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

JEFF CHAMPION,)
)
Petitioner,) LUBA No. 94-130
)
vs.) FINAL OPINION
) AND ORDER
CITY OF PORTLAND,)
)
Respondent.)

Appeal from City of Portland.

Jeff Champion, Portland, filed the petition for review and argued on his own behalf.

Adrienne Brockman, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

SHERTON, Referee, participated in the decision.

AFFIRMED 02/02/95

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 Petitioner appeals a city council order (1) denying
4 demolition review for an existing residence in a historic
5 design district; (2) granting design review approval for a
6 seven-unit apartment building, including modifications to
7 certain development standards; and (3) approving an
8 adjustment reducing the required number of parking spaces.

9 **FACTS**

10 The subject 7,500 sq. ft. property is located in the
11 Lair Hill Historic Conservation District and is zoned
12 Multi-Dwelling Residential with Design Overlay (R1d). The
13 subject property is bounded on the west by S.W. Barbur
14 Boulevard, on the north by S.W. Whitaker Street, on the east
15 by S.W. First Avenue, and on the south by property
16 containing a residence, owned by petitioner. At the time of
17 the city proceedings at issue in this appeal, the subject
18 property was occupied by a vacant residence, listed as of
19 secondary significance in the Lair Hill Historic
20 Conservation District. This structure is not on the
21 Portland Historic Resources Inventory.

22 The owners of the subject property filed applications
23 for demolition and design review. The applicants propose to
24 demolish the existing residence and construct a seven-unit
25 apartment building with parking and landscaping. The
26 proposal includes modifications to code development

1 standards through the design review process, including
2 reducing setback and landscaping requirements for the
3 proposed parking area on the west side of the subject
4 property, reducing the required backing-up space, allowing
5 three of the required parking spaces to be compact size and
6 allowing a reduction in size of the required outdoor area
7 for two upstairs units. In addition, the applicants
8 requested an adjustment to reduce the off-street parking
9 from seven to six spaces.¹

10 After a public hearing, the Portland Historical
11 Landmarks Commission (hereafter Landmarks Commission)
12 adopted a decision approving the applications. Petitioner
13 and the local neighborhood association appealed this
14 decision to the city council. After a de novo review,
15 including a public hearing, the city council adopted an
16 order denying demolition review, thereby allowing demolition

¹Portland City Code (PCC) 33.825.070 explains the relationship between the modification process of PCC Chapter 33.825 (Design Review) and the adjustment process of PCC Chapter 33.805 (Adjustments), as follows:

"The review body may consider adjustments for site-related development standards as part of the design review process. These modifications are done as part of design review and are not required to go through the adjustment process. * * * Adjustments to use-related development standards (such as floor area ratios, intensity of use, size of the use, number of units, or concentration of uses) are required to go through the adjustment process. * * *"

The various adjustments proposed by the applicants were processed and approved as modifications through the design review process, except for the reduction in number of parking spaces, which was processed and approved as an adjustment pursuant to PCC Chapter 33.805.

1 of the existing structure after expiration of the 150-day
2 delay period required by PCC 33.222.020.² The city council
3 order also grants design review approval, including the
4 requested modifications, and approves an adjustment from
5 seven to six parking spaces.³ This appeal followed.

6 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

7 These assignments of error challenge the substance of
8 the city council's interpretation of the 150-day demolition
9 delay provision in PCC 33.222.020, regarding when the delay
10 period begins to run, and the procedures used by the city in
11 interpreting PCC 33.222.020.

12 The city argues these issues are moot, because
13 petitioner did not obtain a stay of the challenged decision
14 pursuant to OAR 661-10-068, and the residence on the subject
15 property has been demolished. Gettman v. City of Bay City,
16 ___ Or LUBA ___ (LUBA No. 94-171, October 5, 1994) (where
17 trees that are subject of the challenged decision
18 authorizing their removal have been cut and removed, LUBA
19 will dismiss the appeal as moot).

²Had the city granted demolition review, the effect would have been to extend the demolition delay period an additional 90 days, for a total of 240 days. The relevant PCC provisions do not give the city the authority to deny a request to demolish a structure in a historic design district. Historical Development Advocates v. Portland, 27 Or LUBA 617, 620 (1994).

