

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WAVERLY LANDING CONDOMINIUMS

5 OWNERS' ASSOCIATION,

6 *Petitioner,*

7
8 vs.

9
10 CITY OF PORTLAND,

11 *Respondent.*

12
13 LUBA No. 2010-026

14
15 FINAL OPINION

16 AND ORDER

17
18 Appeal from Portland.

19
20 Wallace W. Lien, Salem, filed the petition for review and argued on behalf of
21 petitioners.

22
23 Christe C. White, Portland, filed the response brief and argued on behalf of
24 respondent.

25
26 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
27 participated in the decision.

28
29 AFFIRMED

07/12/2010

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city hearings officer decision that grants approval for a sewer pump station and related facilities.

FACTS

The city’s Sellwood neighborhood is served by a combined sewer system—one that combines stormwater and sanitary sewers. During wet weather, when stormwater enters the system, the combined flow can exceed the sewer system’s collection and treatment capacity. When that happens, the current system is designed to divert excess combined stormwater and sewage to an outfall, where the excess combined stormwater and sewage flows into the Willamette River without treatment. In Sellwood, that diversion occurs at Outfall 27, which enters the river at the end of the unimproved Umatilla Street right of way.

The City of Portland Bureau of Environmental Services (BES) is the applicant in this matter. BES proposes to construct a pump station and related improvements to capture and prevent the combined sewer overflow from reaching Outfall 27. That facility would be located a short distance south of Outfall 27, partially on property owned by the Portland Rowing Club (PRC) and partially within existing unimproved rights of way. The subject property is zoned Mixed-Commercial (CM) and is subject to the Greenway General and River Water Quality overlay zones.

The subject property is located between the Umatilla Street right of way (on the north), the Sherrett Street right of way (on the south), the Grand Street right of way (on the east) and the Willamette River (on the west). The east-west Harney Street right of way lies between the Umatilla Street right of way and the Sherrett Street right of way and terminates in the middle of the subject property. In the area of the subject property, all of these rights of way are unimproved, but a rail line and the Sellwood Interceptor sewer line are located in the Grand Street right of way. The decommissioned Lents Trunk Sewer, which is located in the

1 Harney Street right of way, will be used for temporary storage of combined sewer overflow
2 when it exceeds the capacity of the new Sellwood pump station. The challenged decision
3 includes the following description of the proposal:

4 “* * * The project includes a wet weather pump station located partially on
5 the PRC property and partially within the unimproved SE Sherrett Street
6 right-of-way. The pump station is designed to be 2,044 square feet in area
7 and 20 feet in height. Approximately 1,177 square feet will be located on the
8 PRC property.

9 “The pump station will receive combined wastewater from the [previously
10 approved] Sellwood Interceptor * * * by diversion at the Sellwood Interceptor
11 Relief Structure (SIRS). A new diversion structure will be constructed in the
12 unimproved SE Harney Street right-of-way. The diversion structure is
13 designed to be 484 square feet in area and 10 feet in height, constructed of
14 reinforced concrete.

15 “Flow from the SIRS will first enter a drop vortex structure, which is a
16 cylindrical structure that is hydraulically connected to the SIRS, the pump
17 station, and the Lents Truck Sewer (LTS). The vortex drop structure is used
18 to minimize the release of odors and minimize damage to the concrete from
19 erosion. When the combined sewer flow exceeds the capacity of the Sellwood
20 Pump Station, diverted wastewater will back up from the vortex drop structure
21 and flow into the LTS. The LTS will serve as a storage facility for the excess
22 sewer flow.

23 “A new section of force main will carry the flow from the pump station to the
24 discharge point at SE Umatilla and 11th Avenue. The force main route begins
25 at the pump station and travels in a northeast direction to the PRC driveway.
26 The alignment does not cross the PRC driveway, but crosses the railroad
27 tracks south of the driveway at a perpendicular angle. The force main will
28 continue east along SE Harney Street to SE 7th Avenue. At SE 7th Avenue,
29 the pipe turns north to SE Umatilla Street and then turns east again to the tie-
30 in at SE 11th Avenue. The total pipe length is 1,670 feet. Once the force main
31 leaves the pump station site, it is entirely within public right-of-way * * *.
32 Record Volume I, page 4.¹

¹ The city’s three-volume record duplicates some page numbers making it necessary to identify the volume when citing the record.

