

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

3  
4 WENDY M. KENT and  
5 ERIC H. VETTERLEIN,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF PORTLAND,  
11 *Respondent.*

12 LUBA No. 2000-099

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14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from City of Portland.

19  
20 Peggy Hennessy, Portland, filed the petition for review. With her on the brief was  
21 Reeves, Kahn and Eder. Peggy Hennessy and Wendy M. Kent, Portland, argued on behalf of  
22 petitioners.

23  
24 Peter A. Kasting, Senior Deputy City Attorney, Portland, filed the response brief and  
25 argued on behalf of respondent.

26  
27 BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,  
28 participated in the decision.

29  
30 AFFIRMED

02/13/2001

31  
32 You are entitled to judicial review of this Order. Judicial review is governed by the  
33 provisions of ORS 197.850.  
34

**NATURE OF THE DECISION**

Petitioners appeal a city decision approving the siting of a soccer practice area within a city park.

**FACTS**

In an order dated October 24, 2000, we set out the relevant facts as follows:

“Albert Kelly Park is a 15-acre neighborhood park located in the southwest area of the City of Portland and zoned Open Space. It is owned and operated by the city. It is roughly “L”-shaped, with the vertical leg of the “L” running north to south. It contains an improved soccer field and a children’s play area in the vertical leg of the park. In the fall of 1999, the Vista Soccer Club (Vista) approached the city parks and recreation department with a proposal to regrade the eastern portion of Albert Kelly Park (the horizontal leg of the “L”) for use as a soccer practice field. According to Vista, there is a shortage of available soccer practice areas in Southwest Portland and the site in Albert Kelly Park provides an opportunity for additional play. The proposed practice area is open, with an overall slope of approximately seven percent. In exchange for paying the cost of regrading the site, Vista requested that the city permit Vista to conduct soccer practices there four to five evenings a week during September and October each year.

“The proposal was presented informally to the Bridlemile Neighborhood Association Board in October 1999. Neighbors located near the proposed practice area opposed the concept, citing surface drainage problems and increases in traffic congestion within the residential neighborhood as a result of the practice activities. Neighbors were also concerned about the use of a former passive recreational area for more structured recreational activities.

“There were a series of meetings between the city commissioner charged with administering the parks bureau, the parks director, city staff, neighbors and Vista. During these discussions, petitioners and others questioned whether the proposed practice area required a conditional use permit, in accordance with Portland City Code (PCC) 33.100.100.<sup>1</sup>

“As a result of these meetings, the commissioner sent a letter to the parties on March 21, 2000. The letter stated in part:

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<sup>1</sup>PCC 33.100 contains the regulations for the city’s Open Space zone. According to PCC 33.100.100(B)(2), certain facilities, such as “baseball, football, soccer, and other fields used for organized sports; and other facilities that draw spectators to events in a park, are conditional uses within a park use.”

1                   ‘Within the next thirty days, [the parks director] and I will make a  
2                   decision about the field. \* \* \* I will communicate with you again after  
3                   we reach a decision.’ Supplemental Record 15-16.

4                   “On June 7, 2000, the commissioner again wrote to the parties. In this letter,  
5                   the commissioner stated:

6                   ‘Recently, [the parks bureau] was asked if a Conditional Use Review  
7                   should have been done. I requested an opinion from the Office of  
8                   Planning and Development Review, who oversees those reviews. They  
9                   have reviewed the city code and stated that no Conditional Use  
10                  Review is required.

11                  ‘It is my conclusion that the neighborhood is well served by providing  
12                  this play area at Albert Kelly [Park]. It will, as the Bridlemile  
13                  Neighborhood Association Board noted, add to the multi-use of the  
14                  park, not subtract from it. It is open green space now and it will be  
15                  more versatile open green space in the future, for everyone to use.  
16                  \* \* \*

17                  ‘Parks staff will work with the civil engineers and other experts to  
18                  ensure that play area drainage, which has been a primary cause of  
19                  concern, will not affect any neighbors. Site modifications are expected  
20                  to begin in late August or early September \* \* \*.

