BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRENDA WETZEL and
JOHN D. BAGDADE,
*Petitioners*,

vs.

CITY OF EUGENE,
*Respondent*,

and

KENDALL AUTO GROUP,
*Intervenor-Respondent*.

LUBA No. 2004-046

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Bromley Newton LLP.

Emily N. Jerome, Eugene, filed the response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

Peter Livingston, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Schwabe, Williamson & Wyatt, P.C.

HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member, participated in the decision.

DISMISSED 02/03/2005

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

Opinion by Holstun.

**NATURE OF THE DECISION**

Petitioners appeal "a commercial building permit [that authorizes] Intervenor Kendall Auto Group [to convert] a former commercial retail facility to a commercial auto dealership facility." Petition for Review 2.

**FACTS**

Until it was rezoned in 2003, the subject property was zoned C-2 with a planned unit development overlay. In 2003, intervenor applied to amend the zoning of the property to remove the overlay. Respondent approved the request. As relevant here, the effect of the city's 2003 rezoning decision was to allow intervenor to proceed with the desired conversion without seeking planned unit development approval. Petitioners, who live near the property, appealed that rezoning decision to LUBA. Respondent and intervenor moved to dismiss the appeal as untimely filed. Petitioners thereafter moved to voluntarily dismiss that appeal. LUBA issued a final opinion and order dismissing that appeal in 2003. *Bagdade v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2003-158, October 31, 2003).

In January 2004, intervenor applied for a commercial building permit to convert the former K-Mart building on the property into three auto dealerships. The building permit was one of several technical permits that were required to undertake the conversion.[1] In February 2004, the city issued the building permit. In March 2004, petitioners appealed the building permit to LUBA.

**MOTION TO DISMISS**

It is petitioners' burden to establish that LUBA has jurisdiction to review the challenged building permit. OAR 661-010-0030(4)(c); *Billington v. Polk County*, 299 Or 471, 475, 705 P2d 232 (1985); *Bowen v. City of Dunes City*, 28 Or LUBA 324, 330 (1994). As relevant in

[1] Intervenor also applied for mechanical, electrical, plumbing, and public works permits; however, only the building permit is before us in this appeal.

this appeal, LUBA has jurisdiction to review "land use decisions." ORS 197.825(1). As defined by ORS 197.015(10)(a), a land use decision:

> "Includes:
>
> "(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[.]"

ORS 197.015(10)(b) goes on to provide that a land use decision

> "Does not include a decision of a local government:
>
> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) Which approves or denies a building permit issued under clear and objective standards[.]"

The city moved to dismiss this appeal and argued, among other things, that the challenged building permit falls within the ORS 197.015(10)(b)(B) exclusion to the statutory definition of land use decision. Petitioners responded that the building permit is a final city decision in which the city applied or should have applied its land use regulations. Petitioners identified three provisions of Section 9 of the Eugene Code (EC), which petitioners contended the city applied or should have applied to the disputed building permit.[2] Petitioners contended that the exemption in ORS 197.015(10)(b)(B) for some building permits does not apply to the appealed building permit, because the EC provisions they rely on "can plausibly be interpreted in more than one way" and for that reason are not "clear and objective standards," as the ORS 197.015(10)(b)(B) exclusion requires. *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000).

[2] EC Section 9 is the Eugene Land Use Code.

We denied the city's motion to dismiss in a September 10, 2004 order. In that order we set out the three EC provisions that petitioners identified in responding to the city's jurisdictional challenge. We noted in our order that we had some question whether the three EC provisions petitioners relied on were applicable to a building permit decision like the one on appeal:

> "There is some question as to whether all of the code provisions cited by petitioners are actually applicable to the challenged decision, but the city has not responded to petitioners' assertion that they are." *Wetzel v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2004-046, Order, September 10, 2004), slip op 4 (footnote omitted).[3]

We also stated in our order that "[t]he cited provisions appear to include several discretionary approval standards that are not 'clear and objective standards.'" *Id*. at slip op 5. Based on our assumption that at least some of the cited EC provisions apply to the disputed building permit and our conclusion that some of those provisions were not clear and objective, we determined that "the ORS 197.015(10)(b)(B) 'clear and objective' exception to our jurisdiction does not apply." *Id*.