1 **INTRODUCTION**

2 **A. The Portland City Code Terms in Dispute**

3 The central question in this appeal is whether the proposed facility is properly viewed
4 as a “Basic Utility” or a “Utility Corridor.” Basic Utilities are allowed outright in the CM
5 zone, whereas Utility Corridors are a conditional use. In a single assignment of error,
6 petitioner contends the city erred by treating the proposed facility as a Basic Utility and,
7 therefore, erred in (1) failing to follow the city’s conditional use procedure in processing the
8 application and (2) failing to apply the conditional use approval criteria. We set out the key
9 Portland City Code (PCC) language that defines and distinguishes these terms before turning
10 to the challenged decision and the parties’ arguments.

11 **1. Basic Utilities**

12 The PCC classifies individual uses and activities into “Residential Use Categories,”
13 “Commerical Use Categories,” “Industrial Use Categories,” “Institutional Use Categories”
14 and “Other Use Categories.” In its brief, the city provides the following description of how
15 the city’s use classification system works:

16 “PCC 33.920.010 classifies land uses and activities into use categories on the
17 basis of common functional, product, or physical characteristics. Under PCC
18 33.920.030.A.1 uses are then assigned to the ‘category whose description
19 most closely describes the nature of the primary use.’ Each classification of
20 use contains a ‘characteristic statement,’ and an ‘examples’ statement. The
21 ‘characteristics’ subsection of each use describes the characteristics of each
22 use category. PCC 33.920.030.A.1. The ‘examples’ subsection of each use
23 provides a list of examples of uses that are included in that use category. PCC
24 33.920.030.D. * * *” Respondent’s Brief 6.

25 One of the Institutional Use Categories is “Basic Utilities.” PCC 33.920.400.² The
26 distinguishing characteristic of Basic Utilities is that they “are infrastructure services which

² As relevant, PCC 33.920.400 provides:

“Basic Utilities

1 need to be located in or near the area where the service is provided.” Among the listed
2 examples of Basic Utilities are “sewer pump stations * * * and conveyance systems.” PCC
3 33.920.400(D)(4) provides the following exception from the Basic Utilities Use Category:
4 “passageways, including easements, for the express purpose of transmitting or transporting
5 * * * sewage, * * * or other similar services on a regional level are classified as Rail Lines
6 And Utility Corridors.” *See* n 2.

7 **2. Rail Lines and Utility Corridors**

8 One of the “Other Use Categories” is “Rail Lines And Utility Corridors.” PCC
9 33.920.550.³ The “Characteristics” statement for Rail Lines and Utility Corridors states that

“A. **Characteristics.** Basic Utilities are infrastructure services which need to be located in or near the area where the service is provided. * * *

“B. **Accessory uses.** Accessory uses may include parking; control, monitoring, data or transmission equipment; and holding cells within a police station.

“C. **Examples.** Examples include water and sewer pump stations; sewage disposal and conveyance systems; * * *

“D. **Exceptions.**

“* * * * *

“4. Public or private passageways, including easements, for the express purpose of transmitting or transporting electricity, gas, oil, water, sewage, communication signals, or other similar services on a regional level are classified as Rail Lines And Utility Corridors.

“* * * * *.”

³ As relevant, PCC 33.920.550 provides:

“Rail Lines And Utility Corridors

“A. **Characteristics.** This category includes railroad tracks and lines for the movement of trains. The land may be owned or leased by the railroad. The category also includes public or private passageways, including easements, for the express purpose of transmitting or transporting electricity, gas, oil, water, sewage, communication signals, or other similar services on a regional level.

“B. **Examples.** Examples include rail trunk and feeder lines; regional electrical transmission lines; and regional gas and oil pipelines.

1 “[t]he category * * * includes public or private passageways, including easements, for the
2 express purpose of transmitting or transporting * * * sewage, * * * or other similar services
3 on a regional level.” That language is identical to the PCC 33.920.400(D)(4) Basic Utilities
4 *exception* quoted above. Finally, a sewer facility that would otherwise be viewed as a Utility
5 Corridor is not viewed as Utility Corridor if it is “located within motor vehicle rights-of way.
6 PCC 33.920.550(C)(2). *See* n 2.

