

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

3
4 BEAUMONT-WILSHIRE NEIGHBORS
5 FOR RESPONSIBLE GROWTH, RONI RICHEY,
6 JACK BOOKWALTER, JOHN GOLDEN,
7 and MARGARET DAVIS,
8 *Petitioners,*

9
10 vs.

11
12 CITY OF PORTLAND,
13 *Respondent,*

14
15 and

16
17 VWR DEVELOPMENT LLC,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2014-008

21
22 FINAL OPINION
23 AND ORDER

24
25 Appeal from City of Portland.

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27 Ty K. Wyman, Portland filed the petition for review and argued on
28 behalf of petitioners. With him on the brief was Dunn Carney Allen Higgins &
29 Tongue LLP.

30
31 Kathryn S. Beaumont, Chief Deputy City Attorney, Portland, filed a joint
32 response brief and argued on behalf of respondent.

33
34 Michael C. Robinson, Portland, filed a joint response brief and argued on
35 behalf of intervenor-respondent. With him on the brief were Seth J. King and
36 Perkins Coie LLP.

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38 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board
39 Member, participated in the decision.

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AFFIRMED

05/28/2014

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

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NATURE OF THE DECISION

Petitioners appeal a city decision that grants a building permit for a four-story 50-unit apartment building with spaces for commercial uses on the ground floor.

MOTION TO INTERVENE

VWR Development LLC, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

The revised building permit that is the subject of this appeal was issued following LUBA’s remand of the initial building permit for the proposed development. *Beaumont-Wilshire Neighbors v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2013-031, December 4, 2013) (*Beaumont-Wilshire I*). The apartment building and the drywell that is the only remaining issue in this appeal have been constructed. In *Beaumont-Wilshire I* we agreed with petitioners that the approved drywell intruded into a 10-foot setback that is required under the city’s Stormwater Management Manual (SWMM).¹ Because it appeared to us that the drywell could be relocated in the area proposed for the drywell, we suggested that as a solution to solve the setback violation:

¹ SWMM Section 2.3.3 provides:

“[A] drywell must be 10 feet on center from all foundations and 5 feet from property lines. The top of the drywell shall be located downgrade from foundations and at a lower elevation than local basements.”

1 “The city will need to require that the drywell be relocated to
2 comply with the SWMM Section 2.3.3 foundation and property
3 line setbacks.” *Beaumont-Wilshire I*, slip op 6.

4 After we remanded the initial building permit, it was discovered that in
5 the area of the drywell the building is only 12.9 feet from the rear property line.
6 The drywell is located 6.1 feet from the building foundation and it is therefore
7 not possible to correct the 10-foot setback intrusion by moving the drywell
8 back 3.9 feet farther from the building at its current location, because it would
9 then intrude into the required 5-foot setback from the rear property line. If the
10 drywell’s violation of the 10-foot setback from the building is to be corrected
11 by relocating the drywell, the drywell would have to be moved to another
12 location on the property where the building is at least 15 feet from the property
13 line.

14 **JURISDICTION**

15 The SWMM 2.3.3 10-foot setback implements an identical Oregon
16 Plumbing Specialty Code (OPSC) 10-foot setback requirement. The SWMM is
17 not one of the city’s land use regulations, and as far as we can tell is not
18 codified in the Portland City Code (PCC). Similarly, we do not understand any
19 party to contend that the OPSC is a land use regulation. However the initial
20 building permit applied the city’s zoning ordinance, a land use regulation, and
21 there was no dispute that the initial building permit fell within the ORS
22 197.015(10) definition of land use decision.² Because we had jurisdiction in
23 *Beaumont-Wilshire I* to consider petitioners’ appeal of the initial building

² As defined by ORS 197.015(10) a final city decision that (1) applies a land use regulation and (2) does not qualify for one of the exceptions set out at ORS 197.015(10)(b) is a land use decision that is subject to LUBA review under ORS 197.825(1).