Intervenor filed its motion to dismiss on November 29, 2004. In that motion to dismiss, intervenor renews and elaborates on the argument first advanced by the city, arguing that the disputed building permit decision is not a land use decision under ORS 197.015(10)(b)(B), because the only EC provisions cited by petitioners are either inapplicable or clear and objective land use standards. The city in its response brief also elaborates on its earlier arguments that the challenged building permit is excluded from the definition of land use decision by ORS 197.015(10)(b)(B). Intervenor also argues that this appeal should be dismissed because petitioners failed to exhaust available administrative remedies, as required by ORS 197.825(2)(a).

We discuss below each of the land use regulations that petitioners cite and rely on to establish that the disputed building permit is a land use decision subject to our jurisdiction.

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[3] In the omitted footnote, we particularly questioned whether EC 9.2150 applies to the disputed building permit decision. We discuss EC 9.2150 below.

**A. EC 9.2150**

We set out EC 9.2150 in its entirety below. We do so to illustrate that it is possible to be confused about the potential applicability of EC 9.2150 to the disputed building permit if one stops reading after the first four words of EC 9.2150. However, if the entire provision is read, along with EC 9.8865 which is cross referenced by EC 9.2150 and in turn cross references 9.2150, it is quite clear that these provisions apply only to decisions to change the zoning of property. As far as we can tell they have nothing to do with a building permit to convert an existing building to another use without affecting the zoning of the property.

> **"9.2150 Commercial Zone Siting Requirements.** In addition to the approval criteria in EC 9.8865 Zone Change Approval Criteria, the following siting requirements apply:
>
> **"(1) C-1 Neighborhood Commercial.**
>
> "(a) New C-1 zones shall be located within convenient walking or bicycling distance of an adequate support population. For new C-1 areas between 4½ and 5 acres, an adequate support population is 4,000 people (existing or planned) within an area conveniently accessible to the site.
>
> "(b) New C-1 areas larger than 1.5 acres shall be located on a collector or arterial street.
>
> "(c) Existing neighborhood commercial areas shall not be allowed to expand to greater than 1.5 acres unless the development area site abuts a collector or arterial street.
>
> **"(2) C-4 Commercial/Industrial**. The application of the C-4 zone is limited to development sites with all of the following:
>
> "(a) Strip or Street-Oriented Commercial designation in the Metro Plan.
>
> "(b) Direct access to and from an arterial street.

"(c) A mix of commercial and industrial establishments in the area." (Bold lettering and underlining in original).[4]

There is a second problem with petitioners' reliance on EC 9.2150. Even if the challenged decision included a change in zoning, EC 9.2150 only applies in C-1 and C-4 zones. As previously noted the subject property is zoned C-2.

Even though we agree with petitioners that EC 9.2150 and 9.8865 are land use regulations and include standards that are not clear and objective, EC 9.2150 and 9.8865 do not apply to the disputed building permit decision. We agree with respondents that the city is not required to consider or apply inapplicable land use regulations.

**B. EC 9.2175(4)(a)**

EC 9.2175 establishes "Commercial Zone Development Standards [for] Large Multi-Tenant Commercial Facilities." EC 9.2175(a) sets out the "Description and Purpose" of EC 9.2175: "[t]he intent of these regulations is to assure that the design and layout of large multi-tenant

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[4]The text of EC 9.2150 and the cross-reference to EC 9.8865 make it clear that EC 9.2150 establishes special criteria for applying ("siting") the city's C-1 and C-4 zones. EC 9.8865 provides:

> "**Zone Change Approval Criteria.** Approval of a zone change application, including the designation of an overlay zone, shall not be approved unless it meets all of the following criteria:
>
> "**(1)** The proposed change is consistent with applicable provisions of the Metro Plan. The written text of the Metro Plan shall take precedence over the Metro Plan diagram where apparent conflicts or inconsistencies exist.
>
> "**(2)** The proposed zone change is consistent with applicable adopted refinement plans. In the event of inconsistencies between these plans and the Metro Plan, the Metro Plan controls.
>
> "**(3)** The uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban facilities and services.
>
> "**(4)** The proposed zone change is consistent with the applicable siting requirements set out for the specific zone in:
>
> "(a) EC 9.2150 Commercial Zone Siting Requirements.
>
> "* * * * *." (Bold lettering and underlining in original).

commercial facilities (*e.g*. shopping centers) facilitates pedestrian safety, comfort, and convenience." EC 9.2175(4)(a), the provision petitioners argue the city applied or should have applied to the appealed building permit, provides as follows:

> "To insure that large multi-tenant centers include pedestrian-oriented areas, the site plan must include a shopping street designed to accommodate and stimulate pedestrian activity."

