

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

3  
4 JAMES BARNAS,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF PORTLAND,  
10 *Respondent,*

11 and

12  
13 MAIN STREET DEVELOPMENT INC.,  
14 and ERIC RYSTADT,  
15 *Intervenor-Respondents.*

16  
17 LUBA No. 2006-038

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19  
20 FINAL OPINION  
21 AND ORDER

22  
23 Appeal from City of Portland.

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25 James Barnas, Portland, represented himself.

26  
27 Linly F. Rees, Portland, represented respondent.

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29 Thomas H. Cutler, Lake Oswego, represented intervenor-respondents.

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31 HOLSTUN, Board Member; BASSHAM, Board Chair; DAVIES, Board Member,  
32 participated in the decision.

33  
34 DISMISSED

05/17/2006

35  
36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city decision that reinstates a previously revoked building permit.

**MOTION TO INTERVENE**

Main Street Development Inc. and Eric Rystadt, the applicants below, move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

**FACTS**

Pursuant to ORS 455.040, a uniform building code applies throughout the state of Oregon. At the time the disputed building permit application was filed, the 1997 Uniform Building Code (1997 UBC), as amended, applied. 1997 UBC Section 107.4 governs expiration of building permit applications and provides as follows:

**“Expiration of Plan Review.** Applications for which no permit is issued within 180 days following the date of application shall expire by limitation, and plans or other data submitted for review may thereafter be returned to the applicant or destroyed by the building official. The building official may extend the time for action by the applicant for a period not exceeding 180 days on request by the applicant showing that circumstances beyond the control of the applicant have prevented action from being taken. No application shall be extended more than once. In order to renew action on an application after expiration, the applicant shall resubmit plans and pay a new plan review fee.” Record 85.

Petitioner contends that because an application for a building permit expires 360 days after the date of application, at the latest, the building permit application in this case expired long before the building permit was issued. Petitioner contends that the city: (1) erred in issuing the building permit on January 5, 2006, (2) correctly revoked that building permit on January 26, 2006 and (3) erred in subsequently reinstating that building permit on February 23, 2006. Many of the relevant facts are set out in the below-quoted portion of the city’s motion to dismiss:

1 “The decision that is the subject of this appeal is a February 23, 2006 decision  
2 of the City’s Building Code Board of Appeals to reinstate a building permit  
3 for property located at 8712 N. Decatur Street (the ‘property’). The owner of  
4 the property first applied for a building permit for construction on the property  
5 in December 2002. Throughout 2003, the City sent initial reviews and  
6 checksheets to the applicant and the applicant submitted corrections. The  
7 applicant submitted additional corrections in November 2004. On April 12,  
8 2005, the City’s Bureau of Development Services (‘BDS’) sent the applicant a  
9 letter stating that the permit had been inactive for a period of longer than 150  
10 days and that BDS ‘will be purging your permit from our records.’ That letter  
11 gave the applicant the opportunity to contact BDS if the applicant believed the  
12 action was in error. The applicant contacted BDS by phone and in writing,  
13 saying he wished to proceed with the project. BDS provided a verbal  
14 extension. The permit application was cancelled in error on September 30,  
15 2005, because the extension had not been recorded in the computer system.

16 “On October 5, 2005, BDS issued a letter to the applicant stating that the time  
17 for the building permit to be issued was extended until January 5, 2006. On  
18 December 14, 2005, BDS sent a letter clarifying that the applicant would need  
19 to have all checksheets in and signed off by January 5, and that BDS would  
20 not issue a partial permit. BDS issued the building permit for the property on  
21 January 5, 2006. That decision was not appealed. On January 26, 200[6], the  
22 City building official and Director of BDS sent the applicant a letter revoking  
23 the building permit based solely on Sections 106.4.5 and 107.4 of the 1997  
24 Uniform Building Code (UBC), which pertain to extensions of time on  
25 building permits. \* \* \*” Respondent’s Motion to Dismiss 1-2 (record  
26 citations omitted).<sup>1</sup>

27 The applicant appealed the BDS January 26, 2006 decision to revoke the January 5,  
28 2006 building permit to the city’s Building Code Board of Appeals. The Building Code  
29 Board of Appeals applied the 1997 UBC and other portions of the city’s building code and,  
30 on February 23, 2006, voted to reinstate the applicant’s building permit:

31 “\* \* \* The permit revocation should be reversed or vacated for at least the  
32 following reasons: (1) applicant substantially complied with all requirements  
33 for the issuance of the permit to the satisfaction and express approval of  
34 Bureau staff; (2) the Bureau has previously interpreted and applied 1997 UBC

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<sup>1</sup> 1997 UBC Section 107.4 was quoted earlier. 1997 UBC Section 106.4.5 provides:

“**Suspension or revocation.** The building official may, in writing, suspend or revoke a permit issued under the provisions of this code whenever the permit is issued in error or on the basis of incorrect information supplied, or in violation of any ordinance or regulation or any provisions of this code.” Record 84.

