

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

3
4 THE DOWNTOWN COMMUNITY ASSOCIATION,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CITY OF PORTLAND,)
11)
12 Respondent,)
13)
14 and)
15)
16 DOWNTOWN DEVELOPMENT GROUP,)
17)
18 Intervenor-Respondent.)

LUBA No. 96-114
FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Portland.

22
23 Steven R. Schell, Portland, filed the petition for
24 review and argued on behalf of petitioner. With him on the
25 brief was Black Helterline.

26
27 Ruth M. Spetter, Senior Deputy City Attorney, Portland,
28 filed a response brief and argued on behalf of respondent.

29
30 Robert E. Stacey and Linly Ferris Rees, Portland, filed
31 a response brief on behalf of intervenor-respondent. With
32 them on the brief was Stephen T. Janik and Ball Janik.
33 Robert E. Stacey argued on behalf of intervenor-respondent.

34
35 LIVINGSTON, Referee; GUSTAFSON, Referee, participated
36 in the decision.

37
38 AFFIRMED 04/14/97

39
40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 approving the construction of a parking facility in the
5 city's Central Commercial zone.

6 **MOTION TO INTERVENE**

7 Downtown Development Group (intervenor), the applicant
8 below, moves to intervene on the side of the respondent.
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 The subject property has a comprehensive plan and
12 zoning designation of Central Commercial (CX) with a design
13 review overlay (d) and is located in the Central City Plan
14 District. Central City Parking Review approval is required
15 for new parking uses in the Central City Plan District.

16 As petitioner explains:

17 "On January 8, 1996, intervenor submitted an
18 application for Central City Parking Review for a
19 12-story parking structure with one and one-half
20 to two of these floors at ground level being for
21 retail. The parking structure would have 550
22 stalls and would replace the current use, which is
23 a surface parking lot for 145 cars, 92 of which
24 are for short term parking. The approval was for
25 up to 21 parking spaces for growth parking (i.e.,
26 one space per thousand square feet of the new
27 retail space in the project), 100 spaces for
28 visitor parking, and 429 spaces for preservation
29 parking (i.e., long-term parking for existing
30 buildings). The approval also allowed an access
31 off S.W. Yamhill Street, a light rail alignment.
32 The structure is proposed to be located between
33 S.W. Taylor and Yamhill Streets and Park and 9th

1 Avenues. Southwest Park and 9th Avenues are
2 designated as Pedestrian Walkways and serve to
3 connect Portland's North and South Park Blocks. *
4 * * Southwest Yamhill on the north side of the
5 proposed parking structure is designated on the
6 Pedestrian Street Map as a Central City
7 Transit/Pedestrian Street * * * and on the Transit
8 Street Map as a Major Transit Routing Street. The
9 transit corridor currently handles as many as
10 seven trains per hour during peak rush hours, and
11 when the Westside Light Rail facility ("MAX") is
12 open it could handle as many as 20 trains per hour
13 during peak rush hour periods. * * * The garage
14 project [intervenor] proposes has a curbcut for
15 access into the parking structure located on S.W.
16 Yamhill Street, slightly more than 25 feet to the
17 west of the center of the block. Southwest Taylor
18 Stret is designated as a Central City Bikeway.
19 There are 11 to 14 off-street parking facilities
20 within a two-block radius of the proposed parking
21 garage. Both 9th and Park Avenues are one way --
22 one lane streets with parking on either side. The
23 building will be the tallest parking garage in
24 Portland and parkers will have up to one-half mile
25 of distance to travel from the top to the egress
26 on S.W. Taylor Street.

27 * * * * *

28 "The application was deemed complete on January
29 30, 1996. The Hearings Officer approved the
30 permit in a Type III proceeding. On May 23, 1996,
31 the City Council held an 'on the record' hearing.
32 At the conclusion of that hearing they voted four
33 to one to uphold the Hearings Officer's decision
34 in favor of the proposed parking garage * * *.
35 The decision was finalized on May 29, 1996; notice
36 to that effect dated June 4, 1996 was given and
37 this appeal followed." (Citations to record
38 omitted.) Petition for Review-4-7.

