

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 DOROTHY GAGE, and ASHCREEK)
5 NEIGHBORHOOD ASSOCIATION,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13 Respondent,)
14)
15 and)
16)
17 FP-35 PARTNERS,)
18)
19 Intervenor-Respondent.)

LUBA No. 93-030
FINAL OPINION
AND ORDER

20
21
22 Appeal from City of Portland.

23
24 Edward J. Sullivan, Portland, filed the petition for
25 review and argued on behalf of petitioners. With him on the
26 brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

27
28 Peter A. Kasting, Senior Deputy City Attorney,
29 Portland, filed a response brief and argued on behalf of
30 respondent.

31
32 Jeff H. Bachrach, Portland, filed a response brief and
33 argued on behalf of intervenor-respondent. With him on the
34 brief was O'Donnell, Ramis, Crew & Corrigan.

35
36 SHERTON, Chief Referee; HOLSTUN, Referee, participated
37 in the decision.

38
39 AFFIRMED 06/11/93

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city hearings officer decision
4 approving a minor amendment to a previously approved planned
5 unit development (PUD).

6 **MOTION TO INTERVENE**

7 FP-35 Partners, the applicant below, moves to intervene
8 in this proceeding on the side of respondent. There is no
9 opposition to the motion, and it is allowed.

10 **FACTS**

11 This is the second time a decision approving the
12 subject minor PUD amendment has been appealed to this
13 Board.¹ In Gage v. City of Portland, ___ Or LUBA ___ (LUBA
14 No. 92-057, September 15, 1992) (Gage I), slip op 2-3, we
15 described the relevant facts:

16 "The subject property is 6.37 acres in size,
17 currently undeveloped and zoned Medium Density
18 Single-Dwelling Residential (R7). The city zoning
19 map indicates the presence of a 'water feature' on
20 the eastern half of the property. A creek
21 traverses the eastern portion of the subject
22 property, and the property may contain wetlands
23 subject to the jurisdiction of the Division of
24 State Lands. The surrounding property is zoned
25 Low Density Single-Dwelling Residential (R10).

26 "On June 9, 1981, the city approved a conditional
27 use permit and preliminary development plan for
28 the Cedar Meadows PUD. Final development plan

¹The local record submitted in this appeal incorporates the local record submitted for Gage I as "Record," and the record compiled after our remand and submitted in this appeal as "Remand Record."

1 approval was granted on September 17, 1984. As
2 finally approved in 1984, the PUD included 35
3 multi-family dwelling units in six buildings,
4 three detached garage structures for 22 cars and
5 55 additional parking spaces. The development was
6 to be clustered on the western half of the
7 property. * * *

8 "On November 5, 1991, intervenor applied to the
9 city for what it characterized as a 'minor
10 amendment to the PUD development plan.' * * *
11 The proposed amendment does not alter the number
12 of dwelling units, but reduces the number of
13 residential structures from six to three. The
14 amended development plan also includes three
15 detached garage structures for 16 cars and 65
16 additional parking spaces. The locations of the
17 access street from S.W. Multnomah Blvd. and of
18 interior streets are not changed by the proposed
19 amendment, but the distance between the proposed
20 structures and the property boundaries and the
21 storm water detention easement on the eastern half
22 of the property are increased." (Footnote
23 omitted.)

24 In Gage I, we remanded the city's decision because it
25 failed to apply Portland City Code (PCC) chapter 33.299
26 (Temporary Prohibition on the Disturbance of Forests), which
27 was in effect when intervenor's application for a minor
28 amendment to the approved PUD final development plan was
29 filed. After the remand, on January 19, 1993, the city
30 hearings officer held an evidentiary hearing to consider the
31 application of PCC chapter 33.299 to the proposed PUD
32 amendment. On January 22, 1993, petitioners submitted a
33 motion to dismiss the proceedings. On February 4, 1993, the
34 hearings officer issued her decision. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 The city initially granted final development plan
3 approval for the subject PUD on September 17, 1984. Under
4 this assignment of error, petitioners argue the city erred
5 by failing to address their contention that the final
6 development plan approval for the subject PUD expired on
7 September 17, 1992, two days after LUBA remanded the city
8 decision challenged in Gage I, and before the hearing on
9 remand was held.² According to petitioners, if the
10 underlying PUD final development plan approval expired, the
11 city cannot approve an amendment to that PUD final
12 development plan.