³The order includes several conditions regarding design and landscaping and conditions requiring that the existing residence be offered for moving to another site and, if demolished, be made available for salvage and re-use of building materials. Record 16.

1 An issue is moot if our review of the issue would have
2 no practical effect. Citadel Corp. v. Tillamook Co., 66 Or
3 App 965, 675 P2d 1114 (1984); see Davis v. City of Bandon,
4 19 Or LUBA 526, 527 (1990) (and cases cited therein). Our
5 review of the issues raised in petitioner's first three
6 assignments of error can have no practical effect, for two
7 reasons. First, no stay of the challenged decision was
8 requested or granted, the historic building in question was
9 demolished, and petitioner does not contend it could be
10 restored. Second, under petitioner's suggested
11 interpretation of PCC 33.222.020, the 150-day demolition
12 delay period began on July 1, 1994, when the city council
13 order became final. Petition for Review 19. More than 150
14 days have passed since July 1, 1994. Consequently, even if
15 we agreed with petitioner's interpretation, the demolition
16 delay period has already expired.⁴ Therefore, we agree with
17 the city that these issues are moot.⁵

18 The first, second and third assignments of error are
19 denied.

⁴Petitioner's arguments relate only to the proper interpretation of the 150-day demolition delay requirement of PCC 33.222.020. Petitioner does not contend that under PCC 33.222.040, the city must require an additional 90 days demolition delay. Compare, Historical Development Advocates v. Portland, supra, 27 Or LUBA at 627.

⁵To the extent issues regarding the demolition review are included in the remaining assignments of error, they are moot for the reasons stated in the text, and we do not consider them.

1 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

2 Petitioner contends a number of procedural errors
3 occurred during the proceeding before the Landmarks
4 Commission.⁶ For instance, petitioner argues the Landmarks
5 Commission erred by refusing to grant a continuance of its
6 hearing, and that city staff members improperly failed to
7 submit petitioner's letters to the Landmarks Commission.
8 Petitioner argues the city council should have remanded the
9 matter to the Landmarks Commission to correct these errors.
10 According to petitioner, because the city council failed to
11 do so, but rather adopted the same decision and findings as
12 the Landmarks Commission, petitioner was denied a full and
13 fair hearing before the city council.

14 The city denies that procedural errors occurred during
15 the proceeding before the Landmarks Commission. However,
16 the city also argues that even if there were procedural
17 errors in the proceeding before the Landmarks Commission,
18 they were cured by the de novo review proceeding before the
19 city council, during which petitioner submitted written and
20 oral testimony. See Holder v. Josephine County, 14 Or LUBA
21 454, 460 (1986); Colwell v. City of Portland, 1 Or LUBA 74,
22 79 (1980). The city also argues that the city council had
23 no duty, under the statutes or the PCC, to remand the

⁶Petitioner makes similar allegations under other assignments of error as well. All such allegations of procedural error by the Landmarks Commission are resolved under this section.

1 decision to the Landmarks Commission.

2 A procedural error provides a basis for reversal or
3 remand only if it prejudices petitioner's substantial
4 rights. ORS 197.835(7)(a)(B); Forest Park Estate v.
5 Multnomah County, 20 Or LUBA 319, 331 (1990). We have
6 repeatedly held that a de novo review by a higher level
7 local decision maker can cure procedural errors that
8 occurred in the proceedings before a lower level local
9 decision maker. Wilson Park Neigh. Assoc. v. City of
10 Portland, 23 Or LUBA 708, 713 (1992); Murphey v. City of
11 Ashland, 19 Or LUBA 182, 189-90, aff'd 103 Or App 238
12 (1990); Fedde v. City of Portland, 8 Or LUBA 220, 223,
13 (1983), aff'd 67 Or App 81 (1984).

