged decision applies a land use regulation or otherwise falls with the  
9 statutory definition of “land use decision.”<sup>2</sup>

10 The city submitted a supplemental memorandum of law, in which it argues that the  
11 city’s decision merely interprets a development permit condition, and does not apply a land  
12 use regulation or otherwise satisfy the statutory definition of a land use decision. The city  
13 relies on *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 944 P2d 976 (1997), for the  
14 proposition that a local government decision regarding enforcement of a permit condition is  
15 not a land use decision subject to LUBA’s exclusive jurisdiction, where the decision does not  
16 interpret or apply a statewide planning goal, comprehensive plan or land use regulation.

---

<sup>1</sup>ORS 197.825(1) limits LUBA’s jurisdiction to land use decisions and limited land use decisions. There is no dispute that the city’s decision is not a limited land use decision.

<sup>2</sup>ORS 197.015(10)(a) defines a “land use decision” in relevant part as:

“(A) 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           The decision at issue in *Mar-Dene Corp.* was a city decision not to enforce certain  
2 requirements of a permit condition that had not been satisfied. The court agreed with LUBA  
3 that the city’s decision did not interpret or apply any land use regulation and was not a land  
4 use decision. Under such circumstances, the court held, “questions of whether [the permit  
5 condition] has been or must be complied with are subsumed within the circuit court’s  
6 jurisdiction to enforce the land use regulations” pursuant to ORS 197.825(3)(a).<sup>3</sup> 149 Or  
7 App at 515-16. *See also Frevach Land Company v. Multnomah County*, 38 Or LUBA 729,  
8 734-35 (2000) (interpretation of condition to limit spoil disposal sites does not apply land use  
9 regulation or necessarily interpret the land use regulation under which the condition was  
10 imposed, and thus is not a land use decision subject to LUBA’s jurisdiction); *Balk v.*  
11 *Multnomah County*, 38 Or LUBA 1, 7 (2000) (determination that the applicant had failed to  
12 obtain a building permit within the time required by a condition of permit approval is a  
13 factual determination unrelated to any land use regulation and thus not a land use decision  
14 subject to LUBA’s jurisdiction).

15           We agree with the city that the challenged decision does not interpret or apply any  
16 comprehensive plan or land use regulation. Neither does the city’s decision necessarily  
17 involve an interpretation or application of any comprehensive plan provision or land use  
18 regulation underlying the disputed condition. *Compare Terraces Condo. Assn. v. City of*  
19 *Portland*, 110 Or App 471, 823 P2d 1004 (1992) (interpretation of previously approved  
20 variance necessarily involves the application of the land use regulation under which the

---

<sup>3</sup>ORS 197.825(3)(a) provides that:

“Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

“(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]”

1 variance was allowed and is therefore a land use decision). Accordingly, we conclude that  
2 the challenged decision is not a land use decision subject to our jurisdiction.

3 **MOTION TO TRANSFER**

4 On June 27, 2001, petitioners filed a motion to transfer this case to circuit court in  
5 case we determine that we lack jurisdiction in this matter. Petitioners' motion was filed  
6 within 10 days of oral argument, where the Board raised the jurisdictional issue and  
7 requested supplemental briefing.

8 The city objects that petitioners' motion to transfer is not timely filed. Under OAR  
9 661-010-0075(11)(b), a motion to transfer must be filed within 10 days after the date a  
10 respondent's brief or motion that challenges the Board's jurisdiction is filed, or within 10  
11 days of the date the Board raises a jurisdictional issue on its own motion.<sup>4</sup> The city claims  
12 that its response brief effectively challenged LUBA's jurisdiction by noting that the petition  
13 for review had failed to establish LUBA's jurisdiction. Because petitioners did not file a  
14 motion to transfer within 10 days of the filing of the response brief, the city argues, the  
15 motion is untimely.

16 We disagree that the city's response brief raises the dispositive jurisdictional issue  
17 addressed here, or that petitioners' motion to transfer is untimely. The city's response brief  
18 objects that the petition for review fails to comply with the pleading requirements set forth in  
19 OAR 661-010-0030(4). Among the city's objections is that the jurisdictional statement  
20 required by OAR 661-010-0030(4)(c) is inadequate, because it fails to supply "argument or  
21 legal authority" concerning LUBA's jurisdiction. Response Brief 4. The city's objection

---

<sup>4</sup>OAR 661-010-0075(11)(b) provides:

"A request for a transfer pursuant to ORS 19.230 shall be initiated by filing a motion to transfer to circuit court not later than ten days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than ten days after the date the moving party learns the Board has raised a jurisdictional issue."

1 was insufficient to apprise petitioners or the Board that the city challenged LUBA's  
2 jurisdiction, much less identify the grounds that might exist for that challenge. We conclude  
3 that a cognizable jurisdictional issue was raised for the first time by the Board at oral  
4 argument and, therefore, that petitioners' motion to transfer is timely.

5           The motion to transfer is granted.