13 Petitioners specifically argue that under
14 PCC 33.79.140(e) and 33.79.150(d), which were in effect when
15 final development plan approval was granted in 1984, if no
16 development of the PUD occurs, city approval of the PUD
17 final development plan remains valid for eight years.
18 Petitioners further argue this interpretation was expressed
19 in a May 20, 1988 letter from a city planner to the
20 developer. Remand Record 30. According to petitioners,
21 LUBA must remand the challenged decision to the city, so the
22 city may interpret the applicable PCC provisions and
23 determine whether the 1984 PUD final development plan
24 approval expired on September 17, 1992. Weeks v. City of

²Petitioners raised this issue at the hearing on remand. Petition for Review App. F (Remand Transcript) 11-12.

1 Tillamook, 117 Or App 449, 453, ___ P2d ___ (1992).

2 Respondent and intervenor-respondent (respondents)
3 contend (1) petitioners waived this issue by not raising it
4 in Gage I; (2) petitioners' argument is an impermissible
5 collateral attack on a city decision that is not the subject
6 of this appeal; (3) the PCC provisions in effect at the time
7 of the original final development plan approval do not limit
8 that approval to eight years; and (4) even if the PCC
9 provisions in effect at the time of the original final
10 development plan approval did limit the approval to eight
11 years, the city's February 20, 1992 decision (challenged in
12 Gage I) to approve a minor amendment to the PUD final
13 development plan began a new time clock under current
14 PCC 33.730.130(B) and (C). We address respondents' first
15 three arguments separately below.

16 **A. Waiver**

17 Respondents argue that because petitioners could have
18 raised the issue of the expiration of the 1984 PUD final
19 development plan approval in Gage I, but failed to do so,
20 they waived their right to raise this issue before the city
21 on remand and before the Board in this appeal. Mill Creek
22 Glen Protection Assoc. v. Umatilla County, 88 Or App 522,
23 746 P2d 728 (1987). According to respondents, the city was
24 entitled to limit its consideration on remand to correcting
25 the deficiencies in its decision identified in Gage I.
26 Bartels v. City of Portland, 23 Or LUBA 183 (1992).

1 Petitioners' contention is that city approval of the
2 final development plan for the subject PUD expired on
3 September 17, 1992, and that after expiration of that
4 approval the city could no longer act to approve an
5 amendment to the PUD final development plan. The city
6 decision challenged in Gage I was made on February 20, 1992.
7 Our decision in Gage I was issued on September 15, 1992.
8 Both occurred prior to the alleged expiration of the
9 original PUD final development plan approval. We therefore
10 agree with petitioners that the issue they seek to raise now
11 was not ripe at the time of the city's first decision or
12 petitioners' first appeal to this Board, and could not have
13 been raised in those proceedings. Accordingly, petitioners
14 have not waived this issue.³

15 **B. Collateral Attack**

16 Respondents argue a May 20, 1984 letter from the
17 planning director to the developer, stating that a PUD final
18 development plan approval "would be permanently valid," is a
19 final determination by the city that the PUD final
20 development plan approval has no expiration date.
21 Record 95. Respondents assert petitioners did not appeal
22 this May 20, 1984 decision, and argue that petitioners may

³We have stated in previous opinions that local government proceedings on remand may be limited to the issues raised in our opinion remanding the matter. Bartels v. City of Portland, supra. However, our previous decisions did not deal with an instance where an issue that is arguably relevant in the remand proceeding, could not have been raised in the first appeal to this Board.

