

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOLLYWOOD NEIGHBORHOOD)

5 ASSOCIATION, INC.,)

6)

7 Petitioner,)

8)

9 vs.)

10) LUBA No. 91-063

11 CITY OF PORTLAND,)

12)

13 Respondent,)

12) FINAL OPINION
13) AND ORDER

14)

15 and)

16)

17 GENERAL HEALTH, INC., an Oregon)

18 corporation, dba DELTA CLINIC,)

19)

20 Intervenor-Respondent.)

21
22
23 Appeal from City of Portland.

24
25 Michael E. Haglund, Portland, represented petitioner.

26
27 Ruth Spetter, Portland, represented respondent.

28
29 Steven A. Moskowitz, Portland, represented intervenor-
30 respondent.

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

34
35 KELLINGTON, Chief Referee, dissenting.

36
37 DISMISSED 07/12/91

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 Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a letter by the city Bureau of
4 Planning stating that a private methadone clinic is an
5 allowed use in the Office Commercial 1 (CO1) zone.

6 **MOTION TO INTERVENE**

7 General Health, Inc., an Oregon corporation doing
8 business as Delta Clinic, moves to intervene in this
9 proceeding on the side of respondent. There is no objection
10 to the motion, and it is allowed.

11 **MOTION TO DISMISS**

12 Respondent moves to dismiss petitioner's appeal for
13 lack of jurisdiction. Respondent argues that under ORS
14 197.825(1), this Board's jurisdiction is limited to the
15 review of "land use decisions." According to respondent,
16 the challenged decision is not a land use decision because
17 (1) it is not a final decision, and (2) it is a
18 "ministerial" decision.¹ We address the former ground for
19 dismissal first.

20 The appealed letter is addressed to intervenor-
21 respondent's (intervenor's) director, signed by the chief
22 planner of the Land Use Permits section of the Bureau of
23 Planning, and captioned "Zoning Confirmation for 4037 NE

¹Under ORS 197.015(10)(b)(A) and (C), "land use decision" does not include local government decisions which are "made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment." Respondent refers to such decisions as "ministerial."

1 Tillamook." Record 1. After stating the subject property
2 is zoned CO1, the letter further states:

3 "You have asked for confirmation that a private
4 methodone clinic can operate at this location. It
5 is my understanding that the methodone clinic will
6 provide counseling services to all of the clients
7 to whom methodone is dispensed, in addition to
8 providing the daily methodone dosage. The
9 majority of the clients will attend weekly
10 counseling sessions. In the course of treatment,
11 client[s] undergo tests for drug use. Medical
12 examinations of new clients may also take place at
13 this facility.

14 "The above described use falls under the Office
15 use category as described in Chapter 33.920.240 of
16 the Portland Zoning Code. Examples of office use
17 include medical and dental clinics, medical and
18 dental labs, and blood-collection facilities.
19 Therefore, a methodone clinic is an allowed use in
20 the CO1 zone." Id.

21 Respondent argues that under the definition of "land
22 use decision" in ORS 197.015(10)(a), a land use decision
23 must be a final decision, as opposed to one which is merely
24 advisory. According to respondent, if other actions must
25 take place to give the appealed decision effect, it is not a
26 "final" decision. N.O.P.E. in Mulino v. Port of Portland, 2
27 Or LUBA 243 (1980) (approval of study recommending preferred
28 site for new airport is not final decision).

29 Respondent argues that the appealed "zoning
30 confirmation letter" is merely an advisory statement of
31 opinion. Respondent contends there is nothing in the
32 Portland City Code (PCC) which makes the position stated in
33 the letter binding on the city or any other party.

1 According to respondent, a final decision on whether a
2 private methodone clinic is a permitted use in the CO1 zone
3 will not be made until a building or occupancy permit for
4 such a use is applied for, and a review of such application
5 is conducted pursuant to PCC 33.700.010 ("Uses and
6 Development Which Are Allowed by Right").