1 permit, we considered petitioner’s SWMM challenge, because there was no
2 dispute that it was “applicable law,” and LUBA’s scope of review once it has
3 jurisdiction includes compliance with “applicable law.” ORS
4 197.835(9)(a)(D). *Beaumont-Wilshire I*, slip op at 9.

5 The decision that is before us in this appeal reissues the initial building
6 permit with some changes that were adopted to respond to our remand.
7 Therefore, although the only issue that is presented in this appeal concerns the
8 SWMM and OPSC, neither of which is a land use regulation, we arguably have
9 jurisdiction to consider the appeal. No party contends otherwise. Because the
10 reissued building permit arguably reapplied land use regulations, making the
11 decision a land use decision, we decline to raise a jurisdictional question on our
12 own, because doing so would require that we allow the parties an opportunity
13 to present additional argument on the jurisdictional question and delay a final
14 opinion in this matter.³

15 **INTERVENOR’S LOCAL APPEALS AND THE CITY’S ACTIONS**

16 Intervenor applied for and received approvals from the city’s Bureau of
17 Development Services Administrative Appeals Board (BDS Appeals Board)
18 and the city’s Bureau of Environmental Services (BES) Stormwater System

³ Respondents cite *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) in conceding that LUBA has jurisdiction to review the reissued building permit. In *Beck* the Supreme Court held that when a land use permit approval decision is appealed to LUBA, remanded, readopted, and appealed to LUBA a second time it creates “two phases of the same case.” 313 Or at 151. Although we agree that *Beck* lends some indirect support to a conclusion that we have jurisdiction in this appeal given this appeal’s history and facts, we note the issue in *Beck* was the scope of appellate court review in the appeal of LUBA’s second decision in *Beck* and therefore *Beck* is not necessarily determinative of whether LUBA has jurisdiction in this appeal.

1 Program Manager to locate the drywell closer than 10 feet from the building.
2 We discuss those approvals in more detail below. Based on those approvals,
3 the city subsequently issued the challenged revised building permit approval,
4 and this appeal followed.

5 **A. Intervenor’s Oregon Plumbing Specialty Code Appeal**

6 Portland has adopted the OPSC. Portland City Code (PCC) 25.01.020.
7 The OPSC imposes the same 10-foot setback that SWMM Section 2.3.3
8 imposes, unless a proposal to site a drywell closer to the property line or
9 building is “approved by the Authority Having Jurisdiction.” OPSC
10 1101.5.3.2.⁴ On December 13, 2013, intervenor submitted an application
11 requesting permission to deviate from the OPSC 1101.5.3.2 10-foot building
12 setback requirement for drywells. Record 50-51. Petitioner’s appeal includes
13 the following, under a heading “Code Section being appealed:”

- 14 “● Oregon Plumbing Specialty Code - Storm Drainage
15 1101.5.3.2
- 16 “● 2008 Portland Stormwater Management Manual – Chapter
17 2, Drywell Design Requirements, Setbacks Pg 2-88.”
18 Record 51.

19 Under a heading entitled “Reason for Alternate,” the following appears:

20 “The distance from the north property line to the building
21 foundation is 12.92 feet. The required setback to the property line
22 of 5’ was exceeded with the installation at 6’-9” from the property
23 line. The intent of the required setback from the building

⁴ OPSC 1101.5.3.2 provides in relevant part:

“No dry well shall be located closer than five (5) feet (1.5 m) of a property line nor closer than ten (10) feet (3 m) to any building unless approved by the Authority Having Jurisdiction.”