1 not collaterally attack the decision in this appeal
2 proceeding.⁴

3 There is no dispute that the city's September 17, 1984
4 decision approving the PUD final development plan itself
5 says nothing with regard to the duration of the validity of
6 that approval. Record 111-12. Further, we agree with
7 petitioners that the May 20, 1984 letter from the planning
8 director to the developer, written some four months before
9 the decision granting PUD final development plan approval
10 was issued, does not constitute a final, appealable city
11 decision with regard to the duration of the subsequent PUD
12 final development plan approval. Consequently, the issue
13 petitioners seek to raise with regard to expiration of the
14 PUD final development plan approval is not an impermissible
15 collateral attack on an unappealed city decision.

16 **C. PCC 33.79.140 and 33.79.150**

17 PCC 33.79.140 (1981) ("Final Development Plan Approval
18 Process") provides in relevant part:

19 "(a) Preliminary [development plan] approval for
20 the PUD is valid for 3 years. * * * Within
21 this time period the applicant shall submit
22 to the Bureau of Planning a final development
23 plan for the entire site, or a final
24 development plan for the first phase if the

⁴Respondents also argue the May 20, 1988 city planner letter relied on by petitioners is contradicted by a June 15, 1988 letter from the planning department stating that "no termination date has been established" for the PUD final development plan approval. Record 90. However, no party contends either of the 1988 letters constitutes an appealable city "decision."

1 PUD has been approved for phased development.

2 * * * * *

3 "(e) Final decision on the [PUD] conditional use
4 application.

5 "(1) Approval of the final development plan
6 shall constitute a final decision on the
7 PUD conditional use application.

8 * * * * *

9 PCC 33.79.150 (1981) ("Phased [PUD] Development Procedures")
10 provides in relevant part:

11 "(a) An applicant may apply for and receive
12 approval of a preliminary development plan
13 for the total site area which includes phased
14 development and may thereafter apply for and
15 receive approval of final development plans
16 for each phase of the PUD.

17 * * * * *

18 "(d) Thereafter, the applicant shall submit a
19 final development plan. The sum of the years
20 between the first approved final phase and
21 the last approved final phase may not exceed
22 8 years. * * *" (Emphasis added.)

23 Respondents argue nothing in the above quoted PCC
24 sections establishes that PUD final development plan
25 approval expires after a certain time period. Rather,
26 respondents argue that PCC 33.79.140(a) establishes only
27 that preliminary development plan approval will expire after
28 three years, if a final development plan has not been
29 approved.

30 This Board is required to defer to a local government's
31 interpretation of its own ordinances, unless that

1 interpretation is contrary to the express words, policy or
2 context of the local enactment. Clark v. Jackson County,
3 313 Or 508, 514-15, 836 P2d 710 (1992). In Weeks v. City of
4 Tillamook, supra, the court of appeals said Clark requires
5 that this Board not interpret a local government's
6 ordinances in the first instance, but rather review the
7 local government's interpretation of its ordinances.
8 However, the code provisions at issue in Weeks were complex
9 and ambiguous, and their interpretation was the core of the
10 challenged land use decision. We do not believe Weeks
11 should be read to establish a principle that this Board must
12 remand the decision for a local interpretation to be made
13 wherever a petitioner can identify an arguably relevant, but
14 clear and unambiguous, code provision that is not
15 interpreted in the challenged decision. In Terra v. City of
16 Newport, ___ Or LUBA ___ (LUBA No. 92-068, January 22,
17 1993), slip op 13, we explained the fact that a challenged
18 local government decision does not include an interpretation
19 of a particular code provision, alleged to be applicable by
20 petitioners, does not provide a basis for reversal or remand
21 if the code provision in question is not ambiguous or
22 susceptible to different sustainable interpretations.

23 As explained above, there is no dispute that the
24 September 17, 1984 PUD final development plan approval
25 decision itself does not establish that the approval expires
26 after eight years, if no development occurs. In addition,

1 the PCC provisions relied on by petitioners, PCC 33.79.140
2 and 33.79.150 (1981), clearly do not establish such a
3 limitation on the validity of PUD final plan approval.
4 There is absolutely nothing in PCC 33.79.140 (1981)
5 addressing the duration or expiration of PUD final
6 development plan approval. PCC 33.79.150(d) unambiguously
7 provides that an eight year limitation applies to the period
8 allowed between approval of the final development plans for
9 the first and last phases of a phased PUD. PCC 33.79.150(d)
10 has no bearing on the situation in this case.