14 In this case, petitioner had the opportunity to, and
15 did, submit evidence and argument to the city council during
16 its de novo review of the Landmarks Commission decision.
17 Therefore, even if the procedural errors before the
18 Landmarks Commission alleged by petitioner did occur, which
19 we do not determine, petitioner's substantial rights were
20 not prejudiced because the final decision was made by the
21 city council after a de novo review.⁷ Additionally,
22 petitioner cites no legal standard requiring the city
23 council to remand the matter to the Landmarks Commission

⁷In rejecting petitioner's appeal after the de novo review, the city council adopted its own decision and findings regarding the subject applications. It did not adopt the Landmarks Commission decision as its own.

1 rather than adopt its own decision, and we are aware of
2 none.

3 The fourth and fifth assignments of error are denied.

4 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

5 **A. Incomplete Application**

6 Petitioner contends the subject application is
7 incomplete because it does not contain the names, addresses
8 and telephone numbers of all owners of the subject property,
9 as required by PCC 33.730.060.C.1. Petitioner also contends
10 the application is incomplete because it does not include a
11 site plan showing the "[l]ocation of adjacent buildings," as
12 required by PCC 33.730.060.C.3. Petitioner argues a site
13 plan showing the location of adjacent buildings is necessary
14 to determining compliance with Lair Hill Historic
15 Conservation District Design Guidelines (LHDG) Guideline 1
16 regarding building setbacks. Petitioner also argues that
17 under PCC 33.730.060.A.3, the applicants' failure to file a
18 complete application within 90 days of the original
19 submittal means the application is void.

20 **1. PCC 33.730.060.A.3**

21 PCC 33.730.060.A provides, in relevant part:

22 "1. * * * The [Planning] Director will review
23 the application to see if it is complete.
24 The Director must notify the applicant of any
25 missing information or materials within 14
26 days.

27 "2. Time allowed for additional submittals. If
28 the Director finds that the application is
29 not complete, the applicant has 30 days from

1 the date of original submittal to provide the
2 missing information. If the missing
3 information is not provided, the application
4 will be considered complete on the 31st day
5 after its original submittal. It will be
6 processed based on the information submitted.

7 "3. Time extensions. The applicant may request
8 an extension of the 30 day limit in writing.
9 However, if the missing information is not
10 provided within 90 days of the date of
11 original submittal, then the application will
12 be voided. * * *

13 "* * * * *" (Emphasis added.)

14 In its brief, the city argues the above emphasized
15 provision of PCC 33.730.060.A.3 clearly applies only if the
16 planning director notifies an applicant that there is
17 information missing from the application, and the applicant
18 requests an extension of the 30-day time limit for
19 submitting such missing information. The city further
20 argues the record in this case shows the planning director
21 did not notify the applicants that any information was
22 missing from the application, and the applicants did not
23 request an extension of time to submit any missing
24 information.

25 Under Gage v. City of Portland, 319 Or 308, 316-17, 877
26 P2d 1187 (1994), and Clark v. Jackson County, 313 Or 508,
27 514-15, 836 P2d 710 (1992), LUBA is required to give
28 considerable deference to a local governing body's

1 interpretation of local enactments.⁸ Under Weeks v. City of
2 Tillamook, 117 Or App 449, 453-54, 844 P2d 914 (1992), this
3 means that in reviewing a decision adopted by the local
4 governing body, LUBA must review the governing body's
5 interpretation of local code provisions and may not
6 interpret the local code in the first instance, unless there
7 is "no possible rational dispute" regarding the correct
8 interpretation. Gage v. City of Portland, 123 Or App 269,
9 274-75, 860 P2d 282 (1983), rev'd other grounds 319 Or 308
10 (1994); see Towry v. City of Lincoln City, 26 Or LUBA 554,
11 560 (1994).

12 The challenged decision does not include an
13 interpretation of PCC 33.730.060.A.3.⁹ However, there is no
14 possible rational dispute that PCC 33.730.060.A.3 does not
15 apply where the planning director has not notified the
16 applicants that there is information missing from the
17 application and the applicants have not requested an
18 extension of the 30-day time limit for submitting such
19 missing information.

⁸Our review of local government interpretations of comprehensive plans and land use regulations is now governed by ORS 197.829. However, the Court of Appeals has stated that it interprets ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

⁹To be reviewable by LUBA, a local government's interpretation of its code must be provided in the challenged decision or in supporting findings, not in the local government's brief. Eskandarian v. City of Portland, 26 Or LUBA 98, 109 (1993); Miller v. Washington County, 25 Or LUBA 169, 179 (1993).

