

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

DOROTHY GAGE and ASH CREEK)
NEIGHBORHOOD ASSOCIATION,)
Petitioners,)
vs.)
CITY OF PORTLAND,)
Respondent,)
and)
FP-35 PARTNERS,)
Intervenor-Respondent.)

LUBA No. 92-057

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

Peter A. Kasting, Portland, filed a response brief and argued on behalf of respondent.

Jeff H. Bachrach, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan.

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

REMANDED 09/15/92

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

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

6 **MOTION TO INTERVENE**

7 FP-35 Partners, the applicant below, moves to intervene
8 in this proceeding on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject property is 6.37 acres in size, currently
12 undeveloped and zoned Medium Density Single-Dwelling
13 Residential (R7). The city zoning map indicates the
14 presence of a "water feature" on the eastern half of the
15 property.¹ A creek traverses the eastern portion of the
16 subject property, and the property may contain wetlands
17 subject to the jurisdiction of the Division of State Lands.
18 The surrounding property is zoned Low Density
19 Single-Dwelling Residential (R10).

20 On June 9, 1981, the city approved a conditional use
21 permit and preliminary development plan for the Cedar
22 Meadows PUD. Final development plan approval was granted on
23 September 17, 1984. As finally approved in 1984, the PUD
24 included 35 multi-family dwelling units in six buildings,

¹The significance of the "water feature" designation is an issue in this appeal.

1 three detached garage structures for 22 cars and 55
2 additional parking spaces. The development was to be
3 clustered on the western half of the property. Sometime
4 after the original PUD approval, fill was deposited on
5 portions of the property. Petitioners allege the fill was
6 placed on the subject property illegally.

7 On November 5, 1991, intervenor applied to the city for
8 what it characterized as a "minor amendment to the PUD
9 development plan." Record 24. The proposed amendment does
10 not alter the number of dwelling units, but reduces the
11 number of residential structures from six to three. The
12 amended development plan also includes three detached garage
13 structures for 16 cars and 65 additional parking spaces.
14 The locations of the access street from S.W. Multnomah Blvd.
15 and of interior streets are not changed by the proposed
16 amendment, but the distance between the proposed structures
17 and the property boundaries and the storm water detention
18 easement on the eastern half of the property are increased.

19 On December 2, 1991, the planning department approved
20 the subject application. Petitioners appealed this
21 decision. On February 20, 1992, after a public hearing, the
22 hearings officer approved the proposed amendment to the PUD
23 development plan. This appeal followed.

24 **FIRST ASSIGNMENT OF ERROR**

25 "Respondent misconstrued the applicable law,
26 failed to provide adequate findings under
27 ORS 227.173(2) and made a decision not supported

1 by substantial evidence in the whole record when
2 it approved the application for a 'minor
3 modification' under [Portland City Code (PCC)]
4 33.269.440 rather than applying the law in effect
5 at the time the application was initially
6 approved."

7 ORS 227.178(3) provides:

8 "If the [permit, limited land use decision or zone
9 change] application was complete when first
10 submitted or the applicant submits the requested
11 additional information within 180 days of the date
12 the application was first submitted and the city
13 has a comprehensive plan and land use regulations
14 acknowledged under ORS 197.251, approval or denial
15 of the application shall be based upon the
16 standards and criteria that were applicable at the
17 time the application was first submitted."

18 Petitioners contend that under the above quoted
19 statutory provision, the standards applicable to the
20 proposed PUD amendment are the standards that were in effect
21 when the original application for approval of the Cedar
22 Meadows PUD was submitted to the city in 1981. Petitioners
23 further argue the 1981 PCC standards for approval of an
24 amendment to a PUD are entirely different from the 1991 PCC
25 standards applied by the hearings officer here. According
26 to petitioners, the proposed PUD amendment does not satisfy
27 the 1981 PCC standards.

