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

CONCORDIA NEIGHBORHOOD ASSOCIATION,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2009-105

FINAL OPINION
AND ORDER

Appeal from Portland.

Katherine Caldwell, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Maher & Tolleson, LLC.

Kathryn Beaumont, Senior Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

HOLSTUN, Board Member, concurring.

AFFIRMED

04/15/2010

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

NATURE OF THE DECISION

Petitioner appeals a building permit that allowed construction of a single family dwelling in the Concordia neighborhood of Portland.

FACTS

The subject property is a 2,500 square foot lot zoned Residential 5,000 (R5). The maximum height limit for dwellings in the R5 zone is 30 feet, unless the dwelling is proposed on a “newly-created” narrow lot. In that situation, the maximum height of the building is “1.2 times the width of the structure, up to [30 feet].” Portland City Code (PCC) 33.110.215.B.2.a.

The challenged building permit allows a building height of 22 feet 6 inches. Record 57.¹ The proposed height shown on the approved plans was 22 feet 2 inches. Record 59. However, during one of the dwelling inspections during construction, it was discovered that the height of the dwelling measured 23 feet 1 inch. Thereafter, the permit applicant added 7 inches of soil and barkdust to raise the surface of a planter bed that is surrounded by rock that adjoins the northwest corner of the house, near the front entry. A picture of that planter is shown at Record 26. The city then determined that the height of the dwelling was within the PCC 33.110.215.B.2.a limitation of 22 feet 6 inches. This appeal followed.

ASSIGNMENT OF ERROR

PCC 33.930.050.A sets forth the method for measuring building height. That code section provides in relevant part that “[t]he height of buildings is the vertical distance above the base point described in Paragraphs 1. or 2., below. The base point used is the method

¹ For reasons unknown to us and not explained or challenged by any party, the building permit identifies the width of the dwelling as 15 feet but allows a height that is “1.5 times” that width as allowed by PCC 33.110.215.B.2.b for lots in the Residential 2,500 (R-2.5 zone, rather than “1.2 times” that width for lots in the R5 zone, as allowed by PCC 33.110.215.B.2.a. Record 57.

1 that yields the greater height of building.” There is no dispute that the applicable base point
2 for measuring building height set forth in PCC 33.930.050.A is “Base Point 1,” which is:

3 “* * * the elevation of the highest adjoining sidewalk or *ground surface*
4 *within a five-foot horizontal distance of the exterior wall of the building* when
5 such sidewalk or ground surface is not more than 10 feet above the lowest
6 grade.” (Emphasis added.)

7 As framed by the parties, the dispositive issue in this appeal is the meaning of the phrase
8 “ground surface.” The phrase “ground surface” is not defined in the PCC.

9 Petitioner argues that the city erred in allowing the height of the building to be
10 measured from the raised soil and bark planter bed surrounded by rock described above and
11 shown at Record 26. According to petitioner, the city’s interpretation of the term “ground
12 surface” as used in PCC 33.930.050.A.1 is inconsistent with the purpose of the height
13 restrictions, and adding what petitioner characterizes as a “small pile of rocks to the front of
14 the structure” does not make the house any shorter or result in a house that complies with the
15 code.² Petitioner also argues that interpreting the provision in the way that the city did
16 allows for the potential for possibly extreme manipulation of the location of Base Point 1 and
17 ground surface. For that reason, petitioner argues, the city’s measuring of the height of the
18 building from the soil at the top of the raised planter bed is not correct.

19 The city responds by arguing that LUBA is required to affirm the city’s interpretation
20 of its ordinance under ORS 197.829(1).³ That provision has been interpreted to require that

² PCC 33.110.215.A provides that the purposes of the height restrictions are in relevant part to “promote a reasonable building scale and relationship of one residence to another; * * * [and] reflect the general building scale and placement of houses in the city’s neighborhoods.”

³ ORS 197.829(1) requires that LUBA must affirm a local government’s interpretation of a provision of its land use regulations unless LUBA determines that the interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 LUBA affirm a local governing body’s interpretation of its own ordinance. That provision
2 has been interpreted to require that LUBA affirm a local *governing body’s* interpretation of
3 its own ordinance, unless that interpretation fails under ORS 197.829(1)(a) through (d).
4 *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 45-46, 911 P2d 350 (1996).
5 Where, as here, the only code interpretation offered by the city is in the form of an
6 explanation by a city planner of how the city measures building height that is set forth in an
7 email to another city planner, ORS 197.829(1) does not apply. *Rochlin v. City of Portland*,
8 155 Or App 490, 492 n 1, 964 P2d 1081 (1998). Rather, we review the city’s decision to
9 determine whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 752 P2d 323 (1988).

10 The city also responds that the city’s determination that the building’s height could be
11 measured from the top of the soil inside the raised planter bed is consistent with LUBA’s
12 decision in *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002). *Tirumali* involved a
13 similar PCC provision and a similar situation where the city permitted the applicant to
14 measure the height of a dwelling from the top of earthen fill placed on the property rather
15 than the original ground surface. In *Tirumali*, LUBA recognized that although petitioners
16 had a legitimate concern that the city’s interpretation could allow the possibility that a
17 builder could bring in large amounts of soil to increase the allowed building height, we
18 concluded that nothing in the PCC prohibited the city from allowing fill to be placed on
19 property to increase finished grade with the result of increasing permissible building height.
20 *Id* at 244-45.

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

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 The city also points out that “ground surface” is correctly interpreted to mean the
2 surface of the soil, and measuring the building’s height from the surface of soil, even if
3 enclosed by rock, is a correct reading of PCC 33.930.050.A.1. According to the city, adding
4 seven inches of soil and enclosing that soil with rock does not convert the planter into a
5 structure, or something other than “ground surface.” Finally, while conceding that there is a
6 remote possibility that the city’s understanding of the term “ground surface” could result in a
7 building that is inconsistent with the purpose of the building height provisions set out in PCC
8 33.110.215.A, the city maintains that that remote possibility is not present here, where the
9 difference in the height of the soil in the planter from the soil in the front yard is only seven
10 inches.

11 We agree with the city that petitioner has not established that the city’s interpretation
12 of PCC 33.930.050.A is incorrect. Interpreting the phrase “ground surface” to allow
13 measuring the building’s height from the top of the soil in the rock planter that is within five
14 feet of the exterior wall is not inconsistent with the language of PCC 33.930.050.A or with
15 the purpose of the height restrictions. Without further modification, “ground surface” could
16 refer to original ground surface or to the finished ground surface as altered during
17 development. Ground surface can reasonably be understood to mean the finished surface of
18 the soil, wherever that soil surface may be located within the 5 foot horizontal plane from the
19 exterior of the building. While we recognize petitioner’s concern about the possibility of
20 manipulation under PCC 33.930.050.A to allow extremely tall houses if height is measured
21 from the ground surface produced by fill added to tall planters within five feet of the exterior
22 wall, it does not appear that any substantial manipulation of PCC 33.930.050.A has occurred
23 in the present appeal, where approximately seven inches of soil was added to a circular
24 planter that appears to measure between two to three feet in diameter. In fact, petitioner
25 notes that the entire front yard of the subject property was filled in and the base level raised
26 with soil prior to construction beginning, and petitioner concedes that if the entire front yard

1 was filled in with soil to the height of the soil in the planter, Base Point 1 for measuring the
2 building's height would be appropriately measured from that soil level. Accordingly,
3 petitioner has not demonstrated that the city's interpretation of the relevant PCC provision is
4 not correct.

5 The assignment of error is denied.

6 The city's decision is affirmed.

7 Holstun, Board Member, concurring.

8 I agree with the majority that PCC 33.930.050.A is ambiguous and that it is both
9 possible to interpret the text of PCC 33.930.050 to allow Base Point 1 to be measured from
10 *finished* "ground surface" and possible to consider the surface of the relatively large planter
11 in this case to be considered "ground surface." But that interpretation does present the
12 potential for manipulating the building height limit imposed by PCC 33.110.215.B.2.a. For
13 that reason, our decision to affirm the city's interpretation is an exceedingly close one for
14 me. PCC 33.930.050.A has other ambiguities that we have not discussed, because the parties
15 have not discussed them. For example PCC 33.930.050.A includes the following sentence:

16 "The base point used is the method that yields the greater height of building."

17 If that sentence is read in context, it is difficult or impossible to give it meaning. Base points
18 are not a "method" of measuring building height, and the choice between Base Points 1 and 2
19 under PCC 33.930.050.A does not appear to have anything to do with the resulting building
20 height. PCC 33.930.050.A badly needs to be revised to more clearly state how the city
21 measures building height in circumstances that are likely to be encountered in measuring
22 building height.