21                  ‘Parks will work with the Bridlemile Neighborhood Association to  
22                  develop a ‘good neighbor use agreement’ about the use of the site so  
23                  that the neighbors and the soccer club users are very clear about  
24                  appropriate behavior and use of the area. \* \* \* In the event that use of  
25                  this area for soccer practice causes unsolvable problems, Parks will  
26                  not permit it to be used for practice.’ Record 1-2.

27                  “‘In response to the city commissioner’s letter, petitioner Kent made inquiries  
28                  at the commissioner’s office regarding the documents referred to in the letter.  
29                  On June 14, 2000, the city commissioner’s office forwarded to petitioner Kent  
30                  a copy of a ‘Zoning Confirmation Letter,’ dated May 10, 2000, from the  
31                  Portland Office of Planning and Development Review (OPDR) to the parks  
32                  department’s project manager. In that May 10, 2000 letter, OPDR concludes  
33                  that the proposed soccer practice area is not subject to the city’s conditional  
34                  use review.’” *Kent v. City of Portland*, 38 Or LUBA 942, 943-45 (2000).

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<sup>2</sup>The OPDR letter states, in relevant part:

“[PCC] 33.100.100 states that the Parks and Open Areas use category is allowed by right in the Open Space Zone. However, certain facilities such as ‘baseball, football, soccer, and other fields used for organized sports; and other facilities that draw spectators to events in a park,

1 This appeal followed.

2 **MOTION TO DISMISS**

3 On August 23, 2000, the city moved to dismiss this appeal, arguing that petitioner  
4 failed to file a timely appeal, or in the alternative, failed to appeal the appropriate decision. In  
5 our October 24, 2000 order, we denied the city’s motion to dismiss. In that order, we relied  
6 upon the reasoning set out in *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995), to  
7 conclude in this case that petitioners’ appeal of the letter providing notice of the city’s  
8 decision was timely under ORS 197.830(3)(b) and was also sufficient to appeal the letter that  
9 made the relevant land use decision. 38 Or LUBA at 947-48.

10 The city moves that we reconsider our order. According to the city, *Caraher* stands  
11 for the principle that

12 “the appeal of a substantively identical correction or clarification also suffices  
13 to appeal the actual earlier decision, when the appeal of the correction is filed  
14 within 21 days of the date petitioners obtain actual notice of the actual  
15 decision.” Response Brief 5.

16 The city argues that the present case differs in that petitioners failed to appeal the May 10,  
17 2000 letter within 21 days of the date they knew of that decision and, instead, chose to appeal  
18 a letter that provided notice of the land use decision, but was itself not a land use decision.  
19 The city argues that the reasoning in *Caraher* is limited to corrections or clarifications of an  
20 earlier land use decision, and that if LUBA extends that principle, it will extend the time to

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are conditional uses within a park use.’ [In the application for zoning confirmation], you state that the field proposed for grading will not be used for organized games at any time and the space is not large enough to accommodate a field of the size required for organized sports. Further, you state that no permanent markings or structures, goal posts, etc., will be installed.

“**Based on your written explanation of the proposed improvements and activities in the southeastern portion of the park, no Conditional Use Review is required.** That area may be used for ‘pick-up’ games, sports practice sessions and other activities that normally occur in large open play areas. In the future, if the Portland Parks Bureau wishes to sponsor organized matches/games/competition or allows use of the facility for other organizations to hold organized matches/games a Conditional Use Review must be requested and approved.” Record 7-8 (emphasis in original).

1 appeal a land use decision indefinitely by allowing petitioners to incorporate an appeal of a  
2 land use decision in an appeal of a later document.

3 We reject the city’s argument that the principle in *Caraher* is limited to corrections or  
4 clarifications of an earlier land use decision. The keys to our reasoning in *Caraher*, as in the  
5 present case, were that the subsequent document provided relevant notice of the city’s earlier  
6 decision under ORS 197.830(3), and the petitioners clearly intended to appeal the underlying  
7 land use decision. Contrary to the city’s characterization, petitioners in the present case  
8 clearly intended to appeal the city’s decision that the proposed facility did not require  
9 conditional use review. Petitioners’ mistake in locating that decision in the commissioner’s  
10 June 7, 2000 letter does not reflect a choice to appeal a different decision. The city’s strict  
11 reading of the notice of intent to appeal to require dismissal of this appeal is unwarranted.<sup>3</sup>  
12 *See Hilliard v. Lane County Commr’s.*, 51 Or App 587, 595, 626 P2d 905, *rev den* 291 Or  
13 368 (1981) (LUBA may not invoke technical requirements of pleading having no statutory  
14 basis); *Coats v. Crook County*, 18 Or LUBA 344, 350 n 9 (1989) (LUBA may not dismiss  
15 appeals based on technical pleading requirements).