1 foundation is to protect the structural capacity of the soil * * * .
2 The perforated rings of the drywell are set 5’ below grade and the
3 drywell was installed 6’-1” from the building foundation. The
4 high rate of infiltration combined with the installed location of the
5 drywell will provide enough distance from the building to protect
6 the bearing capacity of the soils.” *Id.*

7 **B. The Oregon Plumbing Specialty Code Approval**

8 The BDS Appeals Board is the “Authority Having Jurisdiction” for
9 purposes of OPSC 1101.5.3.2. *See* n 4. Following a December 26, 2013
10 hearing, the BDS Appeals Board approved the proposal to allow the drywell to
11 remain at its location 6.1 feet, rather than the required 10 feet, from the
12 building foundation. The decision itself cites OPSC 1101.5.3.2. OPSC
13 1101.5.3.2 is identified on the first page of the decision at Record 37, and
14 provides that the Authority Having Jurisdiction may grant permission to site a
15 dry well closer than 10 feet from a building. The BDS Appeals Board included
16 the following explanation for granting the reduced setback:

17 “The Administrative Appeals Board finds that the information
18 submitted by the appellant demonstrates that the approved
19 modifications or alternate methods are consistent with the intent of
20 the code; do not lessen health, safety, accessibility, life, fire safety
21 or structural requirements; and that special conditions unique to
22 this project make strict application of those [setback requirements]
23 impractical.” Record 38.

24 **C. Intervenor’s Special Circumstances Appeal**

25 As explained above, SWMM 2.2.3 requires a 10 foot setback from
26 buildings for drywells. Appendix D.7 of the SWMM is entitled “Special
27 Circumstances and Appeals.” The first two pages of Appendix D.7 explain
28 how to prepare and file a Special Circumstances application and the third
29 through fifth pages explain how to prepare and file a Special Circumstances

1 appeal.⁵ The last four pages of Appendix D.7 are an appeal form. Two days
2 after our decision in *Beaumont-Wilshire I*, on December 6, 2013, the applicant
3 filed a “Special Circumstances” appeal. Record 69-72. In the space requesting
4 “Special Circumstances Information,” the completed appeal states:

5 “We are requesting approval for use of a private drywell that was
6 installed 6.08 feet from the building foundation instead of the
7 required 10 feet. The required 5-foot setback to the property line
8 has been met. The dimension from building foundation to
9 property line is 12.92 feet. A geotechnical engineer tested the
10 native soils at 35 in/hr. There is no below grade structure that
11 could be impacted by the drywell.” Record 70.

12 **D. The SWMM Special Circumstances Appeal Approval**

13 In a January 6, 2014 letter, the BES Stormwater System Program
14 Manager approved intervenor’s request to “discharge to a drywell system that
15 does not meet building setback requirements.” Record 2. Prior to adopting
16 that decision, the letter points out that on-site infiltration testing showed an
17 infiltration rate of 35 inches per hour and that “no below grade structure * * *
18 could be impacted by the drywell” and that the BDS Appeals Board had
19 approved the request:

20 “● This project received approval under the Bureau of
21 Development Services (BDS) Plumbing Appeals process to
22 allow the private drywell within the building setback and
23 has met conditions of approval set by BDS Site
24 Development and Structural review departments.” *Id.*

⁵ The third page of Appendix D.7 explains that the “Special Circumstances” appeals authorized by Appendix D.7 also apply to both “special circumstances decisions” as well as “administrative or technical decisions related to other requirements of Chapters 1 through 3 * * *.” The SWMM 2.3.3 setback requirement is a requirement of SWMM Chapter 2.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Petitioners’ Argument**

3 Petitioners’ first assignment of error is set out below:

4 “Respondent erred in concluding that the Project complies with
5 standards governing stormwater management.” Petition for
6 Review 3.

7 The first part of petitioners’ arguments under the first assignment of
8 error is set out below:

9 “As an initial matter, Petitioners question the authority of BDS to
10 waive the subject regulations. The appeal described in the record
11 appears to have taken place pursuant to the Oregon Structural
12 Specialty Code (OSSC) Section 113.2, which limits such appellate
13 authority as follows:

14 ““An application for appeal shall be based on a claim
15 that the true intent of this code or the rules legally
16 adopted thereunder have been incorrectly interpreted,
17 the provisions of this code do not fully apply or an
18 equally good or better form of construction is
19 proposed. An appeals Board, when appointed, shall
20 have no authority to waive requirements of this code.’