11 Petitioners have failed to identify any applicable
12 standard arguably limiting the validity of the September 17,
13 1984 PUD final development plan approval to eight years. In
14 these circumstances, the city's failure to address the issue
15 of whether the PUD final development plan approval expired
16 on September 17, 1992, does not provide a basis for reversal
17 or remand.

18 The first assignment of error is denied.

19 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

20 Petitioners argue the hearings officer lacked
21 jurisdiction to review the proposed PUD final development
22 plan amendment for compliance with PCC chapter 33.299
23 because an application for an exception under the forest
24 disturbance prohibition provisions of PCC chapter 33.299 was
25 never filed.

26 The issue petitioners seek to raise in this appeal

1 regarding lack of city jurisdiction due to absence of an
2 application requesting an exception under certain provisions
3 of PCC chapter 33.299, is an issue that could have been
4 raised in Gage I. Petitioners argued in Gage I only that
5 the standards of PCC chapter 33.299 apply to the proposed
6 amendment to the PUD final development plan. Our decision
7 in Gage I simply requires that the city interpret and apply
8 the standards of PCC chapter 33.299 to the subject final
9 development plan amendment application. Petitioners did not
10 appeal that decision. Thus, the issue of whether the
11 subject application is sufficient to give the city
12 jurisdiction to grant an exception to the prohibition
13 against the disturbance of forests under PCC chapter 33.299
14 is a settled issue that may not be raised in this appeal.
15 Beck v. City of Tillamook, 313 Or LUBA 148, 831 P2d 674
16 (1992).

17 Petitioners also make a related argument that the
18 hearings officer lacked jurisdiction to make an initial
19 decision on compliance of the proposal with PCC
20 chapter 33.299. According to petitioners, under the city's
21 Type II procedures, the hearings officer has authority to
22 make a determination of compliance with PCC chapter 33.299
23 only in an appeal from a decision by the planning director.
24 Petitioners rely on decisions where we found that under
25 local code provisions delegating authority to act on a
26 particular type of application to a lower body, a governing

1 body lacked authority to act upon such an application
2 without it first having been acted upon by the lower body.
3 See Scott v. Josephine County, 22 Or LUBA 82, 86 (1991)
4 (alteration of nonconforming use); Downtown Community Ass'n.
5 v. Portland, 3 Or LUBA 244, 252-53 (1981) (variance).

6 Petitioners' argument is based at least in part on
7 petitioners' contention that a separate application for
8 approval under PCC chapter 33.299 is required (an
9 application the PCC requires to be initially decided by the
10 planning director). This contention has been waived.
11 However, to the extent petitioners also argue the procedures
12 followed by the city on remand were improper, even if a
13 separate application is not required, we disagree.

14 In Gage I, we determined the city failed to apply
15 potentially applicable approval standards in PCC
16 chapter 33.299 to the PUD final development plan amendment
17 application before it. Where a local government fails to
18 apply, or improperly applies, an applicable approval
19 standard in its initial proceedings, it is not automatically
20 required to repeat on remand every procedural step it
21 followed in making its original decision. In Wentland v.
22 City of Portland, 23 Or LUBA 321, 326-27 (1992), we stated:

23 "The PCC does not require that the city, in
24 considering a decision remanded by LUBA, repeat
25 all the procedures followed in rendering the
26 initial decision. We have previously determined
27 that, absent code provisions to the contrary,
28 local procedural requirements that apply in
29 reaching the initial decision need not be followed

1 in local proceedings following remand unless the
2 remand specifically requires those procedures be
3 followed. See Lane County School Dist. 71 v. Lane
4 County, 15 Or LUBA 150, 153-54 (1986); Morrison v.
5 Cannon Beach, 8 Or LUBA 206, 209 (1983). In such
6 circumstances, so long as all parties are given an
7 adequate opportunity to comment upon the * * *
8 application prior to a final decision on that
9 application, the local government's failure to
10 repeat all of the procedures it followed in
11 reaching the first decision provides no basis for
12 reversal or remand."