1 This subassignment of error is denied.

2 **2. PCC 33.730.060.C**

3 The city does not contend the information identified by
4 petitioner concerning the owners of the subject property and
5 the location of adjacent buildings is included in the
6 subject application. Rather, the city contends the
7 information is found elsewhere in the record and, therefore,
8 petitioner's substantial rights were not prejudiced by the
9 lack of such information in the application itself.¹⁰

10 Omission of information required by the local code from
11 a development application is a harmless procedural error if
12 the required information is located elsewhere in the record.
13 McConnell v. City of West Linn, 17 Or LUBA 502, 525 (1989).
14 In order for a petitioner to obtain reversal or remand of a
15 decision because information required by the local code is
16 missing from the application, petitioner must explain why
17 the missing information is necessary to determine compliance
18 of the proposed development with applicable approval

¹⁰The city also contends the planning director waived the requirement for the missing information pursuant to PCC 33.730.060.C (Required Information), which provides:

"[A] complete application consists of all the materials listed in Paragraphs 1 through 5 below. The [Planning] Director may waive items listed if they are not applicable to the specific review. * * *

"* * * * *" (Emphasis added.)

However, the city cites nothing in the record indicating the planning director in fact waived the requirement for the information petitioner contends is missing from the application.

1 standards, and the missing information must not be found
2 elsewhere in the record. Furler v. Curry County, 27 Or LUBA
3 497, 502 (1994); Murphy Citizens Advisory Comm. v. Josephine
4 County, 25 Or LUBA 312, 325 (1993).

5 With regard to information on the names, addresses and
6 phone numbers of the owners of the subject property,
7 petitioner does not explain why this information is
8 necessary to a determination of compliance with an
9 applicable approval standard. In addition, the city
10 identifies information in the record concerning the property
11 owners. Record 205, 222-25. Petitioner does not explain
12 why this information is inadequate to satisfy
13 PCC 33.730.060.C.3.

14 With regard to the location of adjacent buildings, the
15 challenged decision identifies petitioner's dwelling as the
16 only adjacent building, and states that it has a front
17 setback of 15 feet from S.W. First Avenue. Record 23.
18 Petitioner does not dispute these findings, and they are
19 supported by the testimony of a city planner at the June 8,
20 1994 city council hearing. Petition for Review, App. 68.
21 Additionally, petitioner does not explain why the testimony
22 in the record is insufficient to enable the city to
23 determine compliance with LHDG Guideline 1.¹¹

¹¹In any case, under section A of the eighth assignment of error, infra, we sustain the city's interpretation of LHDG Guideline 1 as not establishing a mandatory approval standard.

1 This subassignment of error is denied.

2 **B. Demolition of Existing Structure**

3 Petitioner argues the applicants illegally demolished a
4 structure on petitioner's property and did other illegal
5 site work, without a building permit as required by
6 PCC 33.700.005. Petitioner complains that although
7 PCC 33.700.030.C requires the planning director to enforce
8 PCC Title 33 (Zoning Code), the planning department failed
9 to respond to his complaints regarding these violations.

10 Illegal acts, such as those alleged by petitioner,
11 might provide the basis for a code enforcement proceeding.
12 However, petitioner fails to show that the alleged illegal
13 activity by the applicants is relevant to any legal standard
14 applicable to the approvals granted by the city in the
15 decision challenged in this appeal.