39 **STANDARD OF REVIEW**

40 The challenged decision involves the interpretation and
41 application of the city's comprehensive plan and land use

1 regulations by the city's governing body. ORS 197.829(1)
2 requires we affirm the city's interpretation of its
3 comprehensive plan and land use regulations unless we find
4 the interpretation:

5 "(a) Is inconsistent with the express language of
6 the comprehensive plan or land use
7 regulation;

8 "(b) Is inconsistent with the purpose for the
9 comprehensive plan or land use regulation;

10 "(c) Is inconsistent with the underlying policy
11 that provides the basis for the comprehensive
12 plan or land use regulation; or

13 "(d) Is contrary to a state statute, land use goal
14 or rule that the comprehensive plan provision
15 or land use regulation implements."

16 Our task is not to determine what the local legislation
17 means. It is limited to a review of the city's decision to
18 ensure that it is not "so wrong as to be beyond colorable
19 defense." Zippel v. Josephine County, 128 Or App 458, 461,
20 876 Pd 854, rev den 320 Or 272 (1994). See also Clark v.
21 Jackson County, 313 Or 508, 836 P2d 710 (1992) (Clark). As
22 we have explained before, this Board has difficulty
23 determining how wrong a local government interpretation must
24 be before it becomes reversible as "clearly wrong."
25 Davenport v. City of Tigard, 27 Or LUBA 243, 255 (1994).
26 The Court of Appeals has reversed the Board in past cases
27 where we found a local government interpretation to be
28 clearly wrong. See deBardelaben v. Tillamook County, 31 Or
29 LUBA 131, rev'd 142 Or App 319 (1996); Langford v. City of

1 Eugene, 26 Or LUBA 60, rev'd 126 Or App 52 (1994)
2 (Langford).

3 Petitioner argues the problem with the city's
4 interpretation is not one of interpretation but of "refusal
5 to apply the applicable law." Petition for Review 24.
6 However, whether the city has refused to apply the
7 applicable law depends on which of several acknowledged
8 planning documents applies. The Court of Appeals has
9 stated:

10 "[W]here the local interpretation consists of a
11 decision about which of two or more arguably
12 applicable approval criteria in its legislation
13 applies to a particular use, the local
14 interpretation will seldom be reversible under the
15 Clark standard." Langford, 26 Or LUBA at 57.

16 Petitioner invites us to apply the rules of statutory
17 interpretation, as these are set forth in PGE v. Bureau of
18 Labor and Industries, 317 Or 606, 611, 859 P2d 1143 (1993).
19 However, we cannot employ the rules of statutory
20 construction to interpret plan and code provisions
21 ourselves, even when we do so only as a means to establish a
22 baseline from which to determine the range of possible
23 "colorable defenses." Huntzicker v. Washington County, 141
24 Or App 257, 261, 917 P2d 1051 (1996).

25 **FIRST ASSIGNMENT OF ERROR**

26 Petitioner contends the city's decision improperly
27 construes Portland Zoning Ordinance (PZO) 33.808.100.A, the
28 Central City Transportation Management Plan, Central City

1 Plan Policy 14 and the Downtown Plan. PZO 33.808.100 states
2 the general approval criteria for a Central City Parking
3 Review, and provides, in relevant part:

4 "The request will be approved if the review body
5 finds that the applicant has shown that all of the
6 following approval criteria are met:

7 "A. The proposal will not by itself, or in
8 combination with other parking facilities in
9 the area, significantly lessen the overall
10 desired character of the area. The desired
11 character of the area is determined by City-
12 adopted area, neighborhood, or development
13 plans; by Comprehensive Plan designations and
14 zoning, and by allowed densities.

15 "* * * * *"

16 The parties agree that under PZO 33.800.050.B, the
17 reference in PZO 33.808.100.A to "city-adopted area,
18 neighborhood, or development plans" and "comprehensive plan
19 designations" makes criteria outside the PZO applicable to
20 the proposal.¹ However, the parties dispute how potentially
21 applicable city plans and regulations should be interpreted
22 and applied to determine the meaning of "overall desired
23 character of the area." Petitioner contends the Downtown
24 Plan is the neighborhood plan or area plan that determines
25 the overall desired character of the area, and therefore,

¹PZO 33.800.050.B provides that fulfillment of all requirements and approval criteria in the PZO typically means a proposal is in conformance with the city comprehensive plan. However, if a particular provision of the PZO states that reviews against the goals and policies of the comprehensive plan are required, those goals and policies do apply to the extent specifically stated.

1 all of the policies stated in the Downtown Plan are
2 mandatory criteria. In support of that contention,
3 petitioner relies on certain provisions in the city
4 comprehensive plan, the Central City Traffic Management
5 Plan, the Central City Plan and the Downtown Plan.

