

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GOOSE HOLLOW FOOTHILLS LEAGUE,)
5 GERALD M. POWELL, DAVID)
6 PENNINGTON, and KEITH LUTZ,)
7)
8 Petitioners,)

9)
10 vs.)

11)
12 CITY OF PORTLAND,)
13)
14 Respondent,)

15)
16 and)

17)
18 CHARLES KAADY,)
19)
20 Intervenor-Respondent.)

LUBA No. 92-087

FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Portland.

24
25 Daniel Kearns and Edward J. Sullivan, Portland, filed
26 the petition for review on behalf of petitioners. With them
27 on the brief was Preston, Thorgrimson, Shidler, Gates &
28 Ellis. Daniel Kearns argued on behalf of petitioners.

29
30 Ruth Spetter, Portland, filed a response brief and
31 argued on behalf of respondent.

32
33 Raymond M. Rask and Jonathan R. Gilbert, Portland,
34 filed a response brief on behalf of intervenor-respondent.
35 With them on the brief was Brownstein, Rask, Sweeney, Kerr,
36 Grim & DeSylvia. Raymond M. Rask argued on behalf of
37 intervenor-respondent.

38
39 HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON,
40 Referee, participated in the decision.

41
42 REVERSED 09/28/92

43
44 You are entitled to judicial review of this Order.
45 Judicial review is governed by the provisions of ORS

1 197.850.

2

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision affirming an
4 interpretation of the Portland City Code (PCC) rendered by
5 the city land use hearings officer.

6 **MOTION TO INTERVENE**

7 Charles Kaady moves to intervene in this proceeding on
8 the side of respondent. There is no opposition to the
9 motion, and it is allowed.

10 **STANDING**

11 Standing is an issue in this appeal. In order to have
12 standing to appeal to this Board, petitioners must file a
13 timely notice of intent to appeal and appear at some point
14 during the proceedings below, either orally or in writing.
15 ORS 197.830(2). There is no dispute that petitioners filed
16 a timely notice of intent to appeal. Respondents argue
17 petitioners failed to satisfy the statutory appearance
18 requirement.

19 Goose Hollow Foothills League appeared before the city
20 council in this matter, and for that reason has standing.¹
21 Consistent with our recent decision in Terra v. City of
22 Newport, ___ Or LUBA ___ (LUBA No. 92-068, Order on
23 Objections to the Record and Motions to Intervene, September
24 21, 1992), slip op 7-8, it is sufficiently unclear whether

¹Intervenor objected to the city council's allowance of the appearance, but did not file a cross petition for review.

1 petitioner Powell intended to appear both on his own behalf
2 and on behalf of Goose Hollow Foothills League, that we
3 assume he appeared in both capacities. For that reason,
4 petitioner Powell has standing in his individual capacity.
5 Petitioner Lutz appeared before the city land use hearings
6 officer, and for that reason has standing.² As far as we
7 can tell, petitioner Pennington did not appear below, and
8 for that reason he lacks standing in this appeal.

9 ORS 197.825(2)(a) also imposes a requirement that
10 petitioners exhaust available administrative remedies before
11 appealing a decision to this Board. Respondents argue that
12 petitioners Pennington, Lutz and Powell failed to exhaust
13 available administrative remedies. However, as we explained
14 in McConnell v. City of West Linn, 17 Or LUBA 502, 507
15 (1989), the statutory requirement that administrative
16 remedies be exhausted is satisfied if at least one
17 petitioner exhausts all available administrative remedies,
18 and that occurred in this case.

19 With the exception of petitioner Pennington, all
20 petitioners have standing.

21 **FACTS**

22 The challenged interpretation concludes that the
23 relevant PCC language is unclear and interprets that
24 language to reach a conclusion that a drive-through car wash

²The local record includes the record of the proceedings before the hearings officer and the city council.

1 facility is allowable on intervenor's Central Commercial
2 (CX) zoned property.³ The challenged decision describes the
3 subject property and proposal as follows:

4 "The [subject property] is located within the
5 Goose Hollow subdistrict of the Central City Plan
6 District.^[4] It occupies the full block which is
7 bounded by S.W. Jefferson Street, S.W. Columbia
8 Street, S.W. 17th Avenue and S.W. 18th Avenue.

9 * * * * *

10 "[A separate development application] proposes
11 remodeling of an existing building and other site
12 development in order to accommodate a car wash
13 facility at [the subject property]. The Bureau of
14 Planning is holding [the separate development
15 application] until a decision can be made on the
16 [code interpretation] issue. Record 53.

