BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NAGENDRA TIRUMALI, PARIMALI TIRUMALI, KATELAND WELLS, TONY MILHIZER, CONNY KIENER, GOEFF LAVEAR, JOYCE LAVEAR, EIKO POLITZ, WES ROSS, DOROTHY ROSS, GAIL INGALSBE, RUSS CARSON and ESTHER TOLLS,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2000-005

JERRY L. WARD, NANCY A. WARD, NAGENDRA TIRUMALI, PARIMALI TIRUMALI, KATELAND WELLS, TONY MILHIZER, CONNY KIENER, GOEFF LAVEAR, JOYCE LAVEAR, EIKO POLITZ, WES ROSS, DOROTHY ROSS, GAIL INGALSBE, RUSS CARSON and ESTHER TOLLS,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

LINDA GAETH and STEVEN Y. ORCUTT,
Intervenors-Respondent.

LUBA No. 2000-007

DAVID JUBITZ, MARY JUBITZ, MARY LOU STRIBLING, DONALD BERG, CAROLE A. COOKE, THOMAS MALLOY, ELEANOR MALLOY, JEFFREY M. LANG and RAMONA SVENDGARD,

Petitioners,

vs.

CITY OF PORTLAND,
Respondent,
and

LINDA GAETH and STEVEN Y. ORCUTT,
Intervenors-Respondent.

LUBA No. 2000-018

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Daniel Kearns, Portland, represented petitioners.

Frank Hudson, Deputy City Attorney, Portland, represented respondent.

Steven Y. Orcutt, Portland, represented intervenors-respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

DISMISSED 04/03/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal three city actions concerning the construction of a single-family dwelling and attached garage.

MOTIONS TO INTERVENE

Linda Gaeth and Steven Y. Orcutt (intervenors) move to intervene on the side of respondent in LUBA Nos. 2000-007 and 2000-018. There is no opposition to the motions, and they are allowed.

FACTS

In March 1999, intervenors applied for a building permit for a dwelling on property zoned R-5. The R-5 zone is a residential zone, which permits the siting of dwellings outright, provided the dwellings are in conformance with the city's development regulations and the Oregon Structural Specialty Code.[1]

The subject property slopes downhill from Fulton Park Boulevard. The slope of the site at the corners of the property is 20 percent, allowing intervenors to take advantage of code provisions allowing for modified setbacks on steeply sloping lots. The maximum height of the dwelling and the garage is based on a formula in the code for buildings sited on steeply sloped lots.

The building permit for the dwelling was issued in August 1999. During construction, petitioners, who are nearby residents, became concerned that the structure is taller than allowed under the city's zoning ordinance. In the fall of 1999, neighbors complained about the dwelling's design to city employees and elected officials. The neighbors contended that the dwelling violates the city's height and setback requirements, as well as several zoning

[1]The Oregon Structural Specialty Code contains standards and requirements for building construction within the state of Oregon. It is used by building inspectors to determine whether a particular structure complies with state requirements for building safety.

ordinance policies regarding the purpose of the height and setback requirements. The complaints led to an investigation of the building permit. In a letter dated December 21, 1999, the director of the city's Office of Planning and Development Review (OPDR) responded to the complaints by explaining the process the city used to determine the height of the dwelling and the garage, and how the slope of the property allowed the garage to be sited within a reduced setback. The letter indicated that the director believed staff had correctly applied the applicable code provisions, but that a mathematical error occurred, which resulted in the garage being two feet higher than was permitted by the code. On January 3, 2000, the city issued a building permit that approved revised plans for the garage that conform to the city's reduced height calculations.

Petitioners appeal the issuance of the first building permit (LUBA No. 2000-005), the December 21, 1999 letter (LUBA No. 2000-018) and the second building permit (LUBA No. 2000-007).