6 Petitioner points to Goal 3 (Neighborhoods) of the city
7 comprehensive plan, Policy 6 of which states: "Neighborhood
8 Plan. Maintain and enforce neighborhood plans that are
9 consistent with the Comprehensive Plan and that have been
10 adopted by City Council." In a footnote, plan Policy 6
11 identifies the Downtown Plan as the neighborhood plan
12 included under the policy.

13 The Central City Transportation Management Plan is
14 included in the city comprehensive plan by plan Policy 6.26.
15 Petitioner notes that the introduction to the Central City
16 Transportation Management Plan states, "The Central City
17 Plan is part of the City's Comprehensive Plan, and it
18 updates and incorporates the Downtown Plan. The Downtown
19 Plan remains in effect." (Emphasis added.) Central City
20 Transportation Management Plan 7.

21 Petitioner also relies on the first "further statement"
22 of Central City Plan Policy 14 to argue that even if Policy
23 14 alone articulates the "overall desired character of the
24 area," it imports the policies contained in the Downtown
25 Plan. Central City Plan Policy 14 is to:

26 "Strengthen the Downtown as the heart of the
27 region, maintain its role as the preeminent

1 business location in the region, expand its role
2 in retailing, housing, and tourism, and reinforce
3 its cultural, educational, entertainment,
4 governmental and ceremonial activities.

5 "FURTHER:

6 "A. Maintain and implement the Downtown Plan as a
7 part of the Central City Plan.

8 "B. Continue to actively foster the growth and
9 attractiveness of the Downtown, enhancing its
10 competitive position over other commercial
11 areas in the region." (Emphasis added.)

12 The Central City Plan provides, with respect to
13 "further statements":

14 "The following list of policies and further
15 statements are the core of the Central City Plan.
16 The policies are divided into two groups:
17 functional area policies and district policies.
18 There are thirteen functional policies and eight
19 district policies. Each policy is accompanied by
20 further statements which are considered to be part
21 of the policy and have equal importance. They are
22 intended to elaborate on the policy and provide
23 details needed for application and interpretation
24 in the future. The policies and further
25 statements contained in the Central City Plan are
26 policies of the City's Comprehensive Plan."
27 (Emphasis added.) Central City Plan 36.

28 The city's chief planner for community planning, who
29 was the lead planner on the Central City Plan project,
30 testified before the city council as follows:

31 "It has been noted that further [s]tatement A
32 under Policy 14 reads [']maintain and implement
33 the Downtown Plan,['] but that has been explained
34 away as only a further statement and the status of
35 that statement is perhaps important to you in your
36 deliberations on this. The Planning Commission,
37 at one point, contemplated calling these further
38 statements objectives, but they felt that would

1 diminish their legal power and they directed me to
2 call them further statements so they would be read
3 as part of the policy. Then, when the ordinance
4 was submitted to the council to adopt the Central
5 City Plan, and that is Ordinance 160606, Action A,
6 now before the Council directs reads [sic]:

7 "[']The recommend[ed] Central City Plan vision,
8 goals, policies, and associated further
9 statements, and as shown in Exhibit A and as
10 amended under Exhibit E in this Ordinance by
11 reference are hereby adopted in the City's
12 Comprehensive Plan by amendment of Ordinance
13 150580.[']

14 "And the intention was that the further
15 statements, along with the policies would be part
16 of the comprehensive plan. The reason that policy
17 14 in the Central City Plan was so short, as
18 opposed to the other subarea plans is it relied on
19 the continuation of the Downtown Plan as an
20 elaboration. I just wanted to clarify that one
21 point." Record 1486-87.

22 In view of our limited scope of review, no purpose
23 would be served by setting forth the city's entire lengthy
24 analysis and interpretation, contained in the challenged
25 decision. See Record 35-38. Briefly stated, the city
26 concludes, as noted above, that the city comprehensive plan
27 is implemented through the PZO and need not be consulted
28 unless the PZO identifies some provision of the plan that
29 serves as a decision criterion. As relevant here, PZO
30 33.808.100.A identifies "City-adopted area, neighborhood, or
31 development plans and Comprehensive Plan designations" as
32 plan provisions that serve as criteria for determining the
33 "overall desired character of the area." The city
34 interprets PZO 33.700.070.D.3.b to say that PZO 33.808.100.A

1 allows the city to choose which of one or more of the area,
2 neighborhood, or development plans should be applied.² The
3 city chooses to rely exclusively on the Central City Plan,
4 an area plan that is part of the city comprehensive plan, to
5 determine the "overall desired character of the area."