28 In Tuality Lands Coalition v. Washington County, ___
29 Or LUBA ___ (LUBA Nos. 91-035 and 91-036, November 12,
30 1991), an issue was raised concerning the application of the
31 identically worded statutory provision applicable to
32 counties (ORS 215.428(3)) to two related development

1 applications. The question was whether under the statute,
2 the standards in effect when the first application was filed
3 governed the second application as well. We stated:

4 "ORS 215.428(3) requires the county to apply the
5 standards in effect at the time a development
6 application is first submitted, to that
7 development application. However, there is
8 nothing in ORS 215.428(3) which requires the
9 county to apply the standards in effect at the
10 time one application is submitted to a distinct
11 and subsequent application. For purposes of
12 ORS 215.428(3) then, the question is whether the
13 second development application was a separate and
14 distinct application from the application
15 submitted [previously]." Id., slip op at 12.

16 In this case, intervenor filed a separate application
17 for a minor PUD amendment. Record 79. Under the PCC, an
18 application for a minor PUD amendment is subject to
19 procedures and standards different from those governing
20 initial applications for PUD approval. PCC 33.269.440. We
21 conclude the subject PUD amendment application is a separate
22 and distinct application from the original PUD application
23 filed in 1981 and, therefore, the standards in effect when
24 the PUD amendment application was first filed apply.

25 The first assignment of error is denied.

26 **SECOND ASSIGNMENT OF ERROR**

27 "Respondent misconstrued the applicable law,
28 failed to provide adequate findings under
29 ORS 227.173(2) and made a decision not supported
30 by substantial evidence in the whole record when
31 it found compliance with PCC 33.269.440[.A.1]."

32 Under this assignment of error, petitioners argue the
33 city erred in determining the proposed amendment to the

1 final development plan for Cedar Meadows is a "minor"
2 amendment, rather than a "major" amendment.²
3 PCC 33.269.440.A defines major and minor changes to PUD
4 development plans as follows:

5 "1. Major changes. A major change to a [PUD]
6 development plan is one that may have a
7 significant impact on the surrounding area or
8 will cause a substantial change in the PUD,
9 as approved. Major changes may include:

10 "a. An increase in the density, including
11 the number of housing units;

12 "b. In R zones, a change in the mix of
13 houses and multi-dwelling structures and
14 increases in the amount of land for
15 nonresidential uses;

16 "c. A reduction in the amount of approved
17 open area;

18 "d. Changes to the vehicular system which
19 result in a significant change in the
20 amount or location of streets, common
21 parking areas, and access to the PUD;

22 "e. Changes within 50 feet of the perimeter
23 of the PUD where it abuts an R zone;

24 "f. Other changes of similar scale that
25 [fall] under the standards of this
26 subsection.

27 "2. Minor changes. Minor changes are all other
28 changes to the development plan which will
29 have little effect on the neighborhood and
30 which conform to the intent of the
31 preliminary [development] plan approval."

²Under PCC 33.269.440.B.1, a "major" amendment to a PUD development plan is processed the same as the original application for approval of the PUD development plan.

1 (Emphasis added.)

2 The challenged decision states:

3 "The applicant proposes to reduce the number of
4 residential buildings from six to three * * * and
5 increase the distance between the [residential and
6 garage] structures and the property boundaries,
7 fill areas and the area of the water detention
8 easement. None of these changes will increase the
9 amount of land in nonresidential development.
10 * * *

11 "It is not clear whether any of these changes will
12 occur within 50 feet of the perimeter of the PUD.
13 It may be that some of the structures were or are
14 planned to be within 50 feet of the perimeter.
15 However, the modifications proposed will move the
16 structures further from the perimeter than
17 previously approved. This modification does not
18 make the proposal into a major change.
19 Subsections 1a through 1f only list examples of
20 major changes. The criteri[on] for what
21 constitutes a major change is that it 'is one that
22 may have significant impact on the surrounding
23 area or will cause a substantial change in the
24 PUD, as approved.' The proposed changes that will
25 occur within 50 feet of the perimeter, if any,
26 amount to no more than increasing the distance
27 between structures and the perimeter. This will
28 have no significant impact, nor will it
29 substantially change the PUD.

30 "The [PCC] provides that all changes that do not
31 constitute major changes are minor changes. The
32 density of this development and improvements such
33 as roads remain essentially the same. * * * This
34 proposal will have little effect on the
35 neighborhood and does conform to the intent of the
36 preliminary [development] plan approval * * *.
37 The Bureau of Planning correctly identified the
38 proposed modifications as minor changes."
39 (Emphasis added.) Record 3.

40 Petitioners contend the county erred in concluding the
41 changes listed in PCC 33.269.440.A.1.a through f are merely

1 examples of possible major changes to a PUD development
2 plan. Petitioners argue that a proposed PUD development
3 plan amendment is deemed a major amendment if it falls into
4 any of the categories described in PCC 33.269.440.A.1.a
5 through f, quoted above. According to petitioners, the
6 proposed amendment falls under category e because some of
7 the proposed residential and garage structures were or are
8 proposed to be within 50 feet of the boundary between the
9 subject property and adjoining R10 zoned property.

10 In the alternative, petitioners argue that even if the
11 city correctly interprets the criterion for a major change
12 to be solely that it "may have a significant impact on the
13 surrounding area or will cause a substantial change in the
14 PUD," the city's findings are inadequate to demonstrate
15 compliance with this standard. According to petitioners,
16 the city findings fail to address PCC 33.269.440.A.1.a
17 through d and f. Additionally, petitioners contend the
18 findings fail to explain the basis for the city's
19 determination that the proposed amendment will not have a
20 significant impact on the surrounding area. Petitioners
21 argue a dramatic lessening of adverse impacts itself
22 constitutes a significant impact. Finally, petitioners
23 contend the findings do not respond to relevant issues
24 raised in the county proceedings.

25 Under PCC 33.269.440.A.1, the criterion for determining
26 whether a proposed amendment to a PUD development plan is

1 major is whether the amendment will have "a significant
2 impact on the surrounding area or will cause a substantial
3 change in the [approved] PUD." Under PCC 33.269.440.A.2,
4 any change which is not major is a minor change "which will
5 have little effect on the neighborhood and which conform[s]
6 to the intent of the preliminary plan." We agree with the
7 city and intervenor (respondents) that the types of changes
8 listed in PCC 33.269.440.A.1.a through f are simply
9 illustrative of the types of changes that might result in a
10 significant impact or a substantial change. Therefore,
11 whether the proposed amendment includes changes within 50
12 feet of the PUD perimeter (category e) is not in itself
13 determinative of whether the proposed amendment is major.
14 Additionally, because categories a through f are not
15 independent bases for identifying a major amendment, a
16 determination that the proposed PUD amendment is not major
17 need not be supported by findings addressing each category.

18 PCC 33.269.440.A requires that the city's findings
19 explain why it concluded the proposed amendment will not
20 have "a significant impact on the surrounding area" and will
21 not "cause a substantial change in the [approved] PUD." The
22 findings explain the nature of the proposed changes and note
23 that the amount of land in nonresidential development will
24 not be increased, the number and type of residential units
25 will not be changed, the proposed access and roads will not
26 be altered and structures will be moved only further away

1 from the perimeter, fill areas and the storm water detention
2 easement. Record 3. Petitioners do not challenge the
3 evidentiary support for these findings. We believe these
4 findings provide an adequate basis for concluding that the
5 proposed amendment will not have a significant impact on the
6 surrounding area and does not constitute a substantial
7 change in the proposed PUD.³

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 "Respondent misconstrued the applicable law when
11 it failed to apply the provisions of PCC
12 [Ch.] 33.299 and PCC [Ch.] 33.455 to the subject
13 application, failed to make findings regarding the
14 applicability [of], and conformity to, those
15 chapters under ORS 215.173(2), and failed to have
16 substantial evidence to underlie its decision with
17 respect to these criteria."

18 **A. PCC Chapter 33.455**

19 Petitioners contend the city failed to comply with the
20 provisions of PCC chapter 33.455 (Interim Resource

³Petitioners contend the findings fail to respond to issues specifically raised below. The closest petitioners come to identifying these issues allegedly raised below is saying there were contentions that the proposed changes in the location and number of structures were made because of changes in the Tualatin Basin guidelines, new Division of State Lands rules for fill and the impacts of the allegedly illegal fill placed on the subject property. Petition for Review 21. However, we have reviewed the portions of the record cited by petitioners and do not find that any issues were specifically raised with regard to the impacts of the proposed amendment to the PUD. Rather, the cited comments and evidence below are directed at effects of the allegedly illegal fill or impacts of the entire PUD project. Record 54-57; Transcript 10-11, 24-26, 31, 35, 38. Cites to "Transcript" are to the transcript of the February 4, 1992 hearing before the hearings officer, which is Appendix 2 to the petition for review.

1 Protection Zone).⁴ Petitioners argue IRP zone requirements
2 apply to land within 25 feet on either side of a water
3 feature designated on the city zoning map. PCC 33.455.020
4 and 33.455.030. Petitioners contend the approved site plan
5 shows buildings located in the vicinity of the designated
6 water feature on the subject property, and a road crossing
7 that designated water feature.⁵ According to petitioners,
8 the city improperly failed to apply the IRP review criteria
9 of PCC 33.455.060 in making the challenged decision.

10 Under PCC 33.455.020 and 33.455.030, an interim
11 resource protection review is required for all new
12 development and alterations to existing development within
13 25 feet of the center line of a water feature that was
14 designated on the city zoning map on December 31, 1990. The
15 city zoning maps in effect on December 31, 1990 and on
16 November 5, 1991, when the subject application was filed, of
17 which we take official notice, show a water feature

⁴Respondents contend that under ORS 197.835(2), we may not consider this issue because the applicability of PCC chapter 33.455 was not raised as an issue during the proceedings below, as required by ORS 197.763(1). We disagree. The record shows that the issue of whether the presence of a designated water feature on the subject property necessitates an interim resource protection review was raised during the February 4, 1992 hearing before the hearings officer. Transcript 7-8.

⁵Petitioners also argue that illegal fill has been placed on the property near the water feature. However, neither the original PUD development plan nor the challenged amendment to that plan purports to authorize the placement of such fill. Therefore, the existence of such fill does not provide a basis for finding PCC chapter 33.455 applicable to the challenged decision.

1 designation traversing the eastern half of the property, in
2 a northwest to southeast direction. The challenged decision
3 addresses the applicability of PCC chapter 33.455 as
4 follows:

5 "None of the City's environmental regulations
6 apply to this review. No development will occur
7 near the designated water feature, so the Interim
8 Resource Protection regulations do not apply
9 * * *." (Emphasis added.) Record 4.

10 The above quoted finding determines that no development
11 associated with the proposed PUD will occur within 25 feet
12 of the designated water feature. We understand petitioners
13 to contend this determination is not supported by
14 substantial evidence in the record. However, we agree with
15 respondents the record shows that no development was
16 initially approved within 25 feet of the designated water
17 feature, and the amendment moves the proposed development
18 farther from the water feature. Record 7, 9, 84-85, 137;
19 Transcript 7-8; Site Plan C1. The only items shown on the
20 site plan in the vicinity of the water feature are easements
21 for existing sanitary sewer lines that cross the eastern
22 portion of the subject property and an existing stormwater
23 detention pond. Record 156; Transcript 23; Site Plan C1.
24 Based on the evidence cited by the parties, a reasonable
25 decision maker could conclude that no development is
26 proposed to occur within 25 feet of the designated water
27 feature.

28 This subassignment of error is denied.

1 **B. PCC Chapter 33.299**

2 Petitioners contend the city failed to apply the
3 provisions of PCC chapter 33.299 (Temporary Prohibition on
4 the Disturbance of Forests). Petitioners argue PCC
5 chapter 33.299 was in effect when the subject application
6 was filed. Petitioners further argue that PCC 33.29.030
7 prohibits herbicide application and burning, cutting,
8 damaging or removing vegetation in "forests" in the subject
9 area. Petitioners contend the PCC 33.299.020 definition of
10 "forest" as any grove or stand of 100 or more trees of a
11 certain size, where tree cover extends over an area larger
12 than two acres within contiguous lots in common ownership is
13 met by the subject property.

14 Respondents contend PCC chapter 33.299 was repealed
15 before the subject application was filed.⁶ Respondents also
16 contend that even if PCC chapter 33.299 were in effect when
17 the subject application was filed, it would not be
18 applicable to the challenged decision because it only
19 applies to forested areas and petitioners cite no evidence

⁶Respondents also point out that PCC chapter 33.453 (Interim Forest Review), which replaced PCC chapter 33.299, was declared invalid in Ramsey v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-215, May 22, 1992), aff'd 115 Or App 20 (1992). Respondents argue Ramsey invalidated PCC chapter 33.299 as well.

In Ramsey, we determined the city's adoption of PCC chapter 33.453 failed to comply with Statewide Planning Goal 5. However, the adoption of PCC chapter 33.299 was not challenged in Ramsey or any other appeal to this Board and, therefore, PCC chapter 33.299 is an acknowledged land use regulation. ORS 197.625(1). PCC chapter 33.299 cannot be collaterally attacked in this appeal for failure to comply with Goal 5.

1 in the record demonstrating that the subject property
2 qualifies as such.

3 The challenged decision states the "date of
4 application" is November 15, 1991. Record 1. However, the
5 record contains a letter dated November 7, 1991 from the
6 city planning department informing intervenor the city
7 received its application on November 5, 1991 and certain
8 missing information was required to be submitted before
9 December 6, 1991. Record 77. The planning department's
10 decision states the application was complete on November 15,
11 1991. Record 21. Under ORS 227.178(3), so long as the
12 additional information required by the city was submitted
13 within 180 days of when the application was first submitted,
14 the standards in effect when the application was first
15 submitted are applicable to the application. There is no
16 dispute that in this case, the additional information was
17 submitted within 180 days and, therefore, the standards in
18 effect on November 5, 1991 apply. PCC chapter 33.299 was in
19 effect until November 18, 1991. Portland Ordinances No.
20 164243 and 164800. Therefore, PCC chapter 33.299 is
21 applicable to the challenged decision.

22 The challenged decision does not address PCC
23 chapter 33.299. A member of the city planning staff
24 testified below that it is "almost certain" the PUD site
25 would be considered "forest" under PCC chapter 33.299.
26 Transcript 8. However, the manner in which the prohibitions

1 against disturbing vegetation in PCC 33.299.030 apply to an
2 amendment to a previously approved PUD development plan for
3 the subject property is unclear. Also, PCC 33.299.040
4 contains a list of ten exceptions to the general
5 prohibitions of PCC 33.299.030. Whether any of these
6 exceptions applies to the proposed amendment is also
7 somewhat unclear.⁷

8 It is the local government which, in the first
9 instance, should interpret its own enactments. Fifth Avenue
10 Corp. v. Washington Co., 282 Or 591, 599, 581 P2d 50 (1984);
11 J.C. Reeves Corp. v. Clackamas County, ___ Or LUBA ___ (LUBA
12 No. 91-072, November 20, 1991), slip op 10-11, aff'd 111
13 Or App 452 (1992); Mental Health Division v. Lake County, 17
14 Or LUBA 1165, 1176 (1989); see Clark v. Jackson County, 313
15 Or 508, 515, ___ P2d ___ (1992) (LUBA lacks authority to
16 substitute its own interpretation of an ordinance for the
17 local government's, unless the local government's
18 interpretation is inconsistent with the language or context
19 of the ordinance). Because the city has not interpreted and
20 applied PCC chapter 33.299, we remand the challenged
21 decision so that it may do so.

⁷Clearly, the exception provided by PCC 33.299.040.F for "[a]ny activity authorized by a land use decision accepted and recorded before the effective date of this ordinance" would except construction of the originally approved PUD from the requirements of PCC 33.299.030, assuming the acceptance and recording requirements have been satisfied. Whether this exception or some other exception would apply to the challenged modification of the PUD is sufficiently unclear that we decline to interpret and apply PCC chapter 33.299 in the first instance.

- 1 This subassignment of error is sustained.
- 2 The third assignment of error is sustained, in part.
- 3 The city's decision is remanded.