MOTION TO DISMISS LUBA NOS. 2000-005 AND 2000-007

The city moves to dismiss LUBA Nos. 2000-005 and 2000-007. According to the city, the building permits are not land use decisions subject to our jurisdiction, because the building permits fall under at least one exception to the ORS 197.015(10)(a) definition of "land use decision."[2] ORS 197.015(10)(b) lists exceptions to the definition of "land use decision." It provides, in relevant part, that a "land use decision" does not include a decision:

> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment; [or]

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[2]ORS 197.015(10)(a)(A) defines "land use decision" to include:

> "A final decision or determination made by a local government * * * that concerns the adoption, amendment, or application of:
>
> "* * * * *
>
> "(iii) A land use regulation[.]"

> "(B) Which approves or denies a building permit issued under clear and objective land use standards[.]"

Petitioners argue that the building permit decisions are "land use decisions" because they are the result of interpretation and the exercise of legal and policy discretion. According to petitioners, the city interpreted and applied its code provisions in ways contrary to the plain language of the regulations, and contrary to the city's policies underlying the regulation of building heights. Therefore, petitioners contend that the issuance of the building permits cannot fall under the exceptions to the definition of "land use decision."

ORS 197.015(10)(b)(B) does not categorically prevent our review of building permits. If the standards used to issue the building permits are not clear and objective, they can be land use decisions subject to our jurisdiction. *Sullivan v. City of Ashland*, 27 Or LUBA 411, 414, *rev'd on other grounds* 130 Or App 480, 882 P2d 633 (1994) (a decision to approve a building permit is a land use decision because it required the interpretation and application of discretionary land use standards). Thus, we must look at the standards the city applied to approve the disputed building permits to determine whether they are "clear and objective" within the meaning of ORS 197.015(10)(b)(B). If the standards are "clear and objective," the building permits are not land use decisions.

A. Base Point Measurement

Portland City Code (PCC) 33.110.200 to 33.110.285 establish "development standards" for uses in single dwelling zones. PCC 33.110.215.B provides that the maximum height for buildings in the R-5 zone is 30 feet. However, on lots sloping downhill from the street with an average slope of 20 percent or greater, the height limit is the higher of either 23 feet above the average grade of the street, or the height limit as calculated according to the formula set forth in PCC 33.930.[3] PCC 33.110.215.D. The dwelling, as proposed, uses the formula for calculating building height in PCC 33.930.050.

[3]PCC 33.930 explains how measurements are made under the Portland Zoning Code.

PCC 33.930.050 measures the 30-foot height limit from a "base point." For relatively level lots the base point is the *highest* grade on the site.[4] For steeper lots, such as the one at issue in this appeal, the base point is located 10 feet above the *lowest* site grade. In this case, the building permits approve a building height based on the grade that was established as a result of filling in a portion of the lower part of the property. Petitioners contend that the code requires that the base point should be calculated from the *original* grade. Petitioners argue that their interpretation of the code to require the base point to be measured from the original grade is necessary to support the code policies underlying the height standards.[5] Alternately, petitioners argue that even if the city interpreted the standard correctly, it did not follow the code when it applied the standard to the subject property. Petitioners argue that the city used the grade at the base of the building, and not five feet from the building as required in the code, to determine the base point. According to petitioners, if a point five feet

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[4]PCC 33.910.030 defines "grade" as:

> "The lowest point of elevation of the *finished* surface of the ground * * * 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. This is the definition used in the Oregon Structural Specialty Code (the Uniform Building Code as amended by the State.)" (Emphasis added.)

The UBC defines "finish grade" as:

> "[T]he final grade of the site which conforms to the approved plan." UBC Appendix (1988 Edition).

[5]PCC 33.110.215.A. provides:

> "* * * The height standards serve several purposes:
>
> "• They promote a reasonable building scale and relationship of one residence to another;
>
> "• They promote options for privacy for neighboring properties; and
>
> "• They reflect the general building scale and placement of houses in the city's neighborhoods."

from the building is used, the base point is five feet lower than the base point the city used in approving the building permits.