7 Petitioner argues that the challenged letter is the
8 city's final decision with regard to whether intervenor's
9 proposed methodone clinic is a permitted use in the CO1
10 zone. According to petitioner, that the letter is the
11 city's final decision on this matter is evident because
12 (1) it is reduced to writing and bears the signature of a
13 city planning official, as required by OAR 661-10-010(3);
14 and (2) the Oregon Department of Human Services, Office of
15 Alcohol and Drug Abuse Programs, relied on the letter in
16 issuing a Letter of Approval for operation of intervenor's
17 proposed methodone clinic at the subject location.²

²Exhibit C to petitioner's Opposition to Motion to Dismiss is a letter to petitioner's attorney from a supervisor in the Office of Alcohol and Drug Abuse Programs, dated June 6, 1991, which states:

"[Intervenor] has provided documentation that the local planning body has found that the [proposed methodone] clinic could operate at its proposed location in conformity with local zoning regulations. ORS 197.180(1)(b) obligates this agency to respect local land use decisions, so we will treat the city's decision as evidence of compliance with local land use laws within the meaning of our licensing authority. Therefore, we will issue a Letter of Approval to Delta Clinic if and when they [sic] demonstrate compliance with all other licensing criteria."

1 This Board has exclusive jurisdiction to review "land
2 use decisions." "Land use decision" is defined by ORS
3 197.015(10)(a) to include "[a] final decision or
4 determination by a local government * * *."³ (Emphasis
5 added.) When a local government interprets existing
6 comprehensive plan or land use regulation provisions without
7 amending or adopting plan or land use regulation provisions
8 or granting or denying a development permit or other land
9 use approval, such a decision is a final decision if it is
10 issued pursuant to an established local process for issuing
11 binding declaratory rulings. General Growth v. City of
12 Salem, 16 Or LUBA 447, 451-53 (1988); see also Medford
13 Assembly of God v. City of Medford, 297 Or 138, 140, 681 P2d
14 790 (1984); Friends of Lincoln County v. Newport, 5 Or LUBA
15 346 (1982).

16 In this case, the appealed letter does not adopt or
17 amend city plan or land use regulation provisions. Further,
18 the appealed letter interpreting the PCC was not issued as

Petitioner assumes, and the other parties do not dispute, that the "documentation," provided to the Office of Alcohol and Drug Abuse Programs is the appealed letter. The Office of Alcohol and Drug Abuse Programs issued a Letter of Approval to intervenor on June 19, 1991. Petition for Review, Exhibit D.

³A decision is a "land use decision" subject to this Board's jurisdiction under ORS 197.825(1), if it either meets the statutory definition of ORS 197.015(10) or satisfies the "significant impact" test enunciated in Petersen v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977), and City of Pendleton v. Kerns, 294 Or 166, 653 P2d 992 (1982). However, under either test, a land use decision must be a final decision. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 748, 752 (1988); CBH Company v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988).

1 part of a decision approving a building, occupancy or other
2 permit required for operation of intervenor's methadone
3 clinic. The only question remaining to be decided is
4 whether the letter was issued pursuant to PCC provisions
5 which authorize the planning department to issue binding
6 declaratory rulings interpreting the PCC.

7 PCC Chapter 33.700 is entitled "Administration and
8 Enforcement." PCC 33.700.010 ("Uses and Development Which
9 Are Allowed By Right") establishes a process for
10 "ministerial review" of "proposals for uses or developments
11 which are allowed by right under [Title 33]." It provides,
12 in relevant part:

13 **"A. Method of Review.** Requests for uses and
14 development which are allowed by right are
15 reviewed for compliance with zoning
16 regulations. The review is a
17 nondiscretionary review, sometimes called a
18 ministerial review, and is processed with a
19 Type I procedure. Decisions are made by the
20 Planning Director and are final. The review
21 is done in a timely manner according to
22 general operating procedures of the Bureau of
23 Planning and the City.

24 **"B. Applications**

25 "1. Applications for nondiscretionary
26 reviews are generally processed in
27 conjunction with obtaining a building
28 permit or home occupation permit.
29 Applicants must submit information
30 showing that the proposal complies with
31 this Title, including a site plan with
32 the necessary level of detail.

33 * * * * *

1 **"C. Applications which will not be accepted.**

2 "1. Prohibited uses and development.
3 Applications for uses or development
4 which are listed as prohibited in this
5 Title will not be accepted.

6 "2. Reasonable use. The Planning Director
7 or a review body may refuse an
8 application when the proposed structure
9 has been clearly designed for a use or
10 development different from that which is
11 being proposed, and could not reasonably
12 be expected to meet the needs of the
13 proposed use or development. * * *

14 "3. Procedure. When an application is not
15 accepted, the applicant may appeal the
16 decision through the Type II procedure.
17 * * * A letter requesting the appeal,
18 showing how the application complies
19 with the requirements of Title 33, and
20 stating the reasons the appeal should be
21 granted will substitute for an official
22 appeal form."