17 **DECISION**

18 Although the somewhat ambiguous and overlapping code
19 terminology governing car wash facilities and the differing
20 levels of regulation under the code create the opportunity
21 for confusion, this case presents a relatively
22 straightforward question of code interpretation. As
23 explained below, car washes are an allowed use in the CX
24 zoning district. However, the Central City Plan District
25 imposes additional regulatory requirements which effectively
26 prohibit drive-through car wash facilities in the area of

³The subject property is also subject to a design overlay district, but that overlay district has no bearing on our resolution of this matter.

⁴We discuss the significance of the location of the subject property within the Central City Plan District and Goose Hollow subdistrict, infra.

1 the city where the subject property is located. The city's
2 construction of its code to the contrary is erroneous.

3 **A. Quick Vehicle Servicing Uses and Drive-Through**
4 **Facilities**

5 As the terms are used in the PCC, both "Quick Vehicle
6 Servicing" uses⁵ and "Drive-Through Facilities"⁶ include car

⁵PCC Chapter 33.920 establishes several broad "Use Categories," including "Commercial Use Categories." One of the identified Commercial Use Categories is "Quick Vehicle Servicing," which the PCC describes as having the following characteristics:

"* * * Quick Vehicle Servicing uses provide direct services for motor vehicles where the driver generally waits in the car before and while the service is performed. The development will include a drive-through facility, the area where the service is performed (see [PCC] 33.910, Definitions.) Full-serve and mini-serve gas stations are always classified as a primary use (Quick Vehicle Servicing), rather than an accessory use, even when they are in conjunction with other uses." (Emphasis added.) PCC 33.920.220(A).

PCC 33.920.220(C) specifically lists "car washes" as an example of a Quick Vehicle Servicing use.

⁶The description of Quick Vehicle Servicing uses quoted in n 5, supra, notes that such uses include Drive-Through Facilities, which PCC 33.910.030 defines as follows:

"* * * A facility or structure that is designed to allow drivers to remain in their vehicles before and during an activity on the site. Drive-through facilities are a type of site development that is usually found in conjunction with a Quick Vehicle Servicing use or a Retail Sales and Service use. Drive-through facilities also include facilities designed for the rapid servicing of vehicles, where the drivers may or may not remain in their vehicles, but where the drivers usually either perform the service for themselves, or wait on the site for service to be rendered. Drive-through facilities may serve the primary use of the site or may serve accessory uses. Examples are drive-up windows; menu boards; order boards or boxes; gas pump islands; car wash facilities; auto service facilities; such as air compressor, water, and windshield washing stations; quick-lube or quick-oil change facilities; and drive-in theaters." (Emphasis added.)

1 wash facilities. As the definitions set out in footnotes 5
2 and 6 make clear, the terms "Quick Vehicle Servicing" and
3 "Drive-Through Facilities" overlap significantly. For
4 purposes of this appeal, the important distinction is that
5 Quick Vehicle Servicing uses are a subset of the total class
6 of uses that constitute Drive-Through Facilities. In other
7 words, all Quick Vehicle Servicing uses include a
8 Drive-Through Facility, but not all uses that incorporate
9 Drive-Through Facilities are Quick Vehicle Servicing uses.

10 **B. CX Zoning District**

11 As noted earlier, the subject property is zoned CX, a
12 zoning district which allows Quick Vehicle Servicing uses.⁷
13 However the CX zoning district provides that Quick Vehicle
14 Servicing uses are only allowable "if they comply with the
15 development standards and other regulations of [PCC Title
16 33]."⁸ PCC 33.130.100(A). With certain qualifications, the
17 CX zone also allows Drive-Through Facilities. PCC
18 33.130.260.⁹

19 The subject property is located in the Central City

⁷PCC 33.130.100 identifies "allowed," "limited," "conditional" and "prohibited" uses in the CX zone. Quick Vehicle Servicing uses are identified as "allowed."

⁸One such "development standard" is the Central City Plan District's prohibition against Drive-Through Facilities in certain subdistricts, discussed infra. PCC 33.510.240.

⁹PCC 33.130.260(C) specifically provides that "Drive-Through Facilities are allowed in the CX zone, but are prohibited in certain subdistricts of the Central City Plan District."