16 This subassignment of error is denied.

17 The sixth and seventh assignments of error are denied.

18 **EIGHTH ASSIGNMENT OF ERROR**

19 **A. LHDG Guidelines**

20 As relevant here, PCC 33.700.070.E.1 provides:

21 "Different levels of regulations. In general, an
22 area with base zoning, overlay zoning, and/or in a
23 plan district is subject to all of the regulations
24 of each. When the regulations conflict, unless
25 specifically indicated otherwise, the regulations
26 in a plan district supersede regulations in an
27 overlay zone, and the regulations in an overlay
28 zone supersede regulations in base zones. * * *"

29 The subject property's base zone is R1. It is also

1 subject to the Design overlay zone.¹² The Design zone
2 requires that new developments obtain design review
3 approval. PCC 33.420.040. PCC 33.825.060 (Design Review
4 Approval Criteria) requires design review applications to
5 comply with "the design district guidelines," which in this
6 case is the LHDG document previously referred to.¹³

7 Each section of the LHDG is divided into three parts --
8 Context, Goal and Guidelines.¹⁴ Petitioner points out the
9 Introduction states that Guidelines are "specific elements
10 to be incorporated into building design." Petition for
11 Review, App. 10. Petitioner argues that the above quoted
12 PCC 33.700.070.E.1, together with this language in the LHDG
13 Introduction, make all LHDG Guidelines mandatory approval
14 standards that supersede conflicting standards in the R1
15 base zone. Petitioner contends the city's interpretation,
16 in the challenged decision, of certain LHDG Guidelines as
17 being non-mandatory is incorrect. Petitioner further argues

¹²The subject property is not in a plan district. The Lair Hill Historic Conservation District is an adopted historic design district, but is not listed as a "plan district" in PCC Chapters 33.500 through 33.585.

¹³In its response brief and at oral argument, the city contended the LHDG does not have to be applied because it was not adopted by the city council. However, in a post oral argument letter, the city concedes Ordinance No. 144324, adopted September 8, 1977, amended then PCC 33.120.040(b) and (k) to delegate authority to the Landmarks Commission to adopt design guidelines for historic districts, and that the LHDG was adopted by the Landmarks Commission pursuant to such authority.

¹⁴The LHDG is found at Appendix E to the petition for review, and we take official notice of it.

1 the approved design for the proposed development violates
2 LHDG Guidelines 1 (front and rear yard building setbacks),
3 2.1 (parking in building structure) and 12.1 (fence height
4 limitation).

5 The challenged decision addresses the issue of whether
6 the LHDG Guidelines are mandatory approval standards:

7 "Appellants stated that the [LHDG] Guidelines must
8 be considered as [mandatory] requirements for
9 development. Language of the guidelines
10 identified by them, such as setbacks, and
11 structured parking, are stated as recommendations.
12 For example, Guideline 2.1 states: 'It is
13 strongly recommended that parking be in the
14 building structure.' This statement is not a
15 requirement and is not mandatory in meaning. It
16 is a recommendation. [PCC] 33.700.070.D2(c)
17 states that 'must', 'will', and 'may not' are
18 mandatory." Record 22-23.

19 To the extent individual LHDG Guidelines are expressed
20 in non-mandatory terms (e.g., "should," "recommended"), the
21 city council is well within the interpretive discretion
22 afforded it by ORS 197.829 and Clark v. Jackson County,
23 supra, in determining that compliance with such guidelines
24 is not required. Consequently, we agree with the city's
25 interpretation of Guideline 2.1, quoted above, as being
26 merely a recommendation.

27 Guideline 12.1 states "[f]ences should be below 42" in
28 height and of an open pattern." (Emphasis added.) The city
29 council's findings regarding Guideline 12 indicate it
30 interprets the fence height limitation of Guideline 12.1 to
31 be non-mandatory. Record 25. This interpretation is well

1 within its discretion.

2 As relevant here, Guideline 1 provides:

3 "FRONT YARD: A distance equal to the average of
4 the front setbacks of the immediately adjacent
5 buildings. Where there are no adjacent buildings,
6 the recommended setback is 8'.

7 * * * * *

8 "REAR YARD: Average of adjacent setbacks. If no
9 adjacent setbacks, the recommended setback is
10 15'." (Emphases added.)

11 The city council's findings on Guideline 1 discuss the
12 setbacks of petitioner's adjacent dwelling, as well as the
13 existing setbacks in a four block area around the subject
14 property. The findings conclude Guideline 1 is satisfied
15 because "[t]he proposed setbacks are at or near the
16 recommended distances * * *." Record 23. These findings
17 indicate the city council interprets the provisions of
18 Guideline 1 to establish recommended, rather than mandatory,
19 setbacks. This interpretation of Guideline 1 is not
20 "clearly wrong" and, therefore, must be affirmed. Goose
21 Hollow Foothills League v. City of Portland, 117 Or App 211,
22 217, 843 P2d 992 (1992); West v. Clackamas County, 116
23 Or App 89, 93, 840 P2d 1354 (1992).