13 In this case, petitioners had the opportunity to
14 introduce evidence and argument regarding compliance of the
15 proposed PUD final development plan amendment with PCC
16 chapter 33.299 at the hearing before the hearings officer.
17 Therefore, we agree with respondents the city did not err by
18 allowing the hearings officer to determine compliance with
19 PCC chapter 33.299 on remand, without an initial
20 administrative decision by the planning director.⁵

21 The second and third assignments of error are denied.

22 **FIFTH ASSIGNMENT OF ERROR**

23 Under this assignment of error, petitioners argue the
24 city erred in determining the proposed PUD final development
25 plan amendment is a "minor" amendment, rather than a "major"

⁵Respondents also contend that under ORS 197.835(2) and 197.763(1), we are precluded from reviewing the issues raised by petitioners under these assignments of error because they were not timely raised below. Respondents further argue petitioners may not cite these alleged errors as a basis for reversal or remand, because they are procedural in nature and petitioners neither objected to them below nor experienced prejudice to their substantial rights due to the errors. Because we reject petitioners' arguments on other bases, we do not address these arguments.

1 amendment.⁶ Petitioners concede that in Gage I, this Board
2 affirmed the city's determination that the proposed
3 amendment is minor. However, petitioners contend they
4 argued in Gage I that application of PCC chapter 33.299
5 would affect the determination of whether the proposal
6 constitutes a major or minor amendment, and LUBA did not
7 resolve this issue. Therefore, according to petitioners,
8 they were free to raise this issue before the city, on
9 remand, and before this Board.

10 In Gage I, petitioners' second assignment of error
11 alleged the city erred in determining the proposed amendment
12 to the PUD final development plan constituted a "minor"
13 amendment. We stated:

14 "Under PCC 33.269.440.A.1, the criterion for
15 determining whether a proposed amendment to a PUD
16 development plan is major is whether the amendment
17 will have 'a significant impact on the surrounding
18 area or will cause a substantial change in the
19 [approved] PUD.' * * *

20 "PCC 33.269.440.A requires that the city's
21 findings explain why it concluded the proposed
22 amendment will not have 'a significant impact on
23 the surrounding area' and will not 'cause a
24 substantial change in the [approved] PUD.' The
25 [city's] findings explain the nature of the
26 proposed changes and note that the amount of land
27 in nonresidential development will not be
28 increased, the number and type of residential
29 units will not be changed, the proposed access and
30 roads will not be altered and structures will be

⁶Under PCC 33.269.440.B.1, an application for a "major" amendment to a PUD development plan is processed the same as the original application for PUD development plan approval.

1 moved only further away from the perimeter, fill
2 areas and the storm water detention easement.
3 * * * Petitioners do not challenge the
4 evidentiary support for these findings. We
5 believe these findings provide an adequate basis
6 for concluding that the proposed amendment will
7 not have a significant impact on the surrounding
8 area and does not constitute a substantial change
9 in the proposed PUD.

10 "The second assignment of error is denied."
11 (Record citation and footnote omitted.) Gage I,
12 slip op at 8-9.

13 The above quote indicates that in Gage I, we
14 unequivocally affirmed the city's determination that the
15 proposed PUD final development plan amendment is a "minor"
16 amendment. While petitioners may have mentioned in their
17 petition for review that they think the applicability of PCC
18 chapter 33.299 could affect this determination, our opinion
19 in Gage I implicitly rejects such a contention, and was not
20 appealed by petitioners. Consequently, whether the city
21 erred in determining that the proposed amendment is "minor,"
22 is an old, resolved issue that cannot be raised in this
23 appeal. Beck v. City of Tillamook, supra.

24 The fifth assignment of error is denied.

25 **FOURTH ASSIGNMENT OF ERROR**

26 PCC 33.299.030 (1991) provides that herbicide
27 application and burning, cutting, damaging or removing
28 vegetation are prohibited in certain designated forest
29 areas. There is no dispute that the subject property is
30 within such a forest area. However, PCC 33.299.040 (1991)
31 provides that notwithstanding the general prohibition of PCC

1 33.299.030 (1991), certain activities are allowed, including
2 the following:

3 "F. Any activity authorized by a land use
4 decision accepted and recorded before the
5 effective date of this ordinance[.]"

