

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

3  
4 PHILLIP N. GAGNIER,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF GLADSTONE,  
10 *Respondent.*

11  
12 LUBA No. 2000-044

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Gladstone.

18  
19 John C. Pinkstaff, Portland, filed the petition for review and argued on behalf of  
20 petitioner. With him on the brief was McEwen, Gisvold, Rankin, Carter & Streinz, LLP.

21  
22 John H. Hammond, Jr. and Heather A. Brinton, West Linn, filed the response brief  
23 and argued on behalf of respondent. With them on the brief was Hutchison, Hammond and  
24 Walsh.

25  
26 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,  
27 participated in the decision.

28  
29 REVERSED

10/20/2000

30  
31 You are entitled to judicial review of this Order. Judicial review is governed by the  
32 provisions of ORS 197.850.  
33

**NATURE OF THE DECISION**

Petitioner appeals a city decision concerning a building permit for a duplex.

**FACTS**

On June 23, 1999, petitioner applied to the city for three setback variances for a duplex to be constructed on property zoned Single Family Residential (R-5). At the time of the application, a duplex was an outright permitted use in the R-5 zone. Petitioner sought approval for a zero front yard setback for the duplex, and two side yard variances for an elevated bridge providing vehicular access. In support of the application, petitioner submitted preliminary floor plans for the duplex.

On July 20, 1999, the city planning commission held a hearing and voted to approve the front yard setback and deny the side yard setbacks. Petitioner appealed the denial of the side yard variances to the city council, which, on September 14, 1999, voted to affirm the planning commission's decision. The city's decision included a condition stating that the variance approval would remain valid for one year following the date of approval and that, if no substantial construction had taken place by that date, the approval would expire unless an extension were granted.

On February 8, 2000, the city council amended its zoning ordinance to prohibit duplexes in the R-5 zone, effective March 9, 2000. On February 11, 2000, petitioner applied for a building permit to construct a duplex on the subject property. Petitioner submitted a plan showing the footprint of the proposed duplex, which noted the previously approved zero front yard setback. Under an agreement with Clackamas County, the county processes and issues building permits on the city's behalf, after the city determines that the building permit complies with the city code. On February 18, 2000, the city recorder approved the building permit subject to certain conditions precedent and certain conditions of approval, and forwarded it to the county for processing. The city's conditional approval stated:

1           “The City must indicate that [the conditions precedent] have been fulfilled  
2           prior to the County’s issuance of a building permit. Additionally, the City’s  
3           conditional approval expires on March 9, 2000, the effective date of  
4           Ordinance 1291 which prohibits duplexes as a permitted use within the  
5           subject property’s zoning designation.” Record 34 (emphasis omitted).

6           Petitioner fulfilled the conditions precedent by March 8, 2000, and on that date the  
7           city planning office so advised the county, stating that it was “OK to release building permit  
8           SUBJECT TO CONDITIONS IN LETTER DATED FEBRUARY 18, 2000 \* \* \*.” Record  
9           30. However, petitioner was unable to obtain county verification that all building code  
10          requirements had been satisfied, and the county did not issue the building permit before the  
11          March 9, 2000 expiration date. Following that date, the county continued to process the  
12          application, and has indicated that it will continue to do so up to the point of issuance.  
13          However, based on the March 9, 2000 expiration date specified in the city’s February 18,  
14          2000 letter, the county has advised petitioner that it will not issue the building permit unless  
15          it receives instructions from the city to do so.

16          This appeal followed.

## 17          **JURISDICTION**

18          The city concedes that its decision regarding the building permit involves the  
19          application of a land use regulation, and thus would otherwise fall within the statutory  
20          definition of a land use decision at ORS 197.015(10)(a).<sup>1</sup> However, the city moves to  
21          dismiss this appeal on the grounds that the city’s decision with respect to the building permit

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<sup>1</sup>ORS 197.015(10)(a) defines a “land use decision” to include:

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

“\* \* \* \* \*

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1 falls within one of two exceptions to the statutory definition at ORS 197.015(10)(b).<sup>2</sup>  
2 According to the city, its decision involved an evaluation of whether the proposed use was  
3 permitted within the R-5 zone, and determined the length of time for which its approval was  
4 valid, based on the effective date of an adopted ordinance that altered the permitted uses in  
5 that zone. The city argues that that evaluation was made under land use standards that do not  
6 require interpretation or the exercise of policy or legal judgment, and thus falls within the  
7 exception at ORS 197.015(10)(b)(A). The city also submits that its decision approved a  
8 building permit under “clear and objective” land use standards and thus falls within the  
9 exception at ORS 197.015(10)(b)(B).

