

LAND USE
BOARD OF APPEALS

OCT 16 1 48 PM '89

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

3 GEORGE W. HALL, JR.,)
 4 Petitioner,)
 5 vs.)
 6 CITY OF PORTLAND,)
 7 Respondent,)
 8 and)
 9 ALANNA M. BOVE and JAMES M. FINN,)
 10 Intervenors-Respondent.)

LUBA No. 89-076
FINAL OPINION
AND ORDER

11
12 Appeal from City of Portland.

13 George W. Hall, Jr., Portland, filed the petition for
14 review and argued on his own behalf.

15 Adrienne Brockman, Portland, filed a motion to dismiss and
16 argued on behalf of respondent.

17 James M. Finn, Portland, filed a motion to dismiss and
18 argued on behalf of intervenors-respondent. With him on the
19 motion was Schwabe, Williamson & Wyatt.

20 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
21 Referee, participated in the decision.

22 REMANDED 10/16/89

23 You are entitled to judicial review of this Order.
24 Judicial review is governed by the provisions of ORS 197.850.
25
26

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the City of Portland
4 Bureau of Planning (city) granting a minor variance authorizing
5 construction of an eight foot fence.

6 MOTION TO INTERVENE

7 Allana Bove and James M. Finn move to intervene of the side
8 of respondent. There is no opposition to the motion and it is
9 granted.

10 FACTS

11 The subject property is located in a residential area and
12 is zoned One Family Residential 10 (R-10). The disputed fence
13 separates petitioner's and intervenors' properties. On June 12,
14 1989, the city approved intervenors-respondent's (intervenors')
15 application for a variance to the Portland City Code (PCC) fence
16 height restrictions. Intervenors proposed to build an eight
17 foot fence and the PCC allows only a six foot fence.¹

18 The city provided no notice of or opportunity for public
19 hearing on intervenors' application before it approved the
20 variance. Additionally, the PCC provides no right to a local
21 appeal of decisions authorizing a minor variance.

22 This appeal followed.

23
24
25 ¹PCC 33.98.015(a) (1) provides that modification of fence height by no
26 more than two feet may be approved as a minor, as opposed to a major,
variance. The disputed fence has already been constructed to the eight
foot height authorized by the city's minor variance.

1 JURISDICTION

2 Intervenors and respondent (respondents) contend, in their
3 motions to dismiss, we lack jurisdiction to review the appealed
4 decision because it is not a land use decision as defined by
5 ORS 197.015(10).²

6 This Board's jurisdiction is limited to land use decisions.
7 ORS 197.825(1). ORS 197.015(10) states that "land use
8 decision":

9 "(a) includes:

10 "(A) A final decision or determination made by a
11 local government * * * that concerns the
 adoption, amendment or application of :

12 "(i) The goals;

13 "(ii) A comprehensive plan provision;

14 "(iii) A land use regulation; * * *

15 "* * * * *

16 "* * * * *

17 "(b) Does not include a ministerial decision of a
18 local government made under clear and objective
19 standards contained in an acknowledged
20 comprehensive plan or land use regulation and
 for which no right to a hearing is provided by
 the local government under * * * ORS 227.160 to
 227.185."³

22 ²Neither Respondent nor intervenors filed a response brief. Rather,
23 respondent filed a motion to dismiss in which intervenors joined and
24 intervenors also filed a separate motion to dismiss. Both motions to
dismiss challenge our jurisdiction and petitioner's standing to appeal the
city's decision to this Board.

25 ³ORS 197.015(10) was amended by Oregon Laws 1989, chapter 761,
26 section 1. However, the amendment to ORS 197.015(10) does not apply to
this case.

1 Respondents argue that the city's decision is not a land use
2 decision subject to our review because it is a ministerial
3 decision made under clear and objective land use regulation
4 standards, as provided in ORS 197.015(10)(b).

5 In order to determine whether the city's decision is
6 ministerial, within the meaning of ORS 197.015(10)(b), we must
7 determine whether the applicable approval standards are clear
8 and objective, so that the city's decision can be made without
9 the exercise of of significant factual and legal judgment.
10 Flowers v. Klamath County, 98 Or App 384, 391-392, (1989);
11 Doughton v. Douglas County, 82 Or App 444, 449, 728 P2d 887
12 (1986), rev den 303 Or 74 (1987); McKay Creek Valley Assoc. v.
13 Washington County, ___ Or LUBA ___ (LUBA Nos. 89-027 and 89-028,
14 September 18, 1989), slip op 5.

15 The approval standards applicable to the city's decision
16 are as follows:

17 "(a) Generally, any variance granted shall satisfy
18 all of the following general conditions:

19 "(1) It will not be contrary to the public
20 interest or to the intent and purpose of
21 this Title and particularly to the zone
22 involved.

23 "* * * * *

24 "(3) It will not cause substantial adverse
25 effect upon property values or
26 environmental conditions in the immediate
vicinity or in the zone in which the
property of the applicant is located.

"* * * * *

"(b) Special conditions. When all of the foregoing

1 conditions can be satisfied a variance may be granted
as follows:

2 "(1) Minor Variances. A minor variance * * *
3 may be granted when it will not adversely
4 affect the character, livability, or
appropriate development of adjoining
properties.

5 "* * * * *." PCC 33.98.010

6 Respondents argue that the Court of Appeals has
7 distinguished between two different levels of "ministerial"
8 decision making and one level of "discretionary" decision making
9 as follows:

10 "The purpose of ORS 197.015(10)(b) is to make certain
11 local government actions unreviewable as land use
12 decisions, because they are really nondiscretionary or
13 minimally discretionary applications of established
14 criteria rather than decisions over which any
significant factual or legal judgment may be
exercised. * * *" Doughton v. Douglas County, 82 Or
App at 449."

14 Respondents contend that the challenged decision involved only
15 "minimal discretion," as that term is used in Doughton v.
16 Douglas County, supra.⁴ Respondents argue "the city recognizes
17 that the standards are general, but the city argues that little
18 factual or legal judgment is exercised when the general
19 standards in PCC 33.98.015(a)(2) are applied to facts in this
20

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22
23 ⁴Respondents point out that in Beinz v. City of Dayton, 29 Or App 761,
566 P2d 904 (1977), the Court of Appeals acknowledged that a city could
24 adopt a procedure for administrative approvals of variances, not requiring
notice and an opportunity for hearing. We agree with respondents that
25 there is no impediment, per se, to ministerial approval of minor variances.
However, the issue in this case is whether the city's administrative
26 approval process for minor variances require the exercise of "significant
factual or legal judgment." Doughton v. Douglas County, supra.

1 case." Respondent's Brief 5.⁵

2 We understand petitioner to contend that the applicable
3 approval standards are discretionary. Petitioner suggests that
4 the approval standards are not clear and objective and require
5 discretionary determinations based upon the particular facts of
6 this case. Petitioner argues there are facts he would present
7 to the city, if given the opportunity, to show that the city's
8 approval standards are not satisfied. Specifically, petitioner
9 contends that the 8 foot fence will adversely affect the
10 livability of petitioner's property as follows:

11 "The 8' fence obscures petitioners view; the excessive
12 height creates a tunnel effect into the entry to
13 petitioner's property; because of additional height,
14 fence is unsightly and badly out of proportion as it
15 is placed now; because of additional height, fence
16 obscures the available light from sunset to dawn and
17 causes a hazard to foot and automobile traffic during
18 these darker hours; since petitioner's property is a
19 "flag lot," with an excessively long driveway, the
20 extreme height of the fence further magnifies the
21 whole appearance and the resultant feelings of being
22 squeezed out of a tube, which in the eyes of most
23 potential or prospective future buyers would very
24 likely decrease the the value of the property and
25 render a very serious adverse effect to the petitioner
26 or his heirs. * * *" Petition for Review 3.

19 We understand that the city desires to have a procedure for
20 making decisions on minor variances not including a notice of,
21 and hearing on, the application or notice of and opportunity to
22 appeal the decision as provided by ORS 227.173 and 227.175.

24 ⁵The city also asks that this board examine the facts of this case and
25 determine as a matter of law that the approval standards are satisfied,
26 notwithstanding that no notice, public hearing or appeal procedure was
provided.

1 However, the city chose to require that fence height variances
2 of this size satisfy PCC standards which are highly
3 discretionary. Specifically, the PCC standards requiring that
4 the proposed variance not "adversely affect the character,
5 livability or appropriate development of adjoining properties,"
6 and that the proposed variance must not be contrary to the
7 "public interest or to the intent and purpose of this Title,"
8 state requirements without "articulating criteria for deciding
9 when, whether and how the requirements are satisfied." Doughton
10 v. Douglas County, supra.⁶

11 We conclude that the city's decision to approve the
12 variance to the fence height limitations is not a ministerial
13 decision made under clear and objective standards and,
14 therefore, we have jurisdiction to review it. Nicolai v. City
15 of Portland, ___ Or LUBA ___ (LUBA No. 89-053, October 10,
16 1989.) Respondent's and intervenors' motions to dismiss are
17 denied.

18 STANDING

19 Respondents argue that petitioner does not have standing.

20 _____
21 ⁶The city suggests that we can determine as a matter of law that, based
22 on the record of this proceeding, the criteria applicable to the requested
23 minor variance are met. Even if we agreed with the city, its point is
24 irrelevant to the jurisdictional question. The jurisdictional question is
25 not whether the city's decision is supported by the record filed in this
26 proceeding. Rather, the jurisdictional question is whether the city's
approval standards require the exercise of discretion or whether they are
nondiscretionary or minimally discretionary. That the facts submitted by
the applicant concerning a particular application may seem to indicate that
a requested minor variance should be approved or denied says nothing about
the nature of the standards. The city's standards are either discretionary
or they are not.

1 Respondents contend that petitioner was not entitled to notice
2 of, and is not aggrieved by the city's decision as required by
3 ORS 197.830(3)(c).

4 ORS 197.830(3) provides:⁷

5 "* * * a person may petition the board for review of a
6 quasi-judicial land use decision if the person:

7 "(a) Filed a notice of intent to appeal the decision
8 as provided in subsection (1) of this section;

9 "(b) Appeared before the local government, special
10 district or state agency orally or in writing;
11 and

12 "(c) Meets one of the following criteria:

13 "(A) Was entitled as of right to notice and
14 hearing prior to the decision to be
15 reviewed; or

16 "(B) Is aggrieved or has interests adversely
17 affected by the decision."

18 We understand petitioner to allege that he is both
19 adversely affected by the city's decision and entitled as of
20 right to notice of the city's decision. Respondents do not
21 challenge petitioner's standing based on his claim that he is
22 "adversely affected" by the decision.

23 Petitioner's allegations are sufficient to satisfy the
24 standing requirement of ORS 197.830(3)(c)(B) on the basis that
25 he is adversely affected by the decision.⁸

26 ⁷ORS 197.830 was amended by Oregon laws 1989, chapter 761, section 12.
However, the amendment to ORS 197.830 does not apply to this case.

⁸As we explained in McKay Creek Valley Assoc. v. Washington County
supra, slip op at 12, n 9:

1 We reject respondents' challenge to petitioners standing.

2 ASSIGNMENT OF ERROR

3 We understand petitioner to contend that he was entitled to
4 notice and a hearing regarding intervenors' application for a
5 minor variance.

6 We concluded in our discussion under jurisdiction that the
7 city's decision involves the exercise of significant factual and
8 legal judgment and is, therefore, discretionary. Because the
9 city's decision is discretionary, the city issued a "permit" as
10 that term is defined in ORS 227.160(2), and the notice and
11 hearing requirements of ORS 227.173 and 227.175 apply.⁹

12 It is undisputed that the city provided no opportunity for
13 a public hearing on intervenors' application and no notice of
14 its decision approving the application. It is also undisputed
15 that the PCC does not provide petitioner with a means to appeal
16

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18 ** * * even if petitioners' allegations were not adequate to
19 satisfy the 'adversely affected' criterion of ORS
20 197.830(3)(c), we note that under the Court of Appeals' recent
21 decision in Flowers v. Klamath County, [98 Or App at 389-390],
petitioners' contentions that no hearings were held and no
notice was given are sufficient to satisfy the 'appearance'
criterion of ORS 197.830(3)(b), and the 'aggrieved' criterion
of ORS 197.830(3)(c), if such hearings and notice were required
by statute."

22 ⁹ORS 227.160(2) defines the term "permit" as a "discretionary approval
23 of a proposed development of land * * *." ORS 227.173(3) requires "written
24 notice of the approval or denial [of a permit] shall be given to all
25 parties to the proceeding." ORS 227.175 (3) and (10) require that the city
hold at least one public hearing on an application for a permit, or provide
a procedure for a de novo appeal of a decision concerning a permit made
without notice and a public hearing.

1 the city's decision. Consequently, the city erred in failing to
2 hold a public hearing on intervenors' application or to provide
3 for an appeal from the city's decision on intervenors'
4 application, as required by ORS 227.175(3) and (10).¹⁰

5 The first assignment of error is sustained.

6 The city's decision is remanded.

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19 _____
20 ¹⁰As we noted in our discussion of the jurisdictional question, the city
21 suggests that we could decide, as a matter of law based on the record in
22 this proceeding, that the applicable standards are met. Again, even if we
23 agreed with the city, this would provide no basis for denying petitioner's
24 assignment of error. Petitioner's complaint is he was entitled to notice
25 and a hearing. At that hearing, petitioner will have an opportunity to
26 dispute the evidence submitted in support of the application and to submit
evidence of his own. The fact the city concluded approval of the requested
minor variance was warranted based on the evidentiary record compiled
without petitioner's participation is not important to our decision under
the first assignment of error. Even if the city should adhere to its
original decision after petitioner is given the required opportunity to
present argument and evidence, petitioner is nevertheless entitled to that
opportunity under ORS 227.175(3) and (10).