6 The city determined that the activities allowed by the
7 proposed PUD final development plan amendment are within the
8 above quoted exception to the general prohibition of
9 PCC 33.299.030 (1991):

10 "* * * City Council [approved the preliminary
11 development plan for the PUD] in Ordinance
12 No. 151914, which was accepted and recorded on
13 August 28, 1991, long before [PCC] chapter 33.299
14 was in effect. That approval permits disturbance
15 of a portion of the forested area for development
16 of the dwellings and garage units, as well as the
17 street and utilities. The area to be developed
18 under the amended plan includes less of the
19 forested area than under the originally approved
20 PUD [development plan]. Fewer trees will be
21 removed and the structures have been consolidated
22 to reduce the area disturbed. All the development
23 activity that will disturb forest area was
24 approved in that original approval.

25 "[Intervenor] will be developing under the amended
26 development plan, which was approved as a separate
27 land use permit from the original development.
28 However, the 'activity' that will include removing
29 vegetation and cutting trees was approved in the
30 original PUD development plan. * * * The amended
31 permit allows no activity that was not previously
32 approved. The fact that the minor amendment is
33 processed as a separate land use permit does not
34 change the fact that the 'activity' that includes
35 disturbing the forest was approved in 1981, before
36 [PCC] Chapter 33.299 was in effect." (Emphasis
37 added.) Remand Record 5.

38 Petitioners argue the city's interpretation of the

1 exception provided by PCC 33.299.040.F (1991) is wrong.
2 Petitioners concede PCC 33.299.030.F (1991) would allow
3 construction of a PUD pursuant to the preliminary and final
4 development plans approved in 1981 and 1984, respectively.
5 However, according to petitioners, PCC 33.299.030.F (1991)
6 does not allow construction of the proposed PUD pursuant to
7 the amended final development plan, because that plan was
8 approved by a new land use decision, made after the
9 effective date of PCC chapter 33.299. We note, however,
10 that petitioners do not challenge the evidentiary support
11 for the above emphasized city findings that the amended plan
12 does not allow any forest disturbance that was not approved
13 in the original approvals.

14 As stated above, we are required to defer to a local
15 government's interpretation of its own ordinances, unless
16 that interpretation is contrary to the express words, policy
17 or context of the local enactment. Clark v. Jackson County,
18 supra. This means we must defer to a local government's
19 interpretation of its own enactments, unless that
20 interpretation is "clearly wrong." Goose Hollow Foothills
21 League v. City of Portland, 117 Or App 211, 217, ___ P2d ___
22 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d
23 1354 (1992).

24 Petitioners argue that under Clark, and the subsequent
25 appellate cases applying Clark, we need not give as much
26 deference to an interpretation of a local enactment by a

1 hearings officer as we would to an interpretation by the
2 local governing body. However, Clark and its progeny
3 require us to defer to the interpretation of the local
4 government, and make no distinction between interpretations
5 rendered by a governing body, planning commission, hearings
6 officer or other local decision maker. In any case, we note
7 that so long as the decision maker in question has authority
8 to interpret local enactments, its interpretation becomes
9 the interpretation of the local government, to which we are
10 required to defer under Clark.

11 The challenged decision interprets PCC 33.299.040.F
12 (1991) to allow vegetation disturbance activities authorized
13 under an amended PUD final development plan, if those same
14 activities were authorized, and could be carried out, under
15 an original PUD development plan that was approved prior to
16 the effective date of PCC chapter 33.299. We do not see
17 that such an interpretation is contrary to the express
18 words, policy or context of PCC chapter 33.299, as it does
19 not allow any activity to occur that was not authorized
20 under a land use decision that was accepted and recorded
21 prior to the effective date of PCC chapter 33.299.

22 The fourth assignment of error is denied.

23 The city's decision is affirmed.