

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

3
4 DONALD TOWNSEND, ROY C. PETERSON,)
5 KATHRYN NASH, NICHOLAS STEPHENS,)
6 and RONALD ASKER,)

7)
8 Petitioners,)
9)
10 vs.)

11)
12 CITY OF NEWPORT,)
13)
14 Respondent,)

15)
16 and)
17)
18 RICHARD RUGGIERO and BEVERLY)
19 RUGGIERO,)
20)

21 Intervenors-Respondent.)
22
23

24 Appeal from City of Newport.

25
26 Kurt Carstens, Newport, filed the petition for review
27 and argued on behalf of petitioners.

28
29 No appearance by respondent.

30
31 Steven L. Swartsley, Medford, filed the response brief
32 and argued on behalf of intervenors-respondent.

33
34 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
35 Referee, participated in the decision.

36
37 AFFIRMED 06/13/91

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's decision to issue a
4 building permit to intervenors-respondent (intervenors).

5 **MOTION TO INTERVENE**

6 Richard Ruggiero and Beverly Ruggiero move to intervene
7 in this appeal proceeding on the side of respondent.
8 Petitioners do not object to the motion, and it is allowed.

9 **STANDING**

10 Intervenors argue that none of the petitioners in this
11 appeal proceeding have standing to appeal to this Board
12 because they did not appear during the local proceedings
13 below.

14 Petitioner Roy C. Peterson appeared during the local
15 proceedings below individually. Record 45-46. Petitioner
16 Peterson also testified that he had hired an attorney who
17 was present at the hearing. His attorney stated he
18 represented the "appellants," Record 45, and later stated he
19 represented the "opponents." Record 15. However, the
20 attorney did not identify who the "appellants" and
21 "opponents" below were. Neither did the attorney submit
22 affidavits in this appeal proceeding to establish the
23 identity of the "appellants" or "opponents," and we find
24 nothing in the record disclosing who those people were.
25 While it is reasonably apparent that petitioner Peterson
26 appeared individually and through his attorney, it cannot be

1 ascertained from the record who, other than petitioner
2 Peterson, his attorney represented. Accordingly, the
3 appearance of petitioner Peterson's attorney does not
4 establish an appearance for anyone other than petitioner
5 Peterson. See East McAndrews Neighborhood Association v.
6 City of Medford, 104 Or App 280, 800 P2d 308 (1990), rev den
7 311 Or 150 (1991).

8 Petitioners Donald Townsend, Kathryn Nash and Ronald
9 Asker appeared individually below. Record 61-62.
10 Accordingly, petitioners Peterson, Townsend, Nash, and Asker
11 have standing to appeal to this Board. ORS 197.830(2).

12 We see nothing in the record to indicate that
13 petitioner Nicholas Stephens appeared below. Accordingly,
14 petitioner Stephens does not have standing to appeal to this
15 Board.

16 **FACTS**

17 The subject property is located on several tax lots,
18 and is zoned Retail Commercial (C-1). On May 30, 1990, the
19 city planning commission approved intervenors' application
20 for a conditional use permit for a 74 unit multifamily
21 housing and condominium hotel project on the subject
22 property (hereinafter referred to as the first decision).
23 Record 65, 82. No appeal was taken from that decision.

24 On June 12, 1990, intervenors filed a second
25 application for a conditional use permit for a housing
26 project on the subject property. The project proposed by

1 the second application was similar to the one approved by
2 the first decision, but sought approval for 128 multifamily
3 residential and hotel units. The planning commission
4 approved the second application. Petitioners appealed the
5 planning commission's approval of the second application to
6 the city council.

7 The city council reversed the decision of the planning
8 commission on the second application, and adopted a
9 significantly different interpretation of the C-1 zone from
10 that previously adopted by the planning commission. The
11 city council interpreted the Newport Land Use and
12 Development Code (NLUDC) to permit one single family
13 residence per lot in the C-1 zone. Accordingly, the city
14 council adopted a decision which denied intervenors' second
15 application requesting approval for 128 multifamily
16 residential and hotel units. In this opinion we refer to
17 this decision as the city's second decision.¹

18 Intervenors thereafter applied for, and the challenged
19 decision states the city would issue, a building permit to
20 begin construction of the 74 units approved by the planning
21 commission in the first decision.² This appeal followed.

¹The second application is not in the record. However, the parties agree the second application was submitted, and that it was considered by the city as explained in the text.