6 The commentary for PZO 33.808.100.A., which is included
7 in the Central City Traffic Management Plan, itself part of
8 the comprehensive plan, explains, "In the Central City plan
9 district, each subdistrict -- such as the Central Eastside -
10 - has its own description of desired character." Central
11 City Transportation Management Plan 152. The challenged
12 decision concludes that Policy 14 of the Central City Plan
13 "contains the only relevant description of desired character
14 for purposes of PZO 33.808.100.A. * * * Thus, Central City
15 Plan policies other than Policy 14 need not be separately
16 considered in applying PCC 33.808.100.A." Record 36.

17 The decision addresses petitioner's contention
18 regarding the "further statement" to Policy 14 as follows:

19 "The further statement simply means that to the

²PZO 33.700.070.D.3 provides, in relevant part:

"Conjunctions. Unless the context clearly indicates otherwise,
the following conjunctions have the following meanings:

"* * * * *

"b. 'Or' indicates that the connected items or provisions may
apply singly or in combination.

"* * * * *"

1 extent the Downtown Plan is incorporated in the
2 [Central] City Plan, its goals are incorporated
3 into and are a part of the Central City Plan's
4 policies. The further statement makes this clear
5 when it says: '. . . the Downtown Plan as a part
6 of the Central City Plan.' There was no intent to
7 thereby make the Downtown Plan a separate set of
8 approval criteria where Policy 14 applies."
9 Record 37.

10 Here and elsewhere, the city interprets the Central City
11 Plan generally and Policy 14 specifically to say that the
12 Downtown Plan has no independent force or existence beyond
13 the extent to which it is incorporated in the Central City
14 Plan.

15 In summary, the city chooses to limit the comprehensive
16 plan and area plan criteria which are made applicable to its
17 decision by PZO 33.808.100.A to Policy 14 of the Central
18 City Plan. The city then limits Policy 14, over the
19 objections of the chief author of the document, by
20 interpreting the first "further statement" as a simple
21 observation that the Downtown Plan is to some extent
22 incorporated in the Central City Plan. The city interprets
23 the statement in the Central City Transportation Management
24 Plan that the Downtown Plan is "still in effect" also to
25 mean that the Downtown Plan has been successfully
26 incorporated in subsequent planning documents.

27 Although we may not agree with the city's
28 interpretations of the relevant planning documents, we do
29 not find those interpretations beyond a colorable defense.

30 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioner contends the city erred in determining the
3 Downtown Plan standards are found in the implementing
4 regulations of the Central City Transportation Management
5 Plan and not as separate standards. Because we conclude
6 under the first assignment of error that the city may
7 interpret PZO 33.808.100.A to require consideration of only
8 Central City Plan Policy 14, and may interpret Downtown Plan
9 Policy 14 "further statement A" as simply an observation the
10 Downtown Plan has been successfully incorporated in the
11 Central City Plan's policies, we reject petitioner's
12 argument that individual criteria in the Downtown Plan
13 should be applied as mandatory approval standards.

14 The second assignment of error is denied.

15 **FOURTEENTH ASSIGNMENT OF ERROR**

16 PZO 33.808.100.A requires the city to base its
17 determination of whether or not the proposed development
18 causes a "significant lessening of the overall desired
19 character of the area" on either the neighborhood, area or
20 development plan. For purposes of this assignment of error,
21 petitioner concedes the city correctly selected the Central
22 City Plan as the applicable plan. Petitioner then contends
23 the city erred in limiting its consideration to Policy 14 of
24 the Central City Plan, which includes more than one policy.³

³The Central City Plan includes policies of general application, such as Policy 6, Public Safety, or Policy 4, Transportation.

1 In response to this contention, the city points to the
2 commentary to PZO 33.808.100.A, contained in the Central
3 City Transportation Management Plan Amendments to Zoning
4 Code, which states:

5 "In the Central City plan district, each
6 subdistrict -- such as the Central Eastside -- has
7 its own description of desired character."
8 Central City Transportation Management Plan
9 Amendments to Zoning Code 152.

10 The challenged decision interprets the policy which applies
11 specifically to each district to be the sole and exclusive
12 statement of "desired character" for that district. We do
13 not find that interpretation indefensible.