7 From the above it can be seen that a sewer facility may qualify as either a Basic
8 Utility or a Utility Corridor but not both, because the PCC 33.920.400(D)(4) Basic Utilities
9 exception makes those categories mutually exclusive. The characteristics that distinguish
10 Basic Utility sewer facilities and Utility Corridor sewer facilities are that Basic Utilities
11 “need to be located in or near the area where the service is provided,” whereas sewer
12 facilities to transport sewage “on a regional level” are categorized as Utility Corridors.

13 **B. Standard of Review**

14 We are asked in this appeal to determine whether the city hearings officer correctly
15 interpreted the PCC. Petitioner argues our standard of review is set out at ORS
16 197.835(9)(a)(D), and that we must reverse or remand if we conclude the hearings officer
17 “[i]mproperly construed the applicable law.” The city at several points in its brief argues that
18 LUBA must review the hearings officer’s interpretation under the more deferential standard
19 of review set out in ORS 197.829(1), as explicated by the Court of Appeals in *Siporen v. City*
20 *of Medford*, 231 Or App 585, 599, 220 P3d 427 (2009), *rev allowed* 348 Or 13 (2010);
21 *Western Land & Cattle v. Umatilla County*, 230 Or App 202, 214 P3d 68 (2009) and *Foland*

“C. Exceptions.

“* * * * *

“2. Rail lines and utility corridors that are located within motor vehicle rights-of way are not included.

“* * * * *”

1 *v. Jackson County*, 215 Or App 157, 164, 168 P3d 1238, *rev den* 343 Ore 690, 174 P3d 1016
2 (2007).⁴ Under ORS 197.829(1)(a), which requires that LUBA reverse or remand if an
3 interpretation is “inconsistent with” the comprehensive plan or land use regulation language,
4 we must affirm the city’s decision unless we conclude that interpretation is not “plausible,”
5 given the interpretive principles that ordinarily apply to the construction of ordinances under
6 the rules of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143
7 (1993). *Western Land & Cattle*, 230 Or App at 209.

8 The more deferential standard of review set out at ORS 197.829(1) applies to
9 interpretations by local government governing bodies.⁵ The deferential standard of review
10 set out at ORS 197.829(1) does not apply to interpretations by other local decision makers,
11 such as hearings officers. *Rochlin v. City of Portland*, 155 Or App 490, 492 n 1, 964 P2d
12 1081 (1998). Therefore our review of the hearings officer’s interpretation in this case is
13 governed by ORS 197.835(9)(a)(D), which requires that LUBA determine whether the
14 hearings officer “[i]mproperly construed the applicable law.”

⁴ ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

⁵ At one place in its brief, the city seems to recognize that deferential review under ORS 197.829(1) is not appropriate in this case, and argues that “although LUBA is not required to give the Hearings Officer any deference, no deference is needed.” Respondent’s Brief 9.

1 **ASSIGNMENT OF ERROR**

2 **A. The Hearings Officer’s Interpretation**

3 In rejecting the contentions of opponents below that the proposed facility qualifies as
4 a Utility Corridor and must be subject to conditional use review, the hearings officer adopted
5 the applicant’s reasoning to the contrary. Record Volume I, page 21. We set out that
6 reasoning below:

7 “The Pump Station is a Basic Utility

8 “PCC 33.910.030 defines Basic Utilities as ‘infrastructure services that need
9 to be located in or near the area where the service is provided.’ PCC 33.920.
10 The evidence in the record demonstrates that the pump station must be located
11 near the area of Outfall 27 to control Outfall 27. The evidence also
12 demonstrated that the pump station must be near the existing location of the
13 Lents Trunk Sewer (LTS) on the PRC property and the existing river
14 discharge point of the LTS to serve the technical need to control the outfall
15 and maximize the flows being collected and diverted from the river.

16 “Neither Waverly nor PRC have put on any substantial evidence that
17 contradicts this specific need. Rather, Waverly claims that the pump station is
18 one facet of a larger program to protect the Willamette River and is not
19 therefore a Basic Utility. The fact that the pump station is one of the facilities
20 operated by BES in its larger City system is not relevant to the definition of
21 Basic Utility. This fact alone does not negate the localized need to place the
22 pump station near the infrastructure that it is specifically designed to control.
23 Because the pump station must be placed in near proximity to Outfall 27 and
24 the Lents Trunk Sewer line and there is no substantial evidence in the record
25 to refute this technical conclusion, the Hearings Officer rejects Waverly’s
26 appeal on this ground.