Land use standards that limit building height necessarily require that a beginning point to measure the height of a proposed building be identified. We do not understand petitioners to argue that the subsequent act of measuring the 30-foot building height limit is discretionary, once the starting point or "base point" is identified. The technique employed by the city to identify the "base point" in different circumstances, while somewhat complicated, is about as "clear and objective" as a land use standard could be. The only possible lack of clarity identified by petitioners is whether the lowest and highest grade measurements in PCC 33.930.050 are to be based on *existing* site grades or *finished* site grades. That ambiguity is resolved by the definition of "grade" at PCC 33.910.030, which clearly specifies that the grade is located based on "finished surface." Even if the city's method of measuring building heights fails to implement the purpose listed in PCC 33.110.215.A, that does not mean that PCC 33.930.050 is unclear or subjective. In addition, the fact that the city may have made a mistake calculating the building height by not using the grade five feet from the edge of the building does not make PCC 33.930.050 unclear or subjective.

B. Garage Setback

PCC 33.110.220.B provides that the minimum setback for garage entrances shall be 18 feet from the property line, except where the average slope of the property is 20 percent or greater. If the average slope is greater than 20 percent, then the setback may be reduced to five feet. PCC 33.110.220.D.4.b. However, the height limit in the area of the reduced setback is lowered one foot for every foot of reduced setback. PCC 33.110.220.D.4.b and c. PCC 33.930.060 provides the formula for calculating the average slope:

> "* * * When calculating the slope of a lot an average slope is used *based on the elevations at the corners of the lot*. The average slope of a lot is calculated by subtracting the average elevation of the uphill lot line and the average

elevation of the downhill lot line and dividing the sum by the average distance between the two lot lines. The average elevation of the uphill or downhill lot line is calculated by adding the elevations at the ends of the lot line and dividing by two." (Emphasis added.)

According to the city, the average slope of the property is greater than 20 percent, and the building permits allow the garage to be placed within five feet of the property line. Petitioners argue that the average slope is greater than 20 percent only if the city does not consider the fill that was brought in to establish the finished grade. Petitioners contend that intervenors left an unfilled low spot at a lower corner of the property to obtain the slope necessary to qualify for the reduced setback. According to petitioners, if the calculations are made using the finished grade, the average slope is less than 20 percent. Petitioners argue that the city's decision not to use the elevation at the finished grade to determine the average slope is inconsistent with its use of the finished grade to determine the building height. As a result, petitioners contend that the city's decision was an exercise of discretionary decision making, because the application of the code provisions is not in conformance with the policies underlying the standards.[6]

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[6]33.110.220.A provides:

"* * * The setback regulations for buildings and garage entrances serve several purposes:

"• They maintain light, air, separation for fire protection, and access for fire fighting;

"• They reflect the general building scale and placement of houses in the city's neighborhoods;

"• They promote a reasonable physical relationship between residences;

"• They promote options for privacy for neighboring properties;

"• They require larger front setbacks than side and rear setbacks to promote open, visually pleasing front yards;

"• They provide adequate flexibility to site a building so that it may be compatible with the neighborhood, fit the topography of the site, allow for required outdoor areas, and allow for architectural diversity; and

The city contends that there is nothing in the city's decision that requires the exercise of legal and factual judgment. According to the city, the code allows a reduced setback for garages, where the average slope is greater than 20 percent. The code provides the means to calculate the average slope, and the "corners of the lot" are clearly specified as the points to be used to determine the average slope. A straightforward application of the provisions to the subject property indicates that the alternative setback standards have been met, therefore the city did not have the discretion to look at other points on the property that may be higher or lower than the corners.

The formula for calculating average slope clearly specifies that the calculation is "based on the elevations at the corners of the lot" and those elevations were used here. As was the case with the PCC provisions for locating the "base point," the method specified by PCC 33.930.060 for calculating average slope may frustrate the underlying purposes of the regulation, in particular circumstances. Again, however, the fact that a regulation may allow an anomalous result in a particular factual circumstance does not mean the land use regulation is something other than "clear and objective." PCC 33.930.060 is "clear and objective," within the meaning of ORS 197.015(10)(b)(B).

C. Conclusion

We conclude that the issuance of the building permits was done in accordance with clear and objective standards, and thus falls under ORS 197.015(10)(b)(B). Therefore, the decisions appealed in LUBA Nos. 2000-005 and 2000-007 are not "land use decisions." Because the building permits are not "land use decisions," we do not reach the city's alternative argument that petitioners' notices of intent to appeal were not timely filed.

LUBA Nos. 2000-005 and 2000-007 are dismissed.

> "• They provide room for a car to park in front of a garage door without overhanging the street or sidewalk, and they enhance driver visibility when backing onto the street."

MOTION TO DISMISS LUBA NO. 2000-018

As stated previously, petitioners in LUBA No. 2000-018 appeal a December 21, 1999 letter from the OPDR director (director's letter) to one of the neighbors explaining the basis for her department's determination that the original building permit was issued correctly. The city moves to dismiss this appeal. The city argues that, to the extent the director's letter may be considered a land use decision, it was not appealed within 21 days of the date the decision became final, and therefore the appeal must be dismissed.

The December 21, 1999 letter explains the city's rationale in applying the building height and setback restrictions that we have already discussed. We have some question whether the December 21, 1999 letter is properly viewed as a separate decision from the two building permit decisions, or even a decision at all. If it is properly viewed as a separate decision, we also have some question whether it is a building permit decision or some other kind of decision. However, we need not and do not decide these questions here.

As previously noted, ORS 197.015(10)(b) exempts from the statutory definition of "land use decision," a decision:

> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgement; [or]
>
> "(B) Which approves or denies a building permit issued under clear and objective land use standards[.]"

The December 21, 1999 letter makes it abundantly clear that applying the PCC building height and setback limitations may be complicated in particular circumstances and may produce anomalous results. However, the standards that are discussed in the letter are the same standards that we have already concluded are "clear and objective." The December 21, 1999 letter is therefore exempted from the statutory definition of "land use decision" by ORS 197.015(10)(b)(B), if the December 21, 1999 letter is properly viewed as a decision that "approves * * * a building permit." If ORS 197.015(10)(b)(B) does not apply, because the letter technically does not approve a building permit, we conclude the letter is not a land use

decision because it is exempted from the statutory definition of that term by ORS 197.015(10)(b)(A). We recognize that the operative language in ORS 197.015(10)(b)(A) and (B) is not identical. We also recognize that the question of whether a particular decision "is made under land use standards which do not require interpretation or the exercise of policy or legal judgment," is itself a subjective inquiry. However, for the same reasons that we conclude that the relevant PCC provisions are "clear and objective," we also conclude that they did not "require interpretation or the exercise of policy or legal judgment," within the meaning of ORS 197.015(10)(b)(A). In the case of the height limit, the PCC itself makes it clear that the finished grade rather than the original grade is used to compute the "base point." In the case of the garage entrance setback, the PCC also makes it clear that the lot corners are the relevant measuring points. It may be, as petitioners argue, that the applicant's decision to leave the lot corners at original grade frustrates the underlying purpose of the regulation. However, that does not mean the city's application of the code according to its terms required "interpretation or the exercise of policy or legal judgment." While the facts of this case are perhaps unusual enough to explain the jurisdictional debate and disagreement on the merits, we do not agree that these development standards "require interpretation or the exercise of policy or legal judgment," within the meaning of ORS 197.015(10)(b)(A).[7]

The motion to dismiss LUBA No. 2000-018 is granted.

These appeals are dismissed.[8]

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[7]We have previously noted the unfortunate uncertainty that exists in the current statutory scheme because critical jurisdictional and procedural questions turn on whether a particular decision involves the application of standards that require the exercise of discretion. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651, 664 n 15 (1990). That uncertainty continues to exist in the statutes.

[8]Because we dismiss these appeals, we do not address petitioners' record objections.