

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council
4 approving a building permit for the construction of a
5 residence.

6 **MOTION TO INTERVENE**

7 P. C. Lin, Vicki Lin and Chia Development Corp. move to
8 intervene in this appeal proceeding. There is no objection
9 to the motion, and it is allowed.

10 **FACTS**

11 The subject property is zoned Residential (R-0). The
12 proposal is to construct a four story, 7,118 square foot
13 residence on the subject property. The subject property is
14 steep, and a retaining wall and berm are proposed. The
15 space between the retaining wall and the house is proposed
16 to be filled with dirt, creating a level terrace extending
17 five feet beyond the exterior wall of the residence.

18 The city Development Review Board (DRB) approved the
19 proposal. The DRB decision was appealed to the city
20 council. The city council denied the appeal and affirmed
21 the DRB decision. This appeal followed.

22 **ASSIGNMENT OF ERROR**

23 "The city improperly interpreted and applied the
24 express language of LOC Sections 48.015(25) and
25 49.015(6) and, as a result, granted a building
26 permit for a residence which far exceeds the
27 applicable height restrictions of the R-0 zone."

28 Petitioners argue the city improperly interpreted

1 relevant Lake Oswego Code (LOC) provisions (LOC 48.015(25),¹
2 LOC 49.015(6),² and LOC 48.015(22)³) in determining the

¹LOC 48.015(25) defines "height of building" as follows:

"The vertical distance above a reference datum measured to the highest point of the coping of a flat roof or to the deck line of a mansard roof or to the average height of the highest gable of a pitched or hipped roof. The reference datum shall be selected by either of the following, whichever yields a greater height of building:

"a. The elevation of the highest adjoining sidewalk or ground surface within a 5-foot horizontal distance of the exterior wall of the building when such sidewalk or ground surface is not more than 10 feet above lowest grade.

"b. An elevation 10 feet higher than the lowest grade when the sidewalk or ground surface described in section a. is more than 10 feet above the lowest grade.

"The height of a stepped or terraced building is the maximum height of any segment of the building."

There is no dispute in this appeal that because of the steepness of the grade, the appropriate reference datum is determined under LOC 48.015(25)(b).

²LOC 49.015(6) defines the term "building" as follows:

"Any structure used or intended for supporting or sheltering any use or occupancy."

LOC 49.015(41) defines the term "structure" as follows:

"That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner."

³LOC 48.015(22) defines "grade" as follows:

"[T]he lowest point of elevation of the finished surface of the ground, paving or sidewalk within the area between the building and the property line or, when the property line is more than 5 feet from the building, between the building and a line 5 feet from the building."

1 proposed residence complies with the height limitation of
2 the R-0 zone. Petitioners make a variety of arguments based
3 on their interpretation of the LOC provisions quoted above
4 and, essentially, contend the city should have measured the
5 height of the proposed residence from the grade at the base
6 of the exterior retaining wall. Petitioners contend the
7 city erroneously used the grade at the base of the interior
8 foundation wall as the "reference datum" for calculating the
9 height of the proposed residence. According to petitioners,
10 if the height of the residence is measured from the grade at
11 the base of the exterior retaining wall, as they propose,
12 the residence exceeds the height restrictions of the R-0
13 zoning district.

14 The city determined as follows:

15 "[Petitioners] noted that the retaining wall is
16 connected to the foundation of the dwelling by a
17 number of concrete cell walls, and further note
18 that [intervenors] testified that the sole purpose
19 of the wall was to allow for a greater height
20 without having to obtain a variance.
21 [Petitioners] thereafter argue that the staff
22 should [have] concluded that the retaining wall
23 was an integral part of the 'building,' because
24 the retaining wall supports the 'use and
25 occupancy' of the dwelling. [Petitioners] also
26 argue that the fill dirt behind the retaining wall
27 should not be considered the 'finished surface of
28 the ground' within the meaning of LOC 48.015(22).
29 [Petitioners] conclude that staff's interpretation
30 of these two provisions violates the intent of the
31 height restriction to reduce the apparent height
32 of buildings on sloped lots and allows a house to
33 be constructed that is larger than, and thus
34 incompatible with, its 4000 to 5000 square foot
35 neighbors.

1 "The Council is unconvinced by [petitioners']
2 arguments. Although the retaining wall is
3 connected to the dwelling, the Council concludes
4 that the retaining wall provides no structural
5 support to the dwelling based upon the architect's
6 and staff's testimony * * *. Further, the
7 retaining wall does not by itself 'shelter any use
8 or occupancy.' The Council notes that LOC
9 48.015(25) requires the reference datum to be
10 determined by measuring the 'exterior' wall of the
11 building, which presumes that such wall encloses
12 an interior space. If, as [petitioners]
13 sugges[t], the Council were to include within the
14 definition of 'building' all attached accessory
15 structures which facilitate the use of a building,
16 the city would have to measure grade from the
17 exterior wall of sewer lines, water lines,
18 sidewalks, or other similar structures which touch
19 the building. Such an interpretation would
20 produce an absurd result. The Council agrees
21 with, and hereby adopts, staff's interpretation of
22 the definition of 'building' as including the
23 exterior walls which actually enclose ('shelter')
24 the use or occupancy (in this case, residential)
25 or which provide necessary structural support to
26 those walls, but excluding attached accessory
27 structures which do not have these functions.
28 Based upon this interpretation, the Council
29 concludes that the staff and DRB correctly
30 determined that the retaining wall is not part of
31 the 'building' in this case.

32 "The Council also disagrees that it is
33 inconsistent with the purpose of LOC 48.015(22) to
34 consider the dirt which 'fills the void' between
35 the foundation of the house and the retaining wall
36 as the surface for the purpose of determining
37 lowest grade. The [LOC] requires 'lowest grade'
38 to be measured within an area only five feet from
39 the building based upon the 'finished surface of
40 the ground paving or sidewalk.' The Council finds
41 that the use of the term 'finished' surface
42 clearly contemplates that grade elevation may be
43 altered as part of a proposed development. * * *
44 The Council finds no basis * * * for concluding
45 that a 'ground' surface created by [an] earthen

1 berm should be differentiated from a 'ground'
2 surface created by a retaining wall. The fact
3 that 'finished surface' also includes ground
4 surfaces created by paving or sidewalks, indicates
5 to the Council that the definition of 'finished
6 surface' was not intended to be so limited. Staff
7 testified that this provision has consistently
8 been interpreted to allow changes of grade by use
9 of a retaining wall. The Council finds this
10 interpretation to be correct. The Council
11 concludes that the use of a retaining wall to
12 change the lowest grade within five feet of a
13 building in order to comply with the height limit
14 is allowed by the [LOC]. The Council disagrees
15 that the above interpretation allows [intervenors]
16 to violate the intent of the height restriction by
17 allowing a too-tall house that is incompatible
18 with its neighbors. * * *" Record 9-11.

19 We are required to defer to the city's interpretation
20 of its own code unless the city's interpretation is clearly
21 wrong. Clark v. Jackson County, 313 Or 508, 836 P2d 710
22 (1992); Goose Hollow Foothills League v. City of Portland,
23 117 Or App 211, 217, 843 P2d 996 (1992); West v. Clackamas
24 County, 116 Or App 89, 840 P2d 1354 (1992). The city's
25 interpretation of LOC 48.015(25), LOC 49.015(6) and
26 LOC 48.015(22) is not clearly wrong, as it is not contrary
27 to the express words, policy or context of the relevant LOC
28 provisions, and we defer to it.

29 The assignment of error is denied.

30 The city's decision is affirmed.