1 Plan District. PCC Chapter 33.510. The PCC explains that
2 the regulations imposed by the Central City Plan District
3 control, where they are more restrictive than the base
4 zoning requirements (here the CX zoning district). The
5 Central City Plan District imposes development standards
6 which include, as discussed below, the PCC 33.510.240
7 prohibition against Drive-Through Facilities in the Goose
8 Hollow subdistrict.

9 **C. Central City Plan District and Goose Hollow**
10 **Subdistrict**

11 The Central City Plan District is made up of several
12 subdistricts, including the "Downtown" subdistrict and the
13 "Goose Hollow" subdistrict.¹⁰ Quick Vehicle Servicing uses
14 are prohibited in the Downtown subdistrict, but not in the
15 Goose Hollow subdistrict.¹¹ Under PCC 33.510.240, Drive-
16 Through Facilities are prohibited in both the Downtown and
17 Goose Hollow subdistricts.¹²

¹⁰As noted earlier in this opinion, the subject property is located in the Goose Hollow subdistrict. The subject property is located outside the Downtown subdistrict.

¹¹PCC 33.510.100(A) provides as follows:

"* * * In the CX zone the following regulations apply:

- "1. Quick Vehicle Servicing uses are prohibited in the Downtown subdistrict or within 100 feet of a light rail street.
- "2. Vehicle Repair uses are prohibited in the Downtown subdistrict."

¹²PCC 33.510.240 provides as follows:

1 In its decision, the city finds an implied
2 authorization for Quick Vehicle Servicing uses in the Goose
3 Hollow subdistrict, because PCC 33.510.100(A) only prohibits
4 such uses in the Downtown subdistrict. Specifically, the
5 decision states as follows:

6 "Under [PCC] 33.510.100(A)(1), quick vehicle
7 servicing uses are prohibited in the downtown
8 subdistrict or within 100 feet of a light rail
9 street. This provision does not explicitly state
10 that quick vehicle servicing uses are allowed in
11 all other subdistricts, but it is a reasonable
12 implication. * * *" Record 54.

13 The city then reasons that this implied authorization
14 conflicts with the prohibition against Drive-Through
15 Facilities in the Goose Hollow subdistrict, since by
16 definition all Quick Service Uses must include a Drive-
17 Through Facility. To avoid this alleged conflict, the city
18 construes the prohibition in PCC 33.510.240 as not applying
19 to those Drive-Through Facilities associated with Quick
20 Vehicle Servicing uses. In other words the city reads an
21 exception into the apparently absolute prohibition against
22 Drive-Through Facilities in PCC 33.510.240. That exception
23 allows Drive-Through Facilities in the Goose Hollow
24 subdistrict, so long as the Drive-Through Facility is in
25 conjunction with a Quick Vehicle Servicing use.

26 The challenged decision and respondents' briefs cite

"Drive-through facilities are prohibited in the Downtown and
Goose Hollow subdistricts, and on sites within 100 feet of a
light rail street."

1 numerous cases holding that statutes and local government
2 enactments should be construed as a whole to give effect to
3 all parts. See e.g. Blyth & Co., Inc. v. City of Portland,
4 204 Or 153, 159, 282 P2d 363 (1955); Burt v. Blumenauer, 84
5 Or App 144, 147, 733 P2d 462 (1987); Kenton Neighborhood
6 Assoc. v. City of Portland, 17 Or LUBA 784, 797 (1989);
7 Foster v. City of Astoria, 16 Or LUBA 879, 884 (1988). The
8 city's application of that principle of statutory
9 interpretation in this case proceeds from an erroneous
10 assumption and is taken to an unsupportable extreme,
11 resulting in an incorrect construction of the PCC.

12 The erroneous assumption upon which the city's decision
13 is based is that PCC 33.510.100(A), see n 11, supra,
14 impliedly authorizes Quick Vehicle Servicing uses in the
15 Goose Hollow subdistrict. The PCC explains that the base
16 zones, such as the CX zone, "state which uses are allowed in
17 each zone." PCC Title 33 at i. The PCC goes on to explain
18 that other PCC provisions, including the Central City Plan
19 District, impose additional requirements and limitations on
20 uses that are otherwise allowable under the base zone. The
21 Central City Plan District provisions "are applied in
22 conjunction with the base zone and modify the regulations of
23 the base zone." (Emphasis added.) Id.