1 107.4 as allowing additional extension beyond one year; (3) the Bureau gave  
2 repeated oral and written assurances of extensions of time granted and the  
3 forthcoming issuance of this permit; (4) the Bureau is now barred from any  
4 belated or retroactive enforcement or belated and unreasonably narrow  
5 interpretation of 1997 UBS 107.4; (5) in any event revocation is not  
6 mandatory or appropriate under 1997 UBS 106.4.5 especially in light of no  
7 substantive code violation; (6) applicant’s right to proceed with the project  
8 [is] vested; (7) the Bureau has issued and not resolved numerous other  
9 building permits more than one year from the date of application under the  
10 1997 UBC; and (8) failure to reverse or vacate revocation will result in  
11 violation of applicant’s constitutionally protected rights.” Record 1.

12 This appeal of the Building Code Board of Appeals’ February 23, 2006 decision followed.

13 **MOTION TO DISMISS**

14 The city moves to dismiss this appeal, alleging that the challenged decision is not a  
15 land use decision. Four statutes, ORS 197.825(1), 197.015(11)(a)(A), 197.015(11)(b)(B) and  
16 ORS 197.015(13), bear most directly on the city’s jurisdictional challenge. We briefly note  
17 and discuss those statutes before turning to the parties’ arguments.

18 **A. Relevant Statutes**

19 As relevant here, LUBA’s jurisdiction is limited to land use decisions and limited  
20 land use decisions. ORS 197.825(1).<sup>2</sup> Petitioner does not argue that the challenged decision  
21 is a limited land use decision, as ORS 197.015(13) defines that term, and we agree with the  
22 city that the appealed decision is not a limited land use decision.<sup>3</sup>

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<sup>2</sup> As relevant, ORS 197.825(1) provides:

“[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.”

<sup>3</sup> As relevant, ORS 197.015(13) defines “limited land use decision” as follows:

“‘Limited land use decision’ is a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“(a) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

1 We understand petitioner to contend that the challenged decision is a land use  
2 decision. The statutory definition of land use decision appears at ORS 197.015(11)(a).<sup>4</sup>  
3 ORS 197.015(11)(b) sets out a number of exemptions from the ORS 197.015(11)(a) statutory  
4 definition of land use decision. One of those exemptions is the ORS 197.015(11)(b)(B)  
5 exemption for a decision “[t]hat approves or denies a building permit issued under clear and  
6 objective land use standards.” Reading ORS 197.015(11)(a) together with ORS  
7 197.015(11)(b)(B), building permit decisions may be land use decisions if they apply one or  
8 more of the land use standards set out at ORS 197.015(11)(a)(A)(i) through (iv). Such  
9 building permit decisions are not land use decisions if those land use standards are clear and  
10 objective, however such building permit decisions are land use decisions if those land use  
11 standards are not clear and objective. As explained below, we understand the city to argue  
12 that LUBA need not consider whether the challenged decision was governed by clear and  
13 objective land use standards because the challenged decision was not governed by any of the  
14 ORS 197.015(11)(a)(A) land use standards.

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“(b) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

The challenged decision is a decision to reinstate a previously revoked building permit. Such a decision does not concern approval of a subdivision or partition. Neither does such a decision apply “discretionary standards designed to regulate the physical characteristics of a use permitted outright.”

<sup>4</sup> As relevant, ORS 197.015(11)(a) defines “[l]and use decision” to include the following:

“(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The [statewide planning] goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1           **B.     Petitioner’s Argument**

2           Petitioner has the burden of demonstrating that LUBA has jurisdiction to review the  
3 appealed decision. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). One  
4 issue that was discussed during the appeal proceedings before the Building Code Board of  
5 Appeals was one of the practical consequences of the January 26, 2006 decision to revoke  
6 the January 5, 2006 building permit. The zoning of the subject property changed in June  
7 2004. The residential zoning that applied to the subject property at the time the application  
8 was submitted in December 2003 apparently permits the 29-unit, five-story building that is  
9 proposed; whereas the zoning that was applied in June 2004 would only permit a 10-unit,  
10 three-story building. Record 47. Petitioner relies on this discussion about the property’s  
11 zoning to argue that the city’s February 23, 2006 decision is a land use decision.

12           **C.     The City’s Argument**

13           It may be that the BDS decision to issue the building permit on January 5, 2006 was a  
14 land use decision that could have been appealed to LUBA. We need not and do not decide  
15 that question. However, the city argues that neither the January 26, 2006 decision to revoke  
16 the January 5, 2006 building permit nor the February 23, 2006 decision to reinstate the  
17 building permit was a land use decision, as defined by statute.