23 In contrast, PCC 33.700.020 ("Uses and Development Which Are
24 Not Allowed By Right") provides that requests for uses and
25 developments which are not allowed by right require a "land
26 use review" pursuant to quasi-judicial procedures set out in
27 other PCC chapters.

28 PCC Chapter 33.700 makes no mention of "zoning
29 confirmation letters" and does not specifically establish a
30 process for obtaining a binding declaratory ruling on
31 whether a use is allowed by right. However, PCC
32 33.700.010.A provides the Planning Director may make final
33 decisions concerning "[r]equests for uses and development
34 which are allowed by right * * * according to general

1 operating procedures of the Bureau of Planning * * *."

2 PCC 33.700.010.B.1 states that an application for a
3 decision pursuant to PCC 33.700.010 is "generally" processed
4 in conjunction with obtaining a building or home occupation
5 permit, and that an applicant must submit information
6 demonstrating compliance with PCC Title 33, including a
7 "site plan with the necessary level of detail." Although
8 the term "generally" is used, the city has submitted an
9 unrefuted affidavit by its planning director stating that in
10 fact the PCC 33.700.010 review process is conducted only in
11 conjunction with such permit applications. Affidavit of
12 Robert Stacey 3-4. The planning director's affidavit also
13 describes the "general operating procedures" followed by the
14 city in conducting "plan check" reviews pursuant to PCC
15 33.700.010, and states that such procedures were not
16 followed in issuing the appealed letter. Id. at 3.
17 Petitioner does not refute this statement.

18 There was no application for approval of a permit for a
19 methadone clinic before the planning department when the
20 appealed letter was issued,⁴ and the city did not follow the
21 general operating procedures for making PCC 33.700.010
22 decisions, as explained in the planning director's

⁴In fact, the local record in this appeal includes no application of any kind and consists solely of the challenged letter itself.

1 affidavit, in issuing the appealed letter.⁵ In view of
2 (1) the repeated references in PCC chapter 33.700 to
3 "applications," "applicants" and various kinds of "permits,"
4 (2) the absence of any reference in PCC chapter 33.700 to
5 declaratory rulings or zoning confirmation letters, and
6 (3) the lack of any reference to PCC 33.700.010 in the
7 challenged letter itself, we conclude the challenged letter
8 is not a "final" decision rendered pursuant to PCC
9 33.700.010. Absent a more explicit basis in the code
10 language itself for concluding the challenged letter is
11 properly viewed as a legally binding interpretation of the
12 PCC, we have no basis for concluding it is such a
13 declaratory ruling, over the city's objection that it was
14 not issued as such. We conclude the letter simply provides
15 an advisory opinion on whether a private methodone clinic
16 with certain assumed characteristics is considered a
17 permitted use in the CO1 zone.

18 That the Office of Alcohol and Drug Abuse Programs may

⁵We have some questions concerning the explanation provided in the planning director's affidavit concerning the "general operation procedures of the Bureau of Planning and the City" referred to in PCC 33.700.010.A. Apparently the operation procedures described in the affidavit do not exist in any organized written form in the PCC or elsewhere. Further, the procedure described by the planning director states that the final decisions envisioned by PCC 33.700.010.A occur only in conjunction with obtaining a building permit or a home occupation permit. However during a telephone conference on July 8, 1991, the city took the position that while an occupancy permit must be issued for the proposed change of use to a methodone clinic, a building permit is not required. We assume any interpretive issues presented by an application for an occupancy permit may be challenged, in the appropriate forum, in an appeal of the city's final decision on the occupancy permit.

1 have relied on the appealed letter in issuing a Letter of
2 Approval for a methodone clinic in the CO1 zone does not
3 alter our conclusion that the letter is not a final decision
4 by the city. We have recognized that a local government's
5 determination of the compatibility of a proposed use with
6 its acknowledged plan and land use regulations, made as part
7 of a state agency permit approval process, can be a "final"
8 decision applying the local government's plan and
9 regulations if (1) the state agency is required by statute
10 or rule to assure that the proposed use is compatible with
11 the local government plan and regulations, and (2) the state
12 agency is authorized by statute or rule to rely on the local
13 government's determination of compatibility. Flowers v.
14 Klamath County, 17 Or LUBA 1078, 1083 (1989).