10 We disagree. In this case, determining which of two arguably applicable ordinances  
11 apply to a building permit requires interpretation and the exercise of legal judgment. *See St.*  
12 *Johns v. Yachats Planning Commission*, 138 Or App 43, 47, 906 P2d 304 (1995) (the city’s  
13 determination of which ordinance applied to proposed development requires interpretation  
14 and exercise of legal judgment, is not determinable under clear and objective standards and is  
15 thus a land use decision subject to LUBA’s exclusive jurisdiction). As we discuss below, the  
16 question of whether the existing or amended ordinance controls petitioner’s building permit  
17 is a debatable legal issue, to which the relevant statutes and code provisions do not provide a  
18 straightforward answer. By the same token, whatever land use regulations bear on that  
19 question are by no means “clear and objective” on that point. Consequently, the city’s  
20 determination is a land use decision subject to our jurisdiction.

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<sup>2</sup>ORS 197.015(10)(b) provides in relevant part that a “land use decision” does not include a decision of a local government:

- “(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment;
- “(B) Which approves or denies a building permit issued under clear and objective land use standards[.]”

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the city misconstrued the applicable law in determining that the  
3 amended ordinance governs petitioner’s application for a building permit. Petitioner  
4 advances a number of different theories for why the preexisting ordinance controlled the  
5 building permit application. We address only one theory and, for the following reasons,  
6 agree with petitioner that the city erred in determining that the amended ordinance controlled  
7 the building permit for the proposed duplex.

8 Petitioner argues, and the city does not dispute, that the initial variance approval was  
9 a “permit” as defined at ORS 227.160(2).<sup>3</sup> As such, the city’s variance approval was subject  
10 to ORS 227.178(3), which provides:

11 “If the application was complete when first submitted or the applicant submits  
12 the requested additional information within 180 days of the date the  
13 application was first submitted and the city has a comprehensive plan and land  
14 use regulations acknowledged under ORS 197.251, approval or denial of the  
15 application shall be based upon the standards and criteria that were applicable  
16 at the time the application was first submitted.”

17 Petitioner argues that the city’s variance approval was based in part on a specific  
18 finding that the proposed duplex was a permitted use in the R-5 zone, as required by the code  
19 provisions governing variances. The city’s approval was subject to and incorporated a code  
20 provision that establishes a time limitation of one year for variance approval. Petitioner  
21 contends that when he subsequently applied for a building permit to construct the proposed  
22 duplex, subject to the approved variance and within the specified one-year period, the city

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<sup>3</sup>ORS 227.160(2) provides in relevant part:

“‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. ‘Permit’ does not include:

“\* \* \* \* \*

“(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

1 was obligated by ORS 227.178(3) to apply the “standards and criteria” that were applicable  
2 at the time the variance application was first submitted.

3 The city responds that ORS 227.178(3) plainly applies to applications for a “permit”  
4 as defined at ORS 227.160(2). According to the city, the building permit at issue in this case  
5 is not a “permit” under ORS 227.160(2), because it is not a “discretionary” approval of  
6 development. Even if it were considered a discretionary approval of development, the city  
7 argues, the city’s decision essentially determines the proper zoning classification for the  
8 proposed duplex, and thus it falls within the zoning classification exception at  
9 ORS 227.160(2)(b). With respect to petitioner’s argument that the building permit should be  
10 viewed as part of the city’s variance permit for purposes of ORS 227.178(3), the city  
11 contends that the building permit application was a separate and distinct application, and thus  
12 it was not subject to the standards and criteria applicable at the time the variance application  
13 was first submitted. *See Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319,  
14 329 (1991) (ORS 215.428(3), the analogue to ORS 227.178(3) applicable to counties, does  
15 not require the county to apply the standards in effect at the time one application was  
16 submitted to a distinct and subsequent application).