27 “Further, Waverly argues that because the pump station ‘conveys’ sewage, it
28 is not a Basic Utility. The definition of Basic Utility includes a list of
29 examples of uses that are considered Basic Utilities under the code. There,
30 the code states that examples of Basic Utilities include ‘water and sewer pump
31 stations; sewage disposal and *conveyance systems*; . . . stormwater facilities
32 and *conveyance systems*.’ [Emphases in original]

33 “The definition of Basic Utility includes facilities for the conveyance of
34 sewage and stormwater. The Sellwood pump station fits squarely within this
35 operational definition and therefore Waverly’s appeal is denied on this
36 ground.

1 “Waverly also argued that the pump station is a regional facility because it is a
2 component of the City’s larger storm and sewer management system. This
3 argument is inconsistent with the definition of Basic Utility. The definition of
4 a Basic Utility specifically includes ‘water and sewer pump stations; sewage
5 disposal and conveyance systems.’ This project is a sewer pump station. The
6 facility serves the Sellwood, Lents and Johnson Creek sewer service basins in
7 SE Portland. It does not serve any jurisdictions outside these locations. The
8 Sellwood Pump Station serves 11,780 properties and 2,900 acres in the
9 combined system area and 29,150 properties and 11,700 acres of sanitary
10 system area. By comparison, the total BES service area comprises 112,400
11 properties and 31,580 acres in the combined system area and 85,500
12 properties and 60,850 acres in the sanitary system area. The Sellwood Pump
13 Station is a local component of BES infrastructure serving only about 10% of
14 the properties served by BES and less than 10% of the acreage of the larger
15 service area in the combined system.

16 “The Hearings Officer finds that the record contains sufficient evidence to
17 find that the proposed pump station is a Basic Utility under PCC 33.920.400.”
18 Record Volume I, pages 81-82.

19 Because the distinguishing characteristics for Basic Utilities (“need to be located in
20 or near the area where the service is provided”) and Utility Corridors (“passageways,
21 including easements, for the express purpose of transmitting * * * sewage, * * * on a
22 regional level”) are so subjective, there is a fair amount of room to argue against and in
23 support of the hearings officer’s interpretation. We address petitioner’s primary criticisms
24 below.

25 **B. Petitioner’s Arguments**

26 **1. The Proposed Facilities Do Not Need to be Located Near Outfall**
27 **27 and the Lents Trunk Sewer**

28 The hearings officer found that the proposed facility needs to be located near the LTS
29 and Outfall 27 for technical and operational reasons. Petitioner appears to challenge the
30 evidentiary support for that finding. Petition for Review 11 (lines 8-19), 15 (lines 17-20). It
31 strikes us as almost self-evident that a facility that is being constructed to capture, transmit
32 and at times store excess sewage effluent needs “to be located in or near the area” where that
33 excess sewage effluent can be captured, transmitted and stored. To the extent it is not self-

1 evident, the city cites to evidence in the record that a reasonable person could rely on to
2 conclude that the proposed facility needs to be located near Outfall 27 and the LTS.
3 Respondent’s Brief 8. Petitioner cites to no contrary evidence in the record.

4 **2. Individual Components of the Proposal Qualify as a Utility**
5 **Corridor**

6 Petitioner also argues the hearings officer erred by viewing the project as a whole.
7 We understand petitioner to argue that if the hearings officer had viewed the proposal’s
8 component parts individually, at least some of those components would qualify as a Utility
9 Corridor, and those component parts should have been reviewed as a conditional use rather
10 than a permitted use.⁶

11 We seriously question petitioner’s undeveloped claim that the proposal should have
12 been viewed as a collection of primary uses rather than as a single primary use (a sewer
13 overflow pumping station with multiple components). However, we need not wrestle with
14 that proposition, since the only “component” part for which petitioner offers any focused
15 argument is the pressure line that will be needed to connect the sewer pumping station and
16 the discharge point at SE Umatilla Street and SE 11th Avenue. As we have already noted, to
17 be a Utility Corridor a sewer facility must transmit sewage on a “regional level.” For reasons
18 explained below, we agree with the city that petitioner has not established that the city’s
19 refusal to consider the proposed facility as a “regional” facility is an improper “construction
20 of applicable law,” within the meaning of ORS 197.835(9)(a)(D). In addition, it is
21 undisputed that all or nearly all of the pressure line that will be needed to connect the sewer
22 pumping station and the discharge point at SE Umatilla Street and SE 11th Avenue is to be

⁶ PCC 33.920.030(B) provides:

“Developments with multiple primary uses. When all the primary uses of a development fall within one use category, then the development is assigned to that use category. * * * When the primary uses of a development fall within different use categories, each primary use is classified in the applicable category and is subject to the regulations for that category.”