24 Because we affirm the city council's interpretations of
25 LHDG Guidelines 1, 2.1 and 12.1 as not establishing
26 mandatory approval standards, petitioner's arguments that
27 the approved design for the proposed development violates
28 these guidelines provides no basis for reversal or remand of

1 the challenged decision.

2 This subassignment of error is denied.

3 **B. Adjustments**

4 PCC 33.805.030 identifies regulations which may and may
5 not be adjusted under the PCC Chapter 33.805 adjustment
6 process. PCC 33.805.030.B.6 provides that adjustments are
7 prohibited as "an exception to the procedural steps of a
8 procedure or to change assigned procedures." Petitioner
9 contends the city violated PCC 33.805.030.B.6 by granting
10 adjustments that "reduced the noncompatible outside of the
11 structure, [reduced] surface parking from the required 7 to
12 6 spaces, and reduced required site landscaping * * *."
13 Petition for Review 39.

14 The only adjustment pursuant to PCC Chapter 33.805
15 granted by the challenged decision is a reduction in the
16 number of required parking spaces from seven to six.¹⁵
17 Record 21-22. The challenged decision does not interpret or
18 apply PCC 33.805.030.B.6. However, it is clear
19 PCC 33.805.030.B.6 prohibits exceptions from or changes to
20 required procedures. There can be "no possible rational
21 dispute" that changing the required number of parking spaces

¹⁵The challenged decision also approves modifications to applicable development standards for outdoor living area and parking and loading areas in Multi-Dwelling zones pursuant to PCC 33.825.070 (see n1, supra), as part of design review approval. Petitioner does not challenge the approval of these modifications under PCC 33.825.070. Neither does petitioner contend the city erred by not processing them as adjustments under PCC Chapter 33.805.

1 from seven to six is not "an exception to the procedural
2 steps of a procedure or to change assigned procedures."
3 Consequently, the adjustment approved by the challenged
4 decision does not violate PCC 33.805.030.B.6.

5 This subassignment of error is denied.

6 The eighth assignment of error is denied.

7 **NINTH ASSIGNMENT OF ERROR**

8 As part of the design review process in a historic
9 design district, PCC 33.825.040 requires applicants to
10 submit a copy of the design proposal to the Historic Design
11 District Advisory Board (DAB) at least one week prior to
12 submission to the city, to allow the DAB sufficient time to
13 review the application and make recommendations to the city
14 review body.

15 Petitioner contends that for more than two years the
16 DAB has not provided published public notice of its
17 meetings, as required by ORS 192.640(1). Petitioner argues
18 that because of the alleged Open Meetings Law violations,
19 the DAB's meetings were illegal and any recommendation by
20 the DAB is fatally flawed. Petitioner asserts that although
21 he advised the city council of this problem, the city
22 council improperly relied on the DAB's flawed
23 recommendation.

24 The city replies that petitioner's argument does not
25 provide a basis for reversal or remand, because petitioner
26 does not contend any error was committed by or before the

1 city council. The city also contends the DAB is a
2 neighborhood group, rather than a city body, and that its
3 activities are not activities of the city.

4 Our review is limited to the city's final decision.
5 The final decision challenged in this appeal was made by the
6 city council, after a de novo evidentiary review.
7 Petitioner does not identify any specific determination of
8 compliance with an applicable standard, in the challenged
9 decision, that relies upon a "DAB recommendation."¹⁶
10 Furthermore, even if a DAB recommendation was submitted to
11 the city council, whether the DAB violated provisions of the
12 Open Meetings Law in the manner its meetings were held is
13 beyond the scope of this review proceeding.

14 The ninth assignment of error is denied.

15 The city's decision is affirmed.

¹⁶No party provides a citation to the location of any such "DAB recommendation" in the record.