17 We agree with the city that, as a general proposition, a city’s approval or denial of a  
18 building permit is not a “permit” as defined at ORS 227.160(2). However, we agree with  
19 petitioner that, under the present circumstances, ORS 227.178(3) requires the city to treat  
20 petitioner’s application for a building permit as part of the application for the variance  
21 permit; thus the city’s decision with respect to the building permit must be consistent with  
22 the standards that were in effect when the application for a variance was first submitted.

23 Admittedly, ORS 227.178(3) does not expressly regulate the role of building permits  
24 in carrying out “permit” decisions. Further, the city is correct that the “application”  
25 described in ORS 227.178(3) must be understood to refer to an application for a “permit” as

1 defined at ORS 227.160(2).<sup>4</sup> However, we do not believe the legislature intended that a city  
2 can apply one set of standards to the “discretionary approval of a proposed development of  
3 land” and subsequently apply an amended standard to deny a building permit to construct the  
4 development in accordance with the discretionary permit. The purpose of ORS 227.178(3) is  
5 to assure that “the substantive factors that are actually applied and that have a meaningful  
6 impact on the decision permitting or denying an application will remain constant throughout  
7 the proceedings.” *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993);  
8 *see also Holland v. City of Cannon Beach*, 154 Or App 450, 458, 962 P2d 701, *rev den* 328  
9 Or 115 (1998) (city cannot circumvent ORS 227.178(3) by changing its interpretation of  
10 which standards apply during the course of the proceedings). The logical consequence of the  
11 city’s position is that an applicant could apply for a discretionary permit, invest time and  
12 resources in gaining approval, apply for a building permit within the prescribed time limits to  
13 construct the approved use, yet have the city deny that building permit based on subsequent  
14 zoning ordinance amendments. ORS 227.178(3) implicitly requires that the city apply a  
15 consistent set of standards to the discretionary approval of the proposed development of land  
16 and the construction of that development in accordance with the discretionary approval.

17 We believe the approval of a “permit” (*i.e.* “the discretionary approval of a proposed  
18 development of land”) under ORS 227.160(2) and 227.178(3) carries with it the right to  
19 obtain the building permits that are necessary to build the approved proposed development of  
20 land, *provided* the applicant seeks and obtains those building permits within the time  
21 specified in the permit itself or in accordance with any applicable land use regulations that  
22 establish a deadline for seeking and obtaining required building permits.<sup>5</sup> The building

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<sup>4</sup>The term “application” at ORS 227.178(3) also refers to an application for a zone change or limited land use decision. There is no dispute that the application for a building permit at issue in this case is not an application for a zone change or for a limited land use decision.

<sup>5</sup>Of course the applicant must comply with any conditions of approval in the discretionary permit and any land use regulation requirements that were in effect at the time the permit application was submitted.

1 permit in this context performs a similar role to final plat approval following approval of a  
2 tentative subdivision plan. *See Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA  
3 215, 226-27 (1994) (“both subdivision tentative plan and final plat approvals are based on  
4 the ‘standards and criteria’ in effect when the subdivision application is initially filed”);  
5 *Gilson v. City of Portland*, 22 Or LUBA 343, 351 (1991) (stating same principle for  
6 preliminary and final planned unit development plans). In that way, the ORS 227.178(3)  
7 requirement that an application for discretionary approval of a proposed development of land  
8 be judged by the standards that are in effect when the discretionary permit application is  
9 submitted is not rendered meaningless by having the discretionary “permit” decision  
10 *approved* under one set of standards and the building permits that are needed to make any  
11 use of the discretionary permit *denied* under a subsequent set of standards. Again, the  
12 protection provided by ORS 227.178(3) against changing land use standards is not open-  
13 ended or absolute; the permit applicant must seek and obtain building permits within the time  
14 specified in the permit itself or applicable land use regulations.<sup>6</sup> However, if the permit  
15 applicant does so, he may not be denied such a building permit based on a change in  
16 applicable land use regulations that postdates the application for the discretionary permit.

17 We do not understand the city to dispute the foregoing, at least as a general principle.  
18 However, the city does contend that the present case does not fall within that principle.  
19 According to the city, its earlier variance approval did not “approve” a duplex; it merely  
20 approved a variance from the front yard setback requirement. Because the variance approval  
21 did not approve a duplