

LAND USE  
BOARD OF APPEALS

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

OCT 10 12 32 PM '89

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2  
3 THOMAS R. NICOLAI, ALLEN C. )  
4 SPITLER, SUZANNE R. SPITLER, )  
5 LARRY J. TAPANEN, LINDA S. )  
6 CARLTON, DENNIS N. BOURDETTE )  
7 and JACQUELINE C. BOURDETTE, )  
8 )  
9 Petitioners, )  
10 vs. )  
11 CITY OF PORTLAND, )  
12 Respondent, )  
13 and )  
14 STEVEN L. HANSON and )  
15 JACQUELINE A. BRIDE, )  
16 )  
17 Intervenors-Respondent. )

LUBA No. 89-053

FINAL OPINION  
AND ORDER

18 Appeal from City of Portland.

19 John Shurts, Portland, filed the petition for review and  
20 argued on behalf of petitioners. With him on the brief was  
21 Stoel, Rives, Boley, Jones & Grey.

22 No appearance by respondent City of Portland.

23 Gregory S. Hathaway and Virginia L. Gustafson, Portland,  
24 filed the response brief and Gregory S. Hathaway argued on  
25 behalf of intervenors-respondent. With them on the brief was  
26 Garvey, Schubert & Barer.

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

REMANDED 10/10/89

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

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioners appeal a decision of the City of Portland  
4 (city) approving an application for a minor partition.

5 MOTION TO INTERVENE

6 Steven L. Hansen and Jacqueline A. Bride move to intervene  
7 in this proceeding on the side of respondent. There is no  
8 objection to the motion and it is allowed.

9 FACTS

10 The subject property is zoned One Family Residential  
11 (R-10). It consists of approximately 70,000 square feet and is  
12 located in a "severe hazard area."<sup>1</sup> Record 1.

13 Intervenors-respondent (intervenors) submitted an  
14 application to the city for authorization to partition the  
15 subject parcel into three parcels of approximately 47,000,  
16 11,000 and 10,000 square feet. On January 27, 1989, after  
17 soliciting and receiving comments from the city's bureaus of  
18 environmental services, water works, fire, and transportation,  
19 the city planning director approved the application. The city  
20 provided no notice, other than to the aforementioned city  
21 bureaus, of the pending application or of its decision approving  
22 the application. Additionally, the city provided no opportunity  
23 for a public hearing on the application or for appeal from the  
24 city decision approving the application.

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25  
26 <sup>1</sup>There is some dispute regarding the precise size of the subject parcel.  
However, the size of the parcel is not an issue in this appeal.

1           Petitioner Nicolai learned of the city's approval of the  
2 minor partition on April 20, 1989, during a visit to the city's  
3 permit center, and advised the other petitioners of the  
4 approval. Petitioners filed their notice of intent to appeal  
5 with this Board on May 9, 1989.

6           JURISDICTION

7           Intervenors contend we lack jurisdiction to review the  
8 appealed decision because it is not a land use decision, as  
9 defined by ORS 197.015(10).

10           ORS 197.015(10) states that "land use decision"<sup>2</sup>

11           "(a) Includes:

12                   "(A) A final decision or determination made by a  
13                   local government \* \* \* that concerns the  
                  adoption, amendment or application of:

14                           "(i)     The Goals;

15                           "(ii)    A comprehensive plan provision;

16                           "(iii)  A land use regulation; \* \* \*

17                   "\* \* \* \* \*

18           "(b) Does not include a ministerial decision of a  
19           local government made under clear and objective  
20           standards contained in an acknowledged  
21           comprehensive plan or land use regulation and  
                  for which no right to a hearing is provided by  
                  the local government under \* \* \* ORS 227.160 to  
                  227.185."

22           Intervenors argue that the city's decision is a ministerial  
23           decision made under clear and objective criteria as provided in

24 \_\_\_\_\_  
25           <sup>2</sup>ORS 197.015(10) was amended by Oregon Laws 1989, chapter 761,  
26           section 1. However, this amendment to ORS 197.015(10) does not apply to  
                  this case.

1 ORS 197.015(10) (b) .

2 This Board has exclusive jurisdiction to review "land use  
3 decisions" of local governments. ORS 197.825(1). In order to  
4 determine whether the city's decision is ministerial and,  
5 therefore, not a land use decision, we must determine whether  
6 the applicable approval standards contain clear and objective  
7 criteria, so that the city's decision can be made without the  
8 exercise of significant factual or legal judgment. Flowers v.  
9 Klamath County, \_\_\_ Or App \_\_\_, (CA A61174, September 13, 1989),  
10 slip op 9-10; Doughton v. Douglas County, 82 Or App 444, 449,  
11 728 P2d 887 (1986), rev den 303 Or 74 (1987); McKay Creek  
12 Valley Assoc. v. Washington County, \_\_\_ Or LUBA \_\_\_ (LUBA Nos.  
13 89-027 and 89-028, September 18, 1989), slip op 5.

14 The approval standards applicable to the city's decision  
15 are as follows:

16 \* \* \* \* \*

17 "In the case of a minor land division which is a minor  
18 partition, it must be demonstrated that:

19 "(1) It is in conformance with the Comprehensive  
20 Plan.

21 "(2) It is in conformance with the principles of land  
22 suitability specified in section 34.50.090 of  
23 this Title.<sup>[3]</sup>

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23 <sup>3</sup>PCC 34.50.090 provides in relevant part:

24 "No land shall be \* \* \* partitioned which is found unsuitable  
25 for its intended use by the Hearings Officer by reason of  
26 flooding, inadequate drainage, susceptibility to mud or earth  
slides, or other reason harmful to the health, safety or well  
being of the future residents or property owners of the  
proposed \* \* \* partition or of the community at large.

1           "(3) It is in conformance with the design standards  
2           for lots and parcels specified in Section  
3           34.60.030 of this Title.

4           "(4) The continuation of existing principal streets  
5           in surrounding areas will not be blocked or made  
6           impractical.

7           "(5) Access to adjacent property will not be  
8           eliminated or made impractical.

9           "(6) Adequate required water, sanitary sewer or  
10          approved subsurface disposal systems and  
11          drainage facilities are available or can be  
12          provided.

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13          However, the Hearings Officer may approve a \* \* \* partition map  
14          if the \* \* \* partitioner improves \* \* \* or agrees to improve  
15          the land consistent with the standards of this and other titles  
16          of the City of Portland Code in order to make \* \* \* parcels  
17          suitable for their intended uses. In determining the  
18          suitability of land for \* \* \* partitioning, the Hearings  
19          Officer shall consider the objectives of this Title, including  
20          but not limited to the following:

21          "(A) The danger of [sic] life and property due to the  
22          increased flood heights or velocities caused by fills,  
23          roads and intended land uses.

24          "(B) The danger that intended structures and improvements may  
25          be swept onto other lands or downstream to the injury of  
26          others.

27          "(C) The ability of water supply and sanitation systems to  
28          prevent disease, contamination and unsanitary conditions  
29          under flood conditions.

30          "(D) The susceptibility of proposed land uses to flood damage  
31          and the effect of such damage on the individual owner.

32          "(E) The importance of the services provided by the proposed  
33          land uses to the community.

34          "(F) The safety and access to the property for emergency  
35          vehicles in times of flood.

36          "(G) The costs of providing public services during and after  
37          flooding, including maintenance and repair of public  
38          utilities and facilities such as sewer, gas, electrical  
39          and water systems, street lighting, and streets and  
40          bridges."

1           "(7) The city engineer has no objection." Portland  
2           City Code (PCC) 34.30.030(A).

3           Intervenors argue that the Court of Appeals has  
4 distinguished between two different levels of "ministerial"  
5 decision making and one level of "discretionary" decision making  
6 as follows:

7           "The purpose of ORS 197.015(10)(b) is to make certain  
8 local government actions unreviewable as land use  
9 decisions, because they are really nondiscretionary or  
10 minimally discretionary applications of established  
criteria rather than decisions over which any  
significant factual or legal judgment may be  
exercised. \* \* \*" (Emphasis supplied.) Doughton v.  
Douglas County, 82 Or App at 449.

11           Intervenors contend that the challenged city decision involved  
12 only "minimal discretion," as that term is used in Doughton v.  
13 Douglas County, supra. Intervenors specifically contend that  
14 the PCC 34.30.030(A)(1) requirement that the decision be  
15 consistent with the comprehensive plan requires only that each  
16 lot resulting from the partition "meets the zoning requirements  
17 for lot depth, width and area in the [applicable] zone."  
18 Intervenors-Respondent Brief 16.

19           Petitioners argue that the city's decision is a land use  
20 decision over which we have review authority. Petitioners claim  
21 the city's decision was made under land use regulations not  
22 containing clear and objective criteria. Petitioners contend  
23 the relevant approval criteria, particularly the requirement  
24 that the decision be consistent with the comprehensive plan and  
25 the requirement for conformity with the "principles of land  
26 suitability of PCC 34.50.090," require significant discretionary

1 determinations.

2 We do not believe that determinations of compliance with  
3 the PCC criteria quoted above are "minimally discretionary  
4 applications of established criteria" within the meaning of  
5 Doughton v. Douglas County, supra. For instance, while the city  
6 found the PCC 34.30.030(A)(1) standard requiring the proposed  
7 partition to be consistent with the comprehensive plan is  
8 satisfied because the proposed partition "meets the zoning  
9 requirements for lot depth, width and area in the R-10 zone," we  
10 are cited to nothing in either the plan or the PCC which  
11 supports so narrow an interpretation of PCC 34.30.030(A)(1). We  
12 do not believe this narrow interpretation of PCC 34.30.030(A)(1)  
13 is correct. McCoy v. Linn County, 90 Or App 271,  
14 275-276, 752 P2d 323 (1988). Comprehensive plan provisions can  
15 constitute mandatory approval criteria. The city's standard  
16 that the proposed partition be consistent with the comprehensive  
17 plan requires the city to examine the plan, and to identify and  
18 determine whether applicable approval criteria in the plan are  
19 satisfied.

20 Furthermore, PCC 34.30.030(A)(2) requires that the proposed  
21 partition be consistent with the principles of land suitability  
22 of PCC 34.50.090. PCC 34.50.090 requires that the partitioned  
23 land, among other things, be suitable for its "intended use,"  
24 and not harmful to the "health, safety and well being" of the  
25 "community at large." Thus, PCC 34.50.090 states requirements  
26 without "articulating criteria for deciding when, whether and

1 how the requirement[s are] satisfied."<sup>4</sup> Doughton v. Douglas  
2 County, supra. Determinations of compliance with these  
3 requirements of PCC 34.30.030(A)(2) and PCC 34.50.090 involve  
4 the exercise of significant factual or legal judgment. See  
5 Flowers v. Klamath County, supra, slip op at 9-10.

6 We conclude that the city's decision to approve the  
7 challenged minor partition is not a ministerial decision made  
8 under clear and objective standards and, therefore, we have  
9 jurisdiction to review it.

10 STANDING

11 Standing is an issue in this case.

12 Intervenors argue that petitioners do not have standing  
13 because petitioners do not satisfy ORS 197.830(3)(c). According  
14 to intervenors, petitioners were not entitled to notice of, and  
15 are not aggrieved by, the city's decision.

16 ORS 197.830(3) provides:<sup>5</sup>

17 "Except as provided in ORS 197.620(1), a person may  
18 petition the board for review of a quasi-judicial land  
use decision if the person:

19 "(a) Filed a notice of intent to appeal the decision  
20 as provided in subsection (1) of this section;

21 "(b) Appeared before the local government, special  
22 district or state agency orally or in writing;

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23 <sup>4</sup>While PCC 34.50.090 does list factors to be considered in making the  
24 discretionary determinations required by PCC 34.50.090 (see n 3), those  
25 considerations are not clear and objective criteria for making the  
determinations required by PCC 34.50.090.

26 <sup>5</sup>ORS 197.830 was amended by Oregon laws 1989, chapter 761, section 12.  
However, the amendments to ORS 197.830 do not apply to this case.



1 and

2 "(c) Meets one of the following criteria:

3 "(A) Was entitled as of right to notice and  
4 hearing prior to the decision to be  
5 reviewed; or

6 "(B) Is aggrieved or has interests adversely  
7 affected by the decision."

8 Petitioners claim they have standing to appeal the city's  
9 decision because they are entitled to notice of the decision  
10 under ORS 227.173 and 227.175. Petitioners also claim they have  
11 standing to appeal because they are adversely affected by the  
12 city's decision. Attached to the petition for review are  
13 affidavits by the individual petitioners, stating each owns and  
14 resides at property within 400 feet of the proposed partition,  
15 and each would be adversely affected by the development on each  
16 parcel which would follow partitioning.

17 Intervenors do not challenge petitioners' claim to standing  
18 based on petitioners being "adversely affected" by the decision.  
19 Petitioners' allegations and affidavits are adequate to satisfy  
20 the standing requirement of ORS 197.830(3)(c)(B) on the basis  
21 that they are adversely affected by the decision.<sup>6</sup>

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22 <sup>6</sup>As we explained in McKay Creek Valley Assoc. v. Washington County,  
23 supra, slip op at 12, n 9:

24 "\* \* \* even if petitioners' allegations were not adequate to  
25 satisfy the 'adversely affected' criterion of ORS  
26 197.830(3)(c), we note that under the Court of Appeals' recent  
decision in Flowers v. Klamath County, supra, slip op at 6-7,  
petitioners' contentions that no hearings were held and no  
notice was given by the county, are sufficient to satisfy the  
'appearance' criterion of ORS 197.830(3)(b), and the  
'aggrieved' criterion of ORS 197.830(3)(c), if such hearings  
and notice were required by statute."

1 We reject intervenors' challenge to petitioners' standing.

2 FIRST ASSIGNMENT OF ERROR

3 "The city failed to follow applicable procedures by  
4 failing to provide petitioners mailed written notice  
5 of the application or the decision as required by  
6 state statutes and by failing to afford petitioners an  
opportunity for a public hearing on appeal of the  
administrative decision."

7 Petitioners argue the city's decision is discretionary and,  
8 therefore, approves a "permit," as defined in ORS 227.160(2).  
9 Petitioners maintain that the city erred by approving the permit  
10 without holding a public hearing or providing for an appeal of  
11 the city's decision as required by ORS 227.175(3) and (10).<sup>7</sup>  
12 Petitioners also argue that the city erred in failing to provide  
13 notice of the city's decision, as required by ORS 227.173(3).

14 Intervenors argue that the city's decision is not  
15 discretionary and, therefore, the city did not approve a  
16 "permit" as defined in ORS 227.160(2). Thus, according to  
17 intervenors, the notice and hearing requirements cited by  
18 petitioners do not apply.

19 A "permit" is defined by ORS 227.160(2) as a "discretionary  
20 approval of a proposed development of land \* \* \*."

21 In resolving intervenors' challenge to our jurisdiction, we  
22 decided that the city's decision involves the exercise of

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24 We consider petitioners' claim that hearing and notice are statutorily  
required under the first assignment of error.

25 <sup>7</sup>ORS 227.175(3) requires the city to hold a public hearing on a permit  
26 application, unless the city gives notice of its decision and provides a  
process for appeal of the decision as set out on ORS 227.175(10).

1 significant factual and legal judgment and is, therefore,  
2 discretionary. Because the city's decision is discretionary,  
3 the city approved a "permit" as defined by ORS 227.160(2), and  
4 the notice and hearing requirements of ORS 227.173 and 227.175  
5 apply.<sup>8</sup>

6 It is undisputed that the city provided no opportunity for  
7 public hearing on intervenors' application and no notice of its  
8 decision approving the application. It is also undisputed that  
9 the PCC does not provide petitioners with a means to appeal the  
10 planning director's decision. Consequently, we agree with  
11 petitioners that the city erred in failing to hold a public  
12 hearing on intervenors' application, as required by  
13 ORS 227.175(3).

14 The first assignment of error is sustained.

15 SECOND ASSIGNMENT OF ERROR

16 "The city misconstrued the applicable law and acted in  
17 violation of state statutes and its comprehensive plan  
18 and implementing ordinances by failing to determine  
19 through adequate findings supported by substantial  
20 evidence in the record that its decision complies with  
21 all applicable criteria set forth in Sections  
22 34.30.030, 34.50.090 and 34.60.030 of the Portland  
23 City Code."

24 Petitioners argue that the city's findings are inadequate

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25 <sup>8</sup>Intervenors also argue that the proposed partition is within the  
26 densities authorized for the R-10 zone and that the partition creates no  
greater impact than any other development permitted in the R-10 zone. The  
fact, however, that development is permitted in a particular zone does not  
mean a decision to approve such development does not approve a "permit," as  
defined by statute, if discretionary approval criteria must be applied.  
See, Doughton v. Douglas County, supra.

1 because they fail to explain "what facts the decisionmaker found  
2 to be true, explaining how such facts led to a conclusion of  
3 compliance with applicable criteria." Petition for Review 18.  
4 Petitioners also contend that the city's findings, consisting of  
5 a checklist, are not supported by substantial evidence.

6 Intervenor's argue that the city's findings are adequate  
7 because they support a ministerial decision.

8 We stated in our discussion of jurisdiction that the city's  
9 decision involves the application of significant discretion and,  
10 accordingly, is a land use decision. It is not disputed that  
11 land use decisions must be supported by adequate findings and  
12 substantial evidence. Intervenor's do not argue that the city's  
13 findings are adequate to support a discretionary decision, and  
14 we agree with petitioners that they are not.

15 Because we decide that the city's findings are inadequate,  
16 there is no point in reviewing the substantiality of the  
17 evidence supporting them. DLCD v. Columbia County, \_\_\_ Or  
18 LUBA \_\_\_ (LUBA No. 87-109, March 15, 1988), slip op 7.

19 The second assignment of error is sustained.

20 THIRD ASSIGNMENT OF ERROR

21 "The city misconstrued the applicable law and acted in  
22 violation of its comprehensive plan and implementing  
23 ordinance by issuing a decision that improperly  
24 delegated discretionary decisionmaking and fact  
25 finding to a future time without the proper  
26 preliminary findings or standards."<sup>9</sup>

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<sup>9</sup>Sustaining the first and second assignments of error requires that we remand the city's decision. However, we are generally required by

1           Petitioners argue that PCC 34.30.030(A)(6) imposes a  
2 mandatory approval criterion that storm drainage for the  
3 proposed parcels be adequate. Additionally, petitioners contend  
4 that adequate streets must contribute to the "health, safety and  
5 well being" of residents and the "community at large" under  
6 PCC 34.50.090. Accordingly, petitioners argue that  
7 PCC 34.30.030(A) and 34.30.090 impose a mandatory approval  
8 criterion requiring that streets serving the proposed parcels be  
9 adequate. Petitioners argue the city failed to make findings  
10 demonstrating compliance with either criterion.<sup>10</sup>

11           Citing Margulis v. City of Portland, 4 Or LUBA 89 (1981),  
12 petitioners also argue the city improperly deferred decisions  
13 regarding the adequacy of the storm drainage for the parcels and  
14 the streets abutting the proposed partition to the city's Bureau  
15 of Environmental Services and to the city engineer. Citing  
16 Holland v. Lane County, \_\_\_ Or LUBA \_\_\_ (Luba No. 87-106,  
17 April 13, 1988), petitioners contend that the city's delegation  
18 of the responsibility for determining streets and storm drainage  
19 are adequate deprives petitioners of an opportunity to be heard  
20 on the adequacy of these services.