18           The city argues the January 26, 2006 decision to revoke the building permit did not  
19 apply any of the ORS 197.015(11)(a)(A)(i) through (iv) land use standards. Rather, it  
20 applied the one-year time limit imposed by 1997 UBC Section 107.4 and revoked the  
21 previously issued building permit pursuant to 1997 UBC 106.4.5. *See* n 1. The city contends  
22 the UBC is not a land use regulation. Similarly, the city argues the Building Code Board of  
23 Appeals February 23, 2006 decision to reverse that decision and reinstate the building permit  
24 applied those same UBC provisions and simply reached a different conclusion about how  
25 they should apply in this case. The city argues that while the zoning of the property was  
26 discussed during the Building Code Board of Appeals proceedings below, the zoning

1 ordinance was not *applied* by the Building Code Appeals Board as an applicable approval  
2 standard or criterion in reaching the February 23, 2006 decision.

3 **D. Conclusion**

4 The city’s zoning ordinance is a land use regulation.<sup>5</sup> If the Building Code Board of  
5 Appeals’ February 23, 2006 decision applied that zoning ordinance in reaching its decision,  
6 its decision might fall within the ORS 197.015(11)(a) definition of land use decision.<sup>6</sup>  
7 However, at no point during the proceedings before the city was there any dispute that the  
8 pre-June 2004 zoning governed the building permit application that was submitted in  
9 December 2002. Neither was there any dispute that if the building permit was revoked, as  
10 petitioner and others argued it should be under 1997 UBC Sections 107.4 and 106.4.5, the  
11 post-June 2006 zoning would govern any subsequent building permit application.<sup>7</sup> The  
12 zoning that would apply in either scenario was not a disputed issue. The fact that the zoning  
13 of the property was *discussed* by the Building Code Board of Appeals when it considered  
14 whether the building permit was properly revoked under 1997 UBC Sections 107.4 and  
15 106.4.5 does not mean the Building Code Board of Appeals’ decision “concern[ed] the \* \* \*  
16 application of [a] land use regulation,” within the meaning of ORS 197.015(11)(a). *See* n 4.  
17 We agree with the city that petitioner has not demonstrated that the Building Code Board of  
18 Appeals February 23, 2006 decision concerned the application of the zoning ordinance.

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<sup>5</sup> ORS 197.015(12) provides, in part:

“‘Land use regulation’ means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

<sup>6</sup> We say “might” because if any zoning standards that were applied were clear and objective and the ORS 197.015(11)(b)(B) exemption for some building permit decisions applied, the decision would not be a land use decision.

<sup>7</sup> The applicant apparently believes Ballot Measure 37, which was passed in 2004, would allow the city to apply the pre-June 2004 zoning to a new building permit application if the December 2002 building permit was revoked. We need not and do not address that question, and the potential applicability of Ballot Measure 37 has played no role in our analysis of the jurisdictional question presented in this appeal.

1           The disputed issue before the Building Code Board of Appeals was whether the  
2 building permit was properly revoked under 1997 UBC Sections 107.4 and 106.4.5. The city  
3 argues that those sections of the 1997 UBC are not land use regulations. *See Brodersen v.*  
4 *Jackson County*, 28 Or LUBA 645, 652 (1995) (concluding that building and other structural  
5 code provisions are not “land use standards” within the meaning of ORS 197.015(11)(b)(B)).  
6 We do not understand petitioner to argue that the UBC is a land use regulation.

7           As we explained in *Wetzel v. City of Eugene*, 48 Or LUBA 491, 499 (2005), a  
8 petitioner who appeals a building permit decision to LUBA has the burden to establish “that  
9 the building permit qualifies as a statutory land use decision.” While the challenged decision  
10 in this case is a decision to *reinstate* a building permit after it was revoked, petitioner still has  
11 the burden to demonstrate that the challenged decision is a land use decision. In first  
12 revoking the building permit and in later reinstating the building permit, the city did not  
13 apply any of the land use standards identified at ORS 197.015(11)(a)(A) and petitioner does  
14 not argue that the city *should have applied* any of those land use standards. Rather the city’s  
15 decision was governed by the standards that appear at 1997 UBC Sections 107.4 and 106.4.5  
16 in both instances. We agree with the city that 1997 UBC Sections 107.4 and 106.4.5 are not  
17 land use standards, within the meaning of ORS 197.015(11)(b)(B), and are not land use  
18 regulations or any of the other land use standards that are set out at ORS 197.015(11)(a)(A).

19           Because petitioner has not established that the challenged decision is a “land use  
20 decision,” within the meaning of ORS 197.015(11)(a), LUBA does not have jurisdiction to  
21 review that decision. Under OAR 661-010-0075(11)(b), a motion to transfer a LUBA appeal  
22 to circuit court may be filed in the event a motion is filed that challenges LUBA’s  
23 jurisdiction. If such a motion to transfer is filed, and LUBA determines it does not have  
24 jurisdiction, LUBA will transfer the appeal to circuit court. OAR 661-010-0075(11)(c). If  
25 no such motion to transfer is filed within 10 days after the motion challenging our  
26 jurisdiction is filed, and LUBA determines that it does not have jurisdiction, LUBA will



1 dismiss the appeal. Petitioner filed no contingent motion to transfer under OAR 661-010-  
2 0075(11)(b). Therefore, this appeal is dismissed.