15 In this instance, there was no specific proposed use
16 before the planning department and there is no indication
17 the appealed letter was issued as part of a state agency
18 permit approval process. Further, we are cited to no
19 authority allowing the state agency in question to rely on
20 the city's letter.⁶

21 We conclude the appealed letter is not a "final"

⁶We note that OAR 660-31-035 allows state agencies to rely on local government compatibility determinations in certain instances, when acting on Class A or Class B permit applications. However, OAR 661-31-012 does not list Department of Human Resources Letters of Approval for methodone clinics as either Class A or Class B state agency permits.

1 decision. Respondent's motion to dismiss is granted.⁷

2 This appeal is dismissed.⁸

⁷Because the motion to dismiss must be granted in any case, we do not address whether the appealed decision is excepted from the definition of "land use decision" under ORS 197.015(10)(b)(A) or (C), argued by respondent as an alternative basis for dismissal.

⁸In a telephone conference on July 8, 1991, the Board heard argument on petitioner's motion to stay the appealed decision and made an oral ruling to deny the motion. Because we determine we do not have jurisdiction to review the appealed decision, we do not issue a written order denying the motion for stay.

1 Kellington, Chief Referee, dissenting.

2 The majority characterizes the challenged decision as
3 an "advisory" opinion of the city's chief planner. The
4 majority concludes the challenged decision is not a "final"
5 decision within our review authority, and dismisses the
6 appeal. I would characterize the challenged decision as a
7 final decision within our review authority.⁹ For the
8 reasons explained below, I interpret the challenged decision
9 as a final city determination by the city's chief planner
10 concerning the "application" of a "zoning ordinance." ORS
11 197.015(10).

12 The PCC identifies a particular methodology for
13 determining whether any given use may be permitted in a
14 zoning district. Specifically, the PCC articulates several
15 general "use categories" into which the city will place most
16 proposed uses PCC 33.920.¹⁰ PCC 33.920.010 states the "use
17 categories" serve the following purposes:

18 "This Chapter classifies land uses and activities
19 into use categories on the basis of common
20 functional, product or physical characteristics.
21 Characteristics include the type and amount of
22 activity, the type of customers or residents, how
23 goods or services are sold or delivered, and
24 certain site factors. The use categories provide

⁹I express no opinion on whether the challenged decision is within the "ministerial" exception to the definition of "land use decision" as the city argues.

¹⁰PCC 33.700.070(C) provides that if the city determines a proposed use is not covered by a use category, the planning director may initiate an amendment to the PCC to add a "new use category."

1 a systematic basis for assignment of present and
2 future uses to zones. The decision to allow or
3 prohibit the use categories in the various zones
4 is based on the goals and policies of the
5 Comprehensive Plan."

6 PCC 33.920.030 provides certain considerations relevant
7 to use classification decisions:

8 "Uses are assigned to the category whose
9 description most closely describes the nature of
10 the primary use. The 'Characteristics' subsection
11 of each use category describes the characteristics
12 of each use category.* * *" PCC 33.920.030(1).

13 PCC 33.920.240 describes the characteristics of
14 "office" uses, and lists the following examples of office
15 uses "[m]edical and dental clinics, medical and dental labs;
16 and blood collection facilities."¹¹ PCC 33.130.100 provides
17 that "office" uses are permitted in the CO1 zone. The
18 decision determines the proposed methadone clinic (Delta
19 Clinic), with the characteristics outlined, is properly
20 considered an "office" use under the PCC because it shares
21 some of the characteristics of one or several of the above
22 quoted examples of "office" uses. The decision concludes

¹¹PCC 33.920.030(B) states the following role of the listed examples in determining whether a particular use falls within a specific use category:

"The 'Examples' subsection of each use category provides a list of examples that are included in the use category. The names of uses on the list are generic. They are based on the common meaning of the terms and not on what a specific use may call itself. For example, a use whose business name is 'Wholesale Liquidation' but that sells mostly to consumers, would be included in the Retail Sales And Service category rather than the Wholesale Sales category. This is because the actual activity on the site matches the description of the Retail Sales And Service category."

1 that "a methadone clinic is an allowed use in the C01 zone."
2 Record 1.

3 There is no PCC provision which specifically states how
4 use classification decisions, like the challenged decision,
5 are to be made. More important, for purposes of our
6 resolution of the city's motion to dismiss, there is no
7 specific PCC provision which states when such use
8 classification decisions become "final" city decisions.¹²

9 However, PCC 33.700.070 provides the following "General
10 Rules for Application of Code Language":

11 "A. **Reading and applying the code.** Literal
12 readings of the code language will be used.
13 Regulations are no more or less strict than
14 as stated. Applications of the regulations
15 that are consistent with the rules of this
16 section are nondiscretionary actions of the
17 Planning Director to implement the code. The
18 action of the Planning Director is final."

19 "B. **Ambiguous or unclear language.** Where the
20 language is ambiguous or unclear, the
21 Planning Director may issue a statement of
22 clarification processed through a Type III
23 procedure, or initiate an amendment to Title
24 33 as stated in Chapter 33.835, Goal, Policy,
25 and Regulation Amendments.^[13]

¹²In his affidavit, the planning director states that use classification decisions are made during a "plan check process" which process "only" occurs "in conjunction with obtaining a building permit or a home occupation permit" under PCC 33.700.010. Affidavit of Robert Stacey 3-4. Here, however, there is no dispute that no building or home occupation permit must be obtained.

¹³PCC 3.710.090 authorizes the planning director to "delegate review and decision-making authority to the Bureau of Planning staff." There is no dispute the city's chief planner was acting within the scope of her

1 **"C. Situations where the code is silent.**
2 Proposals for uses where the code is silent
3 or where the rules of this section do not
4 provide a basis for concluding that the use
5 is allowed or prohibited. The Planning
6 Director may initiate an amendment to Title
7 33 to add a new use category, as stated in
8 Chapter 33.835, Goal, Policy, and Regulation
9 Amendments."¹⁴ (Emphasis supplied.)

10 I see no reason in the language of the PCC why the
11 challenged decision is not properly characterized as a
12 decision falling within the terms of either PCC
13 33.700.070(A), as a literal application of the PCC use
14 classification regulations regarding "office" uses, or (B)
15 as a "statement of clarification" of ambiguous or unclear
16 code language. Accordingly, I believe the challenged
17 decision is a "formal determination" which properly serves
18 as a basis for our review "even though it may only be
19 declaratory" under Medford Assembly of God v. Medford,
20 supra.¹⁵

authority in issuing the challenged decision. The dispute here is whether the challenged decision should be characterized as a "final" city decision for purposes of determining the jurisdiction of this Board.

¹⁴It is not clear under what circumstances the planning director may utilize PCC 33.700.070(C) to respond to a use classification problem. However, here, no Title 33 amendment was initiated below and, consequently, it is clear that the challenged decision was not made under PCC 33.700.070(C).

¹⁵No "Type III" proceedings were conducted in making the challenged decision. If the challenged decision is properly characterized as one falling within the terms of PCC 33.700.070(B), that no Type III proceedings were conducted may provide the basis for an assignment of error, however, such failure would not establish that this Board lacks jurisdiction over the challenged decision.

1 The challenged decision is reduced to writing and is
2 signed by the chief planner, whom no one disputes had the
3 authority to make the decision. OAR 661-10-010(3). Nothing
4 in the challenged decision or the PCC suggests that the
5 decision is not binding on the city. Further, nothing in
6 the PCC or the challenged decision suggests there is
7 anything else which must occur before the Delta Clinic is
8 properly considered an "office use" in the city's CO1 zone.
9 In addition, there is nothing in the PCC to suggest any
10 further land use approvals are required for the Delta Clinic
11 to operate.¹⁶ The fact that the city may at some
12 undetermined point choose to make another decision regarding
13 whether the Delta Clinic is properly categorized as an
14 "office" use does not, in my view, make the challenged
15 decision any less a final decision under ORS 197.015(10) and
16 OAR 661-10-010(3).

17 In sum, I see nothing in the challenged decision, the
18 PCC, any statutory or administrative rule, or any of the
19 case authorities cited, to provide a basis for this Board to
20 refuse to review the challenged decision on the basis that
21 it is not "final." Accordingly, I would determine that the
22 challenged decision is a final city decision, and would
23 address the city's second basis for its motion to dismiss --

¹⁶Apparently, the structure in which the Delta Clinic proposes to
conduct its operations is an existing structure. As stated above,
according to the city no building permit is required for the Delta Clinic
to operate in this structure.

1 that the challenged decision is within the "ministerial"
2 exception to our jurisdiction under ORS 197.015.

3 I respectfully dissent.