21  
22 \_\_\_\_\_  
23 ORS 197.835(10)(a) to decide all issues presented to us when we remand a  
24 decision. "The purpose of this requirement is to provide any guidance  
25 needed to the local government, so that it may correct all deficiencies in  
its decision without the need for repeated appeals to this board." McKay  
Creek Valley Assoc. v. Washington County, *supra*, slip op at 15, n 12.  
Accordingly, we will address the issues in this assignment of error to the  
extent we believe it would be helpful to do so.

26           <sup>10</sup>In fact, petitioners point out that the city found that the streets  
serving the proposed partition are not adequate. Record 1.

1 Further, petitioners contend that the responsibility the  
2 city delegated to its Bureau of Environmental Services, to  
3 determine adequacy of storm drainage, was not "adequately guided  
4 by appropriate standards so that it is clear that whatever  
5 services will be decided on will be adequate." Petition for  
6 Review 23.

7 Intervenors argue that adequacy of drainage and streets are  
8 not mandatory approval criteria. Intervenors contend that the  
9 city's decision simply "'conditioned' the approval by informing  
10 the applicant that building permits for the parcels created by  
11 the partition will not be allowed until the street and drainage  
12 system are improved in accordance with the city's established  
13 requirements." Intervenors-Respondent's Brief 17.

14 With regard to drainage, PCC 34.30.030(A)(6), quoted under  
15 our discussion of jurisdiction, requires that land proposed to  
16 be partitioned have adequate drainage facilities available or  
17 that adequate drainage "can be provided." We agree with  
18 petitioners that this standard is a mandatory approval  
19 criterion.

20 With regard to streets, PCC 34.30.090(A)(2) and 34.50.090,  
21 quoted under our discussion of jurisdiction, requires the city  
22 to determine that the proposed partition is on land not  
23 "unsuitable" for its intended use because of "other reason[s]  
24 harmful to the health, safety or well being of the future  
25 residents or the property owners of the proposed \* \* \* partition  
26 or of the community at large." Under our jurisdictional

1 discussion, we determined that PCC 34.50.090 is a mandatory  
2 approval criterion. Although adequacy of streets is not  
3 specifically listed in PCC 34.50.090(A)-(G) as a factor to be  
4 considered in determining suitability, that list is not  
5 inclusive and we see no indication in the words or context of  
6 PCC 34.50.090 that adequacy of streets should be excluded from  
7 the determination of site suitability. If adequacy of streets  
8 is raised as an issue in the city's proceedings, it should be  
9 considered in determining suitability. Certainly, inadequate  
10 streets could render a parcel unsuitable for its intended use,  
11 and in this case the city found "the streets abutting the site  
12 is [sic] not adequate to serve the site." Record 1.

13 While the city decision maker may rely upon the advice of  
14 city bureaus in determining whether adequate drainage exists or  
15 can be provided and whether the site is suitable for its  
16 intended use, we agree with petitioners that the determinations  
17 that drainage is or can be made adequate and that the site is  
18 "suitable", are for the city decision maker to make, as a  
19 prerequisite to approval of the challenged partition. Margulis  
20 v. City of Portland, supra.<sup>11</sup>

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22  
23 <sup>11</sup> While the planning director must determine that provision of adequate  
24 drainage and streets is feasible, the technical details may be decided  
25 later. Margulis v. City of Portland, supra. However, in this case, the  
26 planning director did not make an initial determination that these services  
are adequate as required by the applicable approval criteria and this  
failure is error. Under these circumstances, we need not reach  
petitioners' claim that the planning director's delegation of the adequacy  
determination is not guided by proper standards because the delegation  
itself was improper.

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The third assignment of error is sustained.

The city's decision is remanded.