Both the city and intervenor contend that EC 9.2175(4)(a) expressly applies to "large multi-tenant centers," while the disputed building permit only authorizes conversion of single building for use by intervenor as an auto dealership. Intervenor argues:

> "Even if petitioners are correct that [EC 9.2175(4)(a)] is discretionary, it clearly and objectively does not apply to the auto dealership development covered by the challenged permit. The auto dealership is neither a shopping center nor any other form of development that could conceivably include a shopping street." Motion to Dismiss 5-6 (footnote omitted).[5]

The city adds that EC 9.2175(2) makes it clear that the provisions of EC 9.2175 apply to "development projects proposing at least 50,000 square feet of floor area within 3 or more new buildings on a development site, and the portion of the development site specifically affected by the new buildings." The appealed building permit authorizes one *existing* building to be converted to an auto dealership; it does not authorize any *new* buildings.

As was the case with EC 9.2150 and 9.8865, EC 9.2175(4)(a) does not apply to building permits such as the one that is at issue in this appeal. Therefore, even if EC 9.2175(4)(a) is a land use regulation that is not clear and objective, the city was not required to apply EC 9.2175(4)(a) in issuing the disputed building permit.

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[5] In the omitted footnote, intervenor offers the following analogy:

> "An analogy would be 'Buildings over 30 stories must have viewing decks with handrails designed to enhance scenic views.' If someone applied to develop a one-story building, the city would not be expected to give notice and hold a hearing to find the standard does not apply or to prepare written findings to that effect for LUBA's review."

**C. EC 9.2173(6)(f)**

The final land use regulation provision cited by petitioners is EC 9.2173(6)(f). EC 9.2173 imposes "Commercial Zone Development Standards [for] Large Commercial Facilities." EC 9.2173(6)(f) provides:

> "All on-site pedestrian walkways located in vehicle use areas shall be distinguished from driving surfaces through the use of durable, low maintenance surface materials such as pavers, bricks, or scored concrete to enhance pedestrian safety and comfort, as well as the attractiveness of the walkways."

Intervenor argues that the requirement imposed by EC 9.2173(6)(f), that pedestrian walkways be distinguished from driving surfaces, is clear and objective. Although we tend to agree with intervenor, the Court of Appeals decision in *Tirumali* shrinks the already small universe of land use standards that qualify as "clear and objective" land use standards. We therefore turn first to the city's contention that EC 9.2173(6)(f) does not apply to the disputed building permit. The city notes that EC 9.2173(2) expressly limits application of the EC 9.2173 Commercial Zone Development Standards to "any *new* building with 25,000 square feet or more of floor area, and the portion of the development site specifically affected by the *new* building." (Emphases added). Once again, the city points out that the building permit at issue in this appeal authorizes renovation and conversion of an *existing* building, it does not approve a *new* building. As was the case with EC 9.2150, 9.8865 and 9.2175(4)(a), EC 9.2173(6)(f) does not apply to building permits such as the one that is at issue in this appeal that do not approve new buildings.

**D. Conclusion**

None of the EC provisions cited by petitioners support their contention that in issuing the disputed building permit, the city was required to apply land use regulations that are not clear and objective land use standards. Our September 10, 2004 order was based the erroneous assumption that the cited EC provisions applied to the disputed building permit. We assumed the cited EC provisions applied largely because neither the city nor the intervenor disputed petitioners' claim that the cited EC provisions were applicable land use standards. Based on intervenor's motion to

dismiss and the arguments included in the city's response brief, we now agree that the EC provisions cited by petitioners do not apply. Because petitioners have identified no land use standards that apply to the disputed building permit, petitioners have not established that the building permit qualifies as a statutory land use decision. Petitioners do not argue that the disputed building permit qualifies as a significant impacts test land use decision. *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982). Because petitioners have not established that we have jurisdiction to review the disputed building permit, intervenor's motion to dismiss is granted.

This appeal is dismissed.