21 “Assuming, arguendo, that the dry well setback may be waived,
22 PCC 25.07.020.A appears to set forth the governing standard:

23 ““The Board of Appeals may vary the provisions of
24 this Title if it appears that because of unique
25 circumstances present the purposes and intent of this
26 Code and proper sanitation and safety are best served
27 by some other method, procedure, or material.’

28 “Under these criteria, i.e., ‘unique circumstances’ and intent of
29 [the] code being ‘best served’ [by] an alternative method, the
30 Decision fails.” Petition for Review 4-5.

1 We understand petitioners to argue that the city improperly construed the
2 applicable law and made a decision that is not supported by substantial
3 evidence in issuing the revised building permit. ORS 197.835(9)(a)(B) and
4 (C). Petitioners then go on to point out the BDS Appeals Board decision
5 makes no attempt to establish that “unique circumstances” are present in this
6 case or that the purposes and intent of the OPSC 1101.5.3.2 setback is “best
7 served” by the reduced setback. Petition for Review 5-7.

8 **B. Respondents’ Arguments**

9 The city and intervenor (respondents) take the position that “[t]he
10 SWMM does not include approval criteria or any findings requirement
11 applicable to variations requested through a Special Circumstances review[.]”
12 Respondents’ Brief 11. We understand respondents to contend that the
13 SWMM Special Circumstances procedure simply provides a basis for deviating
14 from SWMM standards, without subjecting those deviations to any approval
15 standards, as such.

16 With regard to the OPSC deviation approval, respondents contend the
17 action was not governed by PCC 25.07.020.A or OSSC 113.2, as petitioner
18 argues. By its terms, PCC 25.07.020.A governs appeals by an “applicant for a
19 plumbing permit whose application has been rejected by the Plumbing
20 Inspector,” which is not the case here.⁶ With regard to OSSC 113.2,

⁶ PCC 25.07.020.A provides, in part:

“Any applicant for a plumbing permit whose application has been rejected by the Plumbing Inspector, or any person who shall have been ordered by the Inspector to incur expense in the alteration, repair, or construction of a plumbing or drainage installation may, within 10 days thereafter appeal such action by serving upon the

1 respondents contend OSSC 113.2 places limits on appeals under the Oregon
2 Structural Specialty Code and the present appeal is under the OPSC, which is
3 governed by the more specific appeal provision in OPSC 101.3.1.⁷

4 **C. Decision**

5 Our decision in *Beaumont-Wilshire I* sustained petitioners' assignment
6 of error that argued that the drywell violated the SWMM 2.3.3 10-foot setback

Plumbing Division of the Bureau of Development Services a notice in writing of the appeal, the notice or a certified copy thereof shall be at once transmitted to the Board of Appeals. After the notice to the parties as the Board may direct, a hearing shall be had, and the Board may affirm, annul, or modify the action of the Plumbing Section. The decision of the Board thereupon shall be in full force and effect. A certified copy of the Board's decision in each appeal shall be delivered to the appellants, and a copy shall be filed for record in the Bureau of Development Services. The Board of Appeals may vary the provisions of this Title if it appears that because of the unique circumstances present the purposes and intent of this Code and proper sanitation and safety are best served by some other method, procedure, or material."

⁷ OPSC 101.3.1 provides as follows:

"Alternative materials, design and methods of construction and equipment. The provisions of this code are not intended to prevent the installation of any material or to prohibit any design or method of construction not specifically prescribed by this code, provided that any such alternative has been approved. An alternative material, design or method of construction shall be approved where the authority having jurisdiction finds that the proposed design is satisfactory and complies with the intent of the provisions of this code, and that the material, method or work offered is, for the purpose intended, at least the equivalent of that prescribed in this code in quality, strength, effectiveness, fire resistance, durability and safety."

1 requirement. Intervenor then sought approval under the city’s approval
2 authority in SWMM Appendix D.7 for a smaller setback. The city approved a
3 smaller setback under SWMM Appendix D.7, relying on the somewhat
4 contemporaneous approval by the BDS Appeals Board of a smaller setback
5 than the OPSC requires. Petitioners’ arguments in this appeal appear to be
6 largely directed at the BDS Appeals Board’s approval of a deviation from the
7 OPSC 1101.5.3.2 10-foot setback.

8 The BDS Appeals Board’s approval cites OPSC 1101.5.3.2, which seems
9 to grant the BDS Appeals Board authority to approve deviations from the 10-
10 foot setback requirement, without imposing any express limits on or standards
11 to guide decisions approving such deviations. *See* n 4. One possibility is that
12 BDS Appeals Board decisions authorizing deviations from OPSC requirements
13 such as the OPSC 1101.5.3.2 setback requirement are at the discretion of the
14 BDS Appeals Board.

15 Petitioners’ initial response to that possibility is to “question the
16 authority of BDS to waive the subject regulations” and to contend the local
17 appeal “appears to have taken place pursuant to the Oregon Specialty Code
18 (OSSC) Section 113.2, which limits such appellate authority * * *.” Petition
19 for Review 4. However, petitioners’ undeveloped questioning of “the authority
20 of BDS to waive the subject regulations,” is an insufficient argument in support
21 of their assignment of error. For one thing, the BDS Appeals Board did not
22 “waive” the OPSC 1101.5.3.2 10-foot setback requirement. Instead, the BDS
23 Appeals Board simply “approved” a drywell that is “closer than ten (10) feet
24 * * * to any building,” as OPSC 1101.5.3.2 expressly allows. *See* n 4.
25 Similarly, petitioners’ citation to OSSC 133.2, without any effort to explain
26 why they believe OSSC 113.2 applies outside the context of the OSSC to a

1 request to deviate from an OPSC setback requirement, provides no basis for
2 sustaining the first assignment of error.

3 Petitioners simply jump to the conclusion that PCC 25.07.020.A applies
4 in this case to limit the BDS Appeals Board’s discretion to approve a smaller
5 setback, again, without making any attempt to explain why they believe PCC
6 25.07.020 applies. PCC 25.07.020.A provides an appeal procedure for
7 plumbing permits that have been rejected by the Plumbing Inspector. *See* n 6.
8 Given the lack of any attempt by petitioners to establish that PCC 25.07.020.A
9 governs the decision challenged in this appeal, we agree with respondents that
10 petitioners’ first assignment of error provides no basis for reversal or remand.⁸

11 Finally, we acknowledge and reject petitioners’ contention that our
12 decision in *Beaumont-Wilshire I* left the city with the sole option of requiring
13 that the drywell be relocated to comply with the required setback. The
14 possibility that the city might have authority to approve a drywell that did not
15 comply with the 10-foot setback was not an issue in *Beaumont-Wilshire I*.

16 The first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR**

18 Petitioners’ evidentiary challenge under the second assignment of error
19 is premised on their contention that the BDS Appeals Board’s decision is

⁸ We therefore need not and do not consider respondents’ contention that the BDS Appeals Board decision to grant a reduction in the OPSC 1101.5.3.2 10-foot setback is governed by OPSC 101.3.1 or that the BDS Appeals Board granted the deviation pursuant to OPSC 101.3.1. Were we required to reach those arguments, there is nothing in the BDS Appeals Board’s decision that identifies OPSC 101.3.1 and little in the record to suggest that the approved deviation to the OPSC 1101.5.3.2 10-foot setback was granted pursuant to OPSC 101.3.1.

1 governed by the PCC 25.07.020.A's requirement that "unique circumstances
2 [be] present," and that the "purposes and intent" of the code are "best served"
3 by the proposed reduction of the setback. Because petitioners' first assignment
4 of error fails to establish the premise for the second assignment of error, the
5 second assignment of error fails as well.

6 The second assignment of error is denied.

7 The city's decision is affirmed.