16 The city’s motion for reconsideration is denied.

17 **ASSIGNMENT OF ERROR**

18 The crux of this appeal is whether PCC 33.100.100(B)(2) requires conditional use  
19 review to establish a soccer practice area.<sup>4</sup> *See* n 1. Petitioners argue that the city erred by

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<sup>3</sup>We acknowledge the city’s point that assembling and settling the record in such cases may be difficult until the decision appealed by the notice of intent to appeal is clarified. However, such difficulties have not been nor seem likely to be overly burdensome.

<sup>4</sup>The purpose of conditional use review is set out at PCC 33.815.010:

“Certain uses are conditional uses instead of being allowed outright, although they may have beneficial effects and serve important public interests. They are subject to the conditional use regulations because they may, but do not necessarily, have significant adverse effects on the environment, overburden public services, change the desired character of an area, or create major nuisances. A review of these uses is necessary due to the potential individual or cumulative impacts they may have on the surrounding area or neighborhood. The conditional

1 determining that the soccer practice area is not a “field used for organized sports” or does not  
2 “draw spectators to events” within the meaning of PCC 33.100.100(B)(2). Petitioners argue  
3 that the field is proposed to accommodate the needs of local, organized soccer clubs.  
4 According to petitioners, those organized clubs will use the field on a regularly scheduled  
5 basis and, in so doing, will exclude other members of the public from using the area for  
6 informal recreational activities. Petitioners contend that the use of the property for soccer  
7 practices will draw family and friends of the players as spectators. Petitioners argue that all  
8 of these factors lead to the conclusion that the proposed use is a soccer field “used for  
9 organized sports” or falls within the category of “other facilities that draw spectators to  
10 events in a park[.]” Therefore, petitioners argue, the siting of a soccer practice area within  
11 Albert Kelly Park requires conditional use review.

12 In response, the city argues that recreational play is allowed in all of the city’s parks,  
13 and that conditional use review is required only when the recreational activities are organized  
14 games or other events that draw spectators to a park. In those cases, the city acknowledges  
15 that there are impacts requiring additional review. The city argues that an area that is leveled  
16 off to allow children to practice skills used in a particular sport does not rise to a level of use  
17 warranting conditional use review. The city emphasizes that the soccer practices will be  
18 occasional, and that the area where the practice area is located is not large enough for a  
19 regulation soccer field. The city also argues that the determination that no conditional use  
20 review is necessary was premised on certain stipulated factors and, if those factors change,  
21 conditional use review may be necessary.

22 The city’s decision was not made by its governing body. Therefore, we review the  
23 city’s decision to determine whether it is reasonable and correct. *Gage v. City of Portland*,  
24 319 Or 308, 317, 877 P2d 1187 (1994); *Ellison v. Clackamas County*, 28 Or LUBA 521, 524

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use review provides an opportunity to allow the use when there are minimal impacts, to allow the use but impose mitigation measures to address identified concerns, or to deny the use if the concerns cannot be resolved.”

1 (1995). In interpreting the meaning of a local code, the focus is on discerning the intent of  
2 the body that adopted the code provisions. *PGE v. Bureau of Labor and Industries*, 317 Or  
3 606, 610, 859 Pd 1143 (1993) (interpretations of state statutes); *Hay v. City of Cannon*  
4 *Beach*, 17 Or LUBA 322, 326 (1995) (rules of statutory construction apply to construction of  
5 municipal ordinances). The starting point of the analysis is the code’s text and context. *PGE*  
6 *v. Bureau of Labor and Industries*, 317 Or at 610-611. If the text and context can reasonably  
7 be construed in more than one way, examination of legislative history is appropriate. *Id.* at  
8 611-612. If legislative history is unclear, after consideration of the text, context and  
9 legislative history, then resort to general maxims of statutory construction is permissible. *Id.*  
10 at 612. For the following reasons, we believe the text and context of PCC 33.100.100(B)(2)  
11 make it reasonably clear that a requirement for a conditional use review is not triggered by  
12 the city’s decision to provide a soccer practice area within Albert Kelly Park.