24 Therefore, it is the CX zone that allows Quick Vehicle
25 Servicing and Drive-Through Facilities in the CX zone. No
26 implied authorization for Quick Vehicle Servicing uses is

1 needed from PCC 33.510.100(A), and none is provided. That
2 section of the PCC simply prohibits Quick Vehicle Servicing
3 uses in the Downtown subdistrict and within 100 feet of a
4 light rail line. It has no effect on the uses that are
5 allowed within the CX zone in the Goose Hollow subdistrict,
6 because by its terms it has no applicability within that
7 subdistrict.

8 The city's decision is founded on a perceived conflict
9 between the prohibition in PCC 33.510.240 against Drive-
10 Through Facilities in the Downtown and Goose Hollow
11 subdistricts, on the one hand, and its interpretation of the
12 prohibition against Quick Vehicle Servicing uses in the
13 Downtown subdistrict. We fail to see the conflict. The
14 city interprets PCC 33.510.100(A) to impliedly authorize
15 Quick Vehicle Servicing uses in the Goose Hollow
16 subdistrict, creating a "conflict" where none exists, and
17 then uses that "conflict" to create an exception to the
18 prohibition of PCC 33.510.240 where, again, none exists.
19 The general interpretive principle that effect should be
20 given to all parts of an enactment, if possible, does not
21 provide a justification for creating an implied
22 authorization in PCC 33.510.100(A) that is not stated in
23 that section and then using that implied authorization to
24 create an exception to the prohibition in PCC 33.510.240

1 that is also not stated in the code language.¹³ Because the
2 city's interpretation is inconsistent with the express
3 language of the PCC, the Oregon Supreme Court's recent
4 decision in Clark v. Jackson County, 313 Or 508, ___ P2d ___
5 (1992) does not require that we defer to the city's
6 interpretation.

7 Rather than engage in such interpretational gymnastics,
8 the PCC should simply be applied as it is written. The most
9 that can be said is that the prohibition against Drive-
10 Through Facilities in the Downtown subdistrict stated in PCC
11 33.510.240 makes the prohibition against the less inclusive
12 Quick Vehicle Servicing uses in the Downtown subdistrict
13 stated in PCC 33.510.100(A)(1) unnecessary, because such
14 uses would include Drive-Through Facilities and thus be
15 prohibited by PCC 33.510.240 in any event.¹⁴ However, we do
16 not agree with the city that the existence of overlapping
17 prohibitions necessarily constitutes a conflict in the PCC

¹³Interpretation of PCC 33.510.100(A) to impliedly authorize Quick Vehicle Servicing uses in the Goose Hollow subdistrict is particularly unwarranted in this case, since, as noted earlier in the text, that interpretation unnecessarily duplicates provisions of the CX zone that already authorize Quick Vehicle Servicing uses. PCC 33.130.100.

¹⁴There is a memorandum by the city attorney's office noting this overlap in the two prohibitions. Supp. Record 7-8. Although the city attorney concludes that this overlap constitutes a conflict in the code, we do not agree. However an alternative theory offered by the city attorney certainly is plausible:

"When analyzing this situation, one should not overlook the obvious - that the [overlap] between the two sections could be the product of simple mistake. * * *." Supp. Record 9.

1 which justifies going to the lengths the city went in this
2 case to give some effect to all its code language. There
3 are limits to the lengths the city may go to prevent
4 overlapping code prohibitions from rendering one of those
5 prohibitions duplicative, and the city's decision in this
6 case goes well beyond those limits. Nothing cited by any
7 party to this proceeding even remotely suggests any specific
8 intent to exclude Quick Vehicle Servicing uses from the
9 unqualified prohibition stated in PCC 33.510.240 against
10 Drive-Through Facilities in the Goose Hollow subdistrict.
11 If the city intends such an exclusion, an amendment of the
12 PCC to reflect that intent is required. Von Lubken v. Hood
13 River County, 106 Or App 226, 229, 806 P2d 727 (1991).

14 In summary, while the CX zone allows drive-through car
15 wash facilities as both Quick Vehicle Servicing uses and
16 Drive-Through Facilities, in certain circumstances, this is
17 one of the circumstances where it does not. PCC 33.510.240
18 directly prohibits Drive-Through Facilities in the Goose
19 Hollow subdistrict; and, because all Quick Vehicle Servicing
20 uses are Drive-Through Facilities, indirectly prohibits
21 Quick Vehicle Servicing uses in that subdistrict. The
22 city's contrary construction of the PCC is erroneous.

23 The city's decision is reversed.¹⁵

¹⁵We do not address petitioners' remaining arguments offering alternative theories for attacking the challenged interpretation. Even if we agreed with those theories, they would not alter our resolution of this appeal.

1