14 The fourteenth assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 Petitioner contends the challenged decision does not
17 address the requirement, stated in PZO 33.808.100.A, that
18 the proposal not "by itself, or in combination with other
19 parking facilities in the area, significantly lessen the
20 overall desired character of the area." (Emphasis added.)
21 Petitioner argues that the hearings officer's decision,
22 which was adopted with additional findings by the city
23 council, does not adequately or accurately discuss the other
24 parking facilities in the area of 25 blocks defined by the
25 city as "the area."

26 The hearings officer's finding addressing PZO
27 33.808.100.A is primarily devoted to the interpretation
28 discussed under the first assignment of error. The

1 application of the standard occurs in the paragraph labeled
2 "Conclusion":

3 "These [applicable plan and code] provisions
4 describe an intense, high-density downtown that
5 serves as the regional center for commerce,
6 shopping, employment, culture and entertainment,
7 yet maintains an attractive pedestrian
8 environment. This proposal adds retail use, adds
9 parking to support cultural, entertainment and
10 retail uses, and adds preservation parking to
11 revitalize downtown's stock of older buildings and
12 has met the design guidelines. With the described
13 conditions, the proposal will not significantly
14 lessen the overall desired character of the area."
15 Record 280.

16 The city council's findings are somewhat more detailed,
17 but share the hearings officer's focus on what is to be
18 gained as result of the proposal. Still, they do include a
19 statement that "this record includes no persuasive evidence
20 that the development of retail and commercial parking uses
21 will 'significantly lessen' the desired character of the
22 area as defined by Policy 14." Record 39. In view of the
23 broad, almost aspirational nature of the standard as it is
24 interpreted by the city council, this finding is adequate.

25 Petitioner contends further that the finding is not
26 based on accurate evidence. Petitioner notes that the
27 hearings officer's report and decision states:

28 "In a 25-block area, including the site and two
29 blocks away on every side of the site, there are
30 several other parking facilities: the City's
31 Morrison West Garage, the half-block garage
32 fronting on S.W. 9th at S.W. Salmon, a small split
33 level one-quarter block facility at S.W. 10th and
34 S.W. Taylor, and a half-block surface lot at S.W.

1 10th and S.W. Main, which is three blocks
2 diagonally away from the site." Record 270.

3 There is no dispute that this description is incorrect.
4 There are actually approximately 14 existing off-street
5 parking facilities within the designated area. Record 91.

6 Intervenor responds that there is enough evidence in
7 the record of the correct number of parking facilities
8 within the designated area to support a finding based on the
9 correct number. For example, there is a parking facility
10 analysis that was before both the hearings officer and the
11 city council. Record 89-91, 1232-35.⁴ The hearings
12 officer's findings in response to PZO 33.808.100.I, which
13 addresses need for parking, leave no doubt she was aware of
14 the parking facility analysis and, in fact, relied upon it
15 to support her conclusions as to need for the proposed
16 development.⁵ The planning staff testified before the city
17 council that there are 13 parking facilities within the

⁴There is also a letter and attached map from an opponent of the proposed development that shows 14 parking facilities within the two-block area. Record 442, 445.

⁵The hearings officer's findings state:

"At the hearing, the applicant presented a comparative analysis of four different area, each area being approximately 25 square blocks. The applicant added an additional comparative parking facility analysis after the hearing, Exhibit H-95. These analyses further support the conclusion that there is a need for parking at this location." Record 284.

1 area.⁶

2 The findings addressing PZO 33.808.100.A do not
3 themselves rely on the incorrect statements in the
4 preliminary description of the site and its vicinity. The
5 erroneous description appears to have been carried forward
6 by word processing from an earlier staff report. See Record
7 951. It is not referred to again by either the hearings
8 officer or the city council during their application of
9 specific criteria. We agree with intervenor that it is
10 clear the hearings officer and the city council considered
11 the correct number of parking facilities when they concluded
12 the proposed development will not significantly lessen the
13 overall desired character of the area.

14 The third assignment of error is denied.

15 **REMAINING ASSIGNMENTS OF ERROR**

16 The remaining assignments of error are based on
17 specific provisions of the Downtown Plan. Since we sustain
18 the city's conclusion, based on its interpretation of its
19 own comprehensive plan and land use regulations, that these
20 provisions of the Downtown Plan are not directly applicable
21 as approval standards, we deny these assignments of error.

22 The city's decision is affirmed.

⁶The city attached a transcript of the staff testimony as an appendix to its brief. As there is no objection, we treat it as an accurate transcript of part of an audio tape of the local proceedings that is part of the record.