²It is not clear whether the challenged decision is expressed in the minutes of the November 19, 1990 city council meeting (minutes), or in the November 26, 1990 letter (letter) from the city planning director. The

1 **JURISDICTION**

2 Intervenors contend this Board does not have
3 jurisdiction over this appeal because petitioners'
4 assignments of error request only that this Board review the
5 merits of the unappealed first decision, but that
6 petitioners failed to exhaust available administrative
7 remedies with regard to the first decision. ORS 197.825(2).
8 However, because this contention relates to petitioners'
9 assignments of error rather than to the nature of challenged
10 decision itself, we address intervenors' exhaustion claims
11 in our resolution of the assignments of error below.

12 Intervenors also argue this Board does not have

minutes state that the city council adopted the following motion regarding the issuance of a building permit pursuant to the first decision:

"* * * the Council believes that [the first decision] does exist as a conditional use permit, and in the event the applicant applies for a building permit and submits additional materials (such as plans, etc.) and everything complies with the Uniform Building Code, and also meets the conditions attached to [the first decision] and the zoning ordinances, that [intervenors] would be entitled to issuance of a building permit." Record 17.

The letter states, in part:

"* * * [T]he Newport City Council determined that [the first decision] is valid. In the event that a completed building permit application and its supporting materials are submitted to the City of Newport, and on the condition that the zoning ordinance, the building codes, and [other] conditions * * * are followed, a building permit should issue."

"* * * * *" Record 3.

Neither party contends there is any legally relevant distinction between the positions taken in the letter and the minutes. As far as we can tell both express the same decision.

1 jurisdiction over the challenged decision because it is not
2 a final city decision regarding the building permit.

3 ORS 197.825(1) and 197.015(10) provide that the land
4 use decisions over which this Board has jurisdiction must be
5 "final" decisions. The challenged decision is a final
6 quasi-judicial, discretionary decision that the proposed
7 development is eligible for a building permit. It is a
8 final decision regarding the application of the requirements
9 of the C-1 zone to the application for a building permit.³
10 Accordingly, the challenged decision is a final land use
11 decision over which we have jurisdiction. See Sensible
12 Transportation Options for People v. Metropolitan Service
13 District, 100 Or App 564, 570, 787 P2d 498 (1990); Jentzsch
14 v. City of Sherwood, ___ Or LUBA ___ (LUBA Nos. 90-125, 90-
15 151 and 90-158, Order on Motions to Dismiss, February 14,
16 1991); Headley v. Jackson County, ___ Or LUBA ___ (LUBA
17 No. 89-144, April 19, 1990).

18 **FIRST ASSIGNMENT OF ERROR**

19 "The city council erred in failing to enforce its
20 own zoning ordinance."

21 **SECOND ASSIGNMENT OF ERROR**

22 "The city council erred in its determination that
23 [the first decision] was a final order."

³We understand the challenged decision to be in the nature of a declaratory ruling concerning the critical dispute between the parties, i.e. may a building permit be issued for more than one dwelling on the property.

1 The central issue in this appeal is whether the first
2 decision was a final unappealed land use decision approving
3 74 multifamily residential and hotel units for which the
4 city could issue a building permit.

5 Petitioners argue the first decision never became final
6 and, consequently, there was no city approval to serve as
7 the basis for issuance of a building permit. Petitioners
8 argue:

9 "Before the appeal period was complete,
10 [r]espondent sought to amend the [first decision].
11 As soon as the [second application] was filed, the
12 [first decision] was, by operation of law,
13 stayed." Petition for Review 10.

14 As we understand it, petitioners contend that as a
15 matter of law, because intervenors filed a second
16 development application within the period provided for
17 taking a local appeal on the first decision, the second
18 application had the effect of "staying" the first decision.⁴
19 Further, petitioners maintain that because the city
20 council's second decision denied the second development
21 application, it also has the legal effect of reversing the
22 planning commission's first approval decision. In addition,
23 petitioners argue the first decision was prevented from

⁴The city staff report and petitioners' brief refer to the second application as an application to amend the conditional use permit approved in the first decision. However, whether or not the second application is characterized as an application to amend the conditional use permit approved in the first decision makes no difference to our disposition of this appeal.

1 becoming final by, or was merged into, the city council's
2 second decision. According to petitioners, under any of
3 these theories, there is no remaining approval decision to
4 serve as the basis for issuance of a building permit; and,
5 therefore, the city erred in determining that a building
6 permit would issue.

7 We disagree with petitioners.

8 The first decision of the planning commission, to
9 approve a conditional use permit for the proposed 74 unit
10 multifamily residential and hotel development, was not
11 appealed to the city council. NLUDC section 2-6-4.005(B)
12 provides:

13 "If no appeal shall be taken within [the] fifteen-
14 day period, the decision of the [Planning]
15 Commission shall be final."

16 Petitioners did not appeal the first planning
17 commission decision. Further, we do not understand the
18 second development application to have operated as an appeal
19 of the first planning commission decision. The second
20 application was a separate application, for a greater
21 intensity of development than allowed by the first decision,
22 for which intervenors paid a second application fee.
23 Record 57. There is nothing to indicate that the first
24 decision was eliminated or merged into the second decision
25 concerning the subject property. Certainly, there is
26 nothing in the NLUDC to support a conclusion that the second
27 decision has such a legal effect.

1 Because no appeal of the first decision was filed,
2 under the above quoted NLUDC provision, the first decision
3 became a final decision. Nothing to which we have been
4 cited would have the legal effect of preventing the city
5 from issuing a building permit on the basis of such an
6 unappealed planning commission decision.

7 Finally, petitioners argue that under Schoonover v.
8 Klamath County, 104 Or App 155, ___ P2d ___ (1991); and
9 Parks v. Tillamook Co. Comm./Spliid, 11 Or App 177, 501 P2d
10 85 (1972), even though no local appeal was taken from the
11 first decision, and that decision was not appealed to this
12 Board, we should review the correctness of the first
13 decision because it was relied upon by the city in making
14 the challenged decision. Petitioners assert that the city's
15 decision on the second application applies the correct
16 interpretation of the C-1 zone, and the city erred in
17 failing to apply that interpretation in making the first
18 decision.

19 We disagree with petitioners' assumption that we may
20 review the merits of the unappealed first planning
21 commission decision. None of the authorities cited by
22 petitioners support their argument that a local government
23 can or must deny building permits for approved conditional
24 uses based on subsequent code interpretations in quasi-
25 judicial proceedings, where the relevant conditional use
26 permit remains effective and was neither appealed locally

1 nor to this Board.

2 The Schoonover decision does not control here.
3 Schoonover involved an appeal of a Land Conservation and
4 Development Commission (LCDC) enforcement order against the
5 county. LCDC has specific statutory authority to issue
6 enforcement orders against a local government if LCDC
7 determines the conditions identified in ORS 197.320 exist.
8 There is no statutory or other jurisdictional prerequisite
9 that LCDC exhaust all local appeals of those local decisions
10 which it determines justify the commencement of an
11 enforcement proceeding and the issuance of an enforcement
12 order. Schoonover does not stand for the proposition that
13 any allegedly erroneous local planning decision may be
14 appealed to this Board regardless of whether administrative
15 appeals below were exhausted. ORS 197.825(2)(a) provides
16 that our jurisdiction is limited to the following:

17 "* * * those cases in which the petitioner has
18 exhausted all remedies available by right before
19 petitioning the board for review."

20 Petitioners could have, but did not, appeal the first
21 planning commission decision. Because petitioners did not
22 exhaust their administrative remedies below, we may not
23 review the city's first decision here.

24 Additionally, Parks does not apply here. That case
25 determines that a local government building official, when
26 acting in a ministerial capacity, must apply the law
27 correctly. Where ministerial decisions are made

1 incorrectly, a writ of mandamus may issue to require the
2 local government official to correctly discharge his
3 ministerial responsibilities. Parks, supra, 11 Or App at
4 206-207.

5 Parks does not support petitioners' argument that the
6 legal correctness of the city's legal interpretations in the
7 first decision may or must be reexamined when issuing a
8 building permit for the use approved by the first decision.
9 Parks simply says that in issuing a building permit, the
10 building official must correctly apply the law. Here,
11 unlike in Parks, the "law" is the conditional use permit
12 approved by the first decision. The conditional use permit
13 may or may not be based on a correct interpretation of the
14 C-1 zone. However, because the time for appeal of that
15 conditional use permit has expired, the time for LUBA review
16 of the correctness of the legal interpretations supporting
17 that conditional use permit has passed.

18 The challenged decision to issue a building permit was
19 based on the unappealed first planning commission decision
20 approving the proposed 74 unit multifamily residential and
21 hotel development. Petitioners cite no reason to invalidate
22 the challenged building permit other than those discussed
23 above. For the reasons discussed above, we do not have
24 authority to review petitioners' claims regarding the merits
25 of the unappealed first decision. Accordingly, there is no
26 basis in this appeal to reverse or remand the challenged

1 decision.

2 The first and second assignments of error are denied.

3 The city's decision is affirmed.

4