

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

3
4 ERIC WENTLAND, STEVEN D. ROGERS,)
5 SUSAN HARTNETT,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13 Respondent,)
14)
15 and)
16)
17 VOLUNTEERS OF AMERICA OREGON,)
18 INC.,)
19)
20 Intervenor-Respondent.)

LUBA No. 92-015
FINAL OPINION
AND ORDER

21
22
23 Appeal from City of Portland.

24
25 Eric Wentland, Portland, filed the petition for review
26 and argued on his own behalf.

27
28 Kathryn Beaumont Imperati, Portland, filed the response
29 brief and argued on behalf of respondent.

30
31 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
32 Referee, participated in the decision.

33
34 AFFIRMED 06/03/92

35
36 You are entitled to judicial review of this Order.
37 Judicial review is governed by the provisions of ORS
38 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision granting conditional use
4 approval for a residential drug and alcohol treatment
5 facility for nonviolent male offenders.

6 **MOTION TO INTERVENE**

7 Volunteers of America Oregon, Inc., the applicant
8 below, moves to intervene on the side of respondent. There
9 is no opposition to the motion, and it is allowed.

10 **FACTS**

11 This is the second time an appeal concerning this
12 proposed treatment facility has been before this Board. In
13 Wentland v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-
14 054, September 4, 1991) (Wentland I) we reversed in part,
15 and remanded in part, a prior city decision granting
16 conditional use approval and a variance for a treatment
17 facility on the subject property.

18 The facility, as proposed in the original application
19 (hereafter original application), would have accommodated up
20 to 60 residents and included 7,000 square feet of open space
21 and eight on-site parking spaces. All but 500 square feet
22 of the open space was to be provided on the roof of the
23 existing two-story structure located on the front portion of
24 the subject property, with the balance of the open space
25 provided at the rear of the property adjacent to the on-site
26 parking area. The applicant had arranged to provide

1 additional parking off-site within 300 feet of the subject
2 property, if needed.

3 Under applicable Portland City Code (PCC) provisions,
4 the applicant was required to provide 9,000 square feet of
5 open space for 60 residents.¹ In its original decision, the
6 city granted a variance from that requirement, allowing the
7 proposed facility to provide only 7,000 square feet of open
8 space. It was in the variance portion of the city's
9 decision that we found error in Wentland I. While we
10 rejected petitioners' arguments concerning the conditional
11 use approval, we remanded the city's decision for additional
12 proceedings to determine whether the required open space
13 could be provided or whether the facility could be modified
14 to make the open space variance unnecessary.

15 On remand, the applicant modified the application in
16 several respects (hereafter modified application). First,
17 the number of residents to be accommodated in the proposed
18 facility is reduced from 60 to 40.² The reduction in number
19 of residents obviates the need for a variance from the PCC
20 open space requirements. Second, all of the required 6,000
21 square feet of open space is provided in the vacant area at
22 the rear of the property at ground level and on an above

¹The PCC requires 150 square feet of open space per resident.

²The applicant also changed the drug and alcohol treatment program to be conducted in the subject facility from a three month program to a four month program.

1 ground level deck. Finally, in the modified application,
2 the required parking spaces are provided at a site within
3 300 feet of the subject property.³

4 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

5 Under the third and fourth assignments of error,
6 petitioners appear to argue the city committed error by
7 failing to make clear which version of the PCC it was
8 applying and by failing to apply the correct version of the
9 PCC.

10 Under ORS 227.178(3), if an application for permit
11 approval is complete when submitted, or is later made
12 complete within the time provided in the statute, the
13 standards in effect when the permit application was first
14 submitted apply. See Kirpal Light Satsang v. Douglas
15 County, 96 Or App 207, 212, 772 P2d 944, modified 97 Or App
16 614, rev den 308 Or 382 (1989) (construing the parallel
17 provisions of ORS 215.428 applicable to counties). The
18 original application was filed and made complete before
19 certain amendments to the PCC became effective in 1991.

20 With one exception, noted below, the city applied the
21 PCC as it existed prior to the 1991 amendments in approving
22 the modified application. Under the 1991 PCC amendments,
23 the facility would not be required to provide on-site open

³Under applicable code provisions, required off-street parking is to be provided on-site or within 300 feet of the subject property. The required off-street parking was provided on-site in the original application.

1 space, but would be required to comply with somewhat
2 different standards governing facilities such as the one
3 proposed. The applicant therefore could have submitted a
4 new application following Wentland I and pursued approval
5 under the revised PCC. See Gilson v. City of Portland, ___
6 Or LUBA ___ (LUBA No. 91-093, November 15, 1991), slip op
7 11-13 (standards revised during initial permit approval
8 proceedings); Sunburst II Homeowners v. City of West Linn,
9 18 Or LUBA 695, 700-02, aff'd 101 Or App 458, rev den 310 Or
10 243 (1990) (standards revised following remand of initial
11 permit decision). However, the applicant did not elect to
12 pursue this course. Instead, as noted above, the applicant
13 modified the original application, attempting to satisfy the
14 PCC standards as they existed when the original application
15 was submitted.

16 The one exception to the above, as noted by the city in
17 its decision, concerns the nearby property where off-street
18 parking will be provided (off-site parking property). The
19 off-site parking property was not included in the original
20 application, because the original application included the
21 required off-street parking on the subject property. The
22 zoning for the off-site parking property changed after the
23 original application was filed. In approving the modified
24 application, the city applied the new zoning designation for
25 the off-street parking property, which requires that
26 development of the parking lot be subject to design review.

1 The modifications to the proposed facility were made to
2 eliminate the necessity for a variance to the open space
3 requirements. The facility remains a residential drug and
4 alcohol treatment facility for nonviolent male offenders.
5 The only changes to the proposal are to (1) reduce the
6 intensity of the use, and (2) change the location of
7 required open space and parking. The city determined that
8 the modified application should be judged by the same
9 standards that applied to the original application, with the
10 exception of the new and apparently more stringent standards
11 governing the off-site parking property under its new zoning
12 designation.⁴

13 We see no error in the city continuing to apply the
14 pre-1991 PCC standards on remand. The city's action on
15 remand is consistent with ORS 227.178(3) and was sufficient
16 to apprise the parties of the standards the city deemed
17 applicable. The changes to the application leave the
18 original proposal fundamentally intact and, as the city
19 notes in its brief, the changes are essentially what this
20 Board suggested the city could do in Wentland I.⁵

⁴Petitioners offer no argument that the prior zoning of the off-street parking property imposed requirements that are not also imposed by the amended zoning for the property. We therefore do not decide whether the city erred in applying the amended zoning requirements applicable to the off-site parking property.

⁵We note that PCC 33.106.010 imposes the following requirement for conditional use approval:

1 The third and fourth assignments of error are denied.

2 **FIRST ASSIGNMENT OF ERROR**

3 Following our remand in Wentland I, the city council
4 held a hearing and considered intervenor's modified
5 application. The city council thereafter entered its
6 decision granting the requested conditional use approval.
7 Under this assignment of error, petitioners argue the
8 modified application differs so substantially from the
9 facility proposed in the original application, that the city
10 council erred by proceeding in the manner it did.
11 Specifically, petitioners contend a new application should
12 have been required and a second hearing before the city land
13 use hearings officer should have been provided.⁶

14 **A. New Application**

15 We conclude under the third and fourth assignments of
16 error, supra, that the modified application did not
17 significantly differ from the original application. We also
18 conclude the city did not err in failing to require that a
19 new application be filed. This conclusion is consistent

"* * * that the use at the particular location is desirable to
the public convenience and welfare and not detrimental or
injurious to the public health, peace, or safety, or to the
character and value of the surrounding properties. * * *"

Petitioners do not argue that the modified application fails to comply
with PCC 33.106.010 or other PCC requirements designed to limit the impacts
of the proposed facility on surrounding properties.

⁶Under relevant PCC provisions, a hearing before the city land use
hearings officer was required and provided during consideration of the
original application.

1 with our prior cases considering the effect of amendments to
2 a permit application prior to the local government's initial
3 decision on the application. In that context we have held
4 that the local government need not, in all cases, require
5 that amendments to the permit application be treated as new
6 permit applications. Bonner v. City of Portland, 11 Or LUBA
7 40, 60 (1980); see Billington v. Polk County, 13 Or LUBA
8 125, 135-36 (1985). We see no reason why a different rule
9 should apply where the modification to the permit
10 application occurs following remand of the initial permit
11 decision by this Board.

12 **B. Rehearing Before the Hearings Officer**

13 With regard to the city's failure to provide a second
14 public hearing before the hearings officer in reaching its
15 decision on remand in this matter, petitioners cite no PCC
16 or statutory provision requiring that a hearing before the
17 hearings officer be provided following a remand by this
18 Board. A public hearing before the city council was
19 provided on remand. Petitioners appeared at the public
20 hearing and make no attempt to explain why providing the
21 public hearing before the city council, rather than before
22 the hearings officer, prejudiced their substantial rights or
23 provided them an inadequate opportunity to present their
24 case.

25 The PCC does not require that the city, in considering
26 a decision remanded by LUBA, repeat all the procedures

1 followed in rendering the initial decision. We have
2 previously determined that, absent code provisions to the
3 contrary, local procedural requirements that apply in
4 reaching the initial decision need not be followed in local
5 proceedings following remand unless the remand specifically
6 requires those procedures be followed. See Lane County
7 School Dist. 71 v. Lane County, 15 Or LUBA 150, 153-54
8 (1986); Morrison v. Cannon Beach, 8 Or LUBA 206, 209 (1983).
9 In such circumstances, so long as all parties are given an
10 adequate opportunity to comment upon the modified
11 application prior to a final decision on that application,
12 the local government's failure to repeat all of the
13 procedures it followed in reaching the first decision
14 provides no basis for reversal or remand.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Under this assignment of error, petitioners argue that
18 whether the pre-1991 or amended PCC applies, the city failed
19 to give adequate notice of its proceedings on remand.
20 However, no petitioner argues he or she was prevented from
21 participating fully in the proceedings on remand by virtue
22 of the alleged failures to provide the required notice of
23 proceedings on remand to owners of property within 400 feet
24 of the newly proposed off-site parking property. We
25 recently considered and rejected a similar argument in
26 Bartels v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-

1 178, April 24, 1992), slip op 3, where we explained as
2 follows:

3 "The error petitioners allege is procedural.
4 Procedural errors provide no basis for reversal or
5 remand unless petitioners' substantial rights are
6 prejudiced by the procedural error.
7 ORS 197.835(7)(a)(B); Murphey v. City of Ashland,
8 19 Or LUBA 182, 188-90, aff'd 103 Or App 238
9 (1990); Slatter v. Wallowa County, 16 Or LUBA 611,
10 617 (1988). Although other persons entitled to
11 notice of the local proceedings on remand may not
12 have been given the legally required notice,
13 petitioners in this appeal do not claim that they
14 did not receive notice of those proceedings, nor
15 do they contend they were denied a full
16 opportunity to participate in the local
17 proceedings on remand. Therefore, even if
18 petitioners are correct that the city erred by
19 limiting the notice of hearings on remand to the
20 parties in Bartels I, there was no prejudice to
21 petitioners' substantial rights." (Emphasis in
22 original.)

23 The second assignment of error is denied.

24 The city's decision is affirmed.

25