1 located within street rights of way. PCC 33.920.550(C)(2) expressly provides that facilities
2 that would otherwise qualify as a Utility Corridor are not to be considered Utility Corridors if
3 they are located “within motor vehicle rights of way.” See n 3.

4 **3. The Proposed Facility Transmits Sewage on a Regional Level and**
5 **Therefore Qualifies as a Utility Corridor**

6 As we have already noted, under PCC 33.920.400(D)(4) and 33.920.550(A),
7 “[P]assageways * * * for the express purpose of transmitting * * * sewage * * * on a regional
8 level are * * * Utility Corridors,” and they *are not* Basic Utilities. Petitioner contends that
9 because the proposed facility is part of a larger city regional effort to correct a systemic
10 combined sewer overflow problem, and because the facility is proposed to collect combined
11 sewer overflow from the Sellwood, Lents and Johnson Creek sewer basins, its transmission
12 of combined sewer overflow is on a “regional level,” making the proposed facility a Utility
13 Corridor.

14 The definitions set out at PCC 33.910 do not include a definition for “regional.”
15 Dictionary definitions of that term are not particularly helpful.⁷ It is true that the proposed
16 facility is part of the city’s larger effort to correct a combined sewer overflow problem that
17 recurs throughout the city’s sewer system in older areas of the city. However, we agree with
18 the city that just because the proposed facility can be viewed as *part of* a regional system
19 does not mean that the proposed Sellwood pump station and related facilities themselves
20 must be viewed as a “regional level” facility. It is also true that the Sellwood, Lents and
21 Johnson Creek sewer basins cover a sizable area. Record Volume II, page 511. However, as
22 the hearings officer found in concluding the proposed facility is properly viewed as a local
23 rather than a regional facility, the Sellwood pump station will only serve “about 10% of the
24 properties served by BES and less than 10% of the acreage of the larger service area in the

⁷ Webster’s definitions of “regional” include the following: “a: of or relating esp. to a geographical region * * *.” *Webster’s Third New Int’l Dictionary*, 1912 (1981).

1 combined system.” Record Volume I, page 82. Given the subjective nature of the term
2 “regional,” a term that is not defined in the PCC, we cannot say that the hearings officer
3 “[i]mproperly construed the applicable law,” within the meaning of ORS 197.835(9)(a)(D),
4 when he concluded that the proposed facility need not be viewed as a facility that will
5 transmit sewage “on a regional level.”

6 **C. Conclusion**

7 We conclude that the hearings officer’s interpretation is more consistent with the text
8 of PCC 33.920.400 and 33.920.550 than petitioner’s interpretation. The evidentiary record
9 supports the hearings officer’s finding that the proposed facility has the stated characteristic
10 of Basic Facilities, *i.e.*, it needs “to be located in or near the area where the service is to be
11 provided.” Sewer pump stations are among the examples of Basic Utilities listed at PCC
12 33.920.400(C). Sewer pump stations are not among the stated examples of Utility Corridors.
13 Further, to qualify as a Utility Corridor, the proposed facility would have to transmit sewage
14 “on a regional level.” While it may be at least debatable whether the proposed facility *could*
15 *be* viewed as a “regional level” facility, because it serves more than one sewer basin, the
16 city’s conclusion that a facility that only serves 10 percent of the larger BES system is not
17 properly viewed as a “regional level” facility is at least as supportable as petitioner’s
18 contrary view.

19 For all of the above reasons, we conclude that the hearings officer’s conclusion that
20 the Sellwood pump station qualifies as a Basic Utility, and that it is not properly viewed as a
21 Utility Corridor, does not constitute a improper construction of the applicable law under ORS
22 197.835(9)(a)(D). The city’s decision is affirmed.