13 PCC 33.100.100(B)(2) provides that “[u]ses in the Parks And Open Areas category  
14 are allowed by right. However, certain facilities which are part of a Park And Open Areas  
15 use require a conditional use review.” As stated above, PCC 33.100.100(B)(2) provides that

16 “baseball, football, soccer, and other fields used for organized sports; and  
17 other facilities that draw spectators to events in a park, are conditional uses  
18 within a park use.”

19 The relevant terms used in PCC 33.100.100(B)(2) are not defined in the city’s code, and the  
20 code provides that when a term is not defined by the code, the normal dictionary meaning  
21 should be used. PCC 33.910.010.

22 The pertinent definitions support the city’s interpretation of its code.<sup>5</sup> The definitions  
23 suggest that fields used for “soccer and other \* \* \* organized sports” are those dedicated to a

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<sup>5</sup>*Webster’s Third New Int’l Dictionary* (unabridged ed 1981) provides the following definitions for the pertinent terms:

“**Soccer:** \* \* \* a football game with 11 players on a side in which the ball is advanced by kicking or by propelling it with any part of the body except the hands and arms \* \* \*” *Id.* at 2161.

1 singular use or are areas subject to a greater intensity of use than that contemplated by the  
2 use at issue here. No one disputes that Vista will use the area for conducting regularly  
3 scheduled soccer practices. However, we agree with the city that soccer practices are not the  
4 same as soccer games, nor are open, grassy areas graded to permit soccer practice the same  
5 as fields used for organized sports.<sup>6</sup> The proposed practice area contains no structures or  
6 facilities that dedicate the area to particular organized sports, or to any sport. As far as the  
7 record shows, the proposed practice area is not intended for or capable of use for official  
8 sports games or events.

9 Conditional use review is also required when organized events will draw a number of  
10 spectators to view them. We understand that the use of the area for soccer practice may draw  
11 parents of participants or other persons who might not otherwise patronize the park.  
12 However, we do not believe that youth soccer practices are the type of “events” capable of  
13 drawing “spectators” to a facility as those terms are used in PCC 33.100.100(B)(2). *See*  
14 *Carlsen v. City of Portland*, 169 Or App 1, 13, 8 P3d 234 (2000) (affirming the city council’s

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“**Field:** \* \* \* **2 d** (1) : an athletic or sports area or space (as an outdoor enclosure for baseball, cricket, football) \* \* \*” *Id.* at 845.

“**Facility:** \* \* \* **5 d** something \* \* \* that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end” *Id.* at 812-813.

“**Spectator:** one that looks on or beholds; *esp:* one witnessing an exhibition (as a sports event)” *Id.* at 2188.

“**Event:** **1 a** (1) : something that happens : OCCURRENCE \* \* \* (2) : course of events : ACTIVITY, EXPERIENCE \* \* \* **b** : a noteworthy occurrence or happening : something worthy of a remark : an unusual or significant development \* \* \* **3 a** : any one of the contests in a program of sports <track and field [event]s> **b** : a competitive contest of a specified kind or class \* \* \*” *Id.* at 788.

<sup>6</sup>We disagree with the city’s argument that the area will not be used for an organized sport. A program established by a soccer league to provide soccer practice areas for children is both organized and geared toward a particular sport. However, based on the parties’ apparent agreement that no official games may be played on the graded area, we conclude that the practice area is not a “soccer field” as that term is used in PCC 33.100.100(B)(2).

1 interpretation of PCC 33.100.100(B)(2) to include only organized events that have the  
2 principal purpose of attracting substantial numbers of spectators).

3 In sum, it is not necessary for the city to undergo conditional use review before  
4 grading an area within a park for multiple recreational activities, including use as a soccer  
5 practice area for a soccer league. Petitioners' assignment of error is denied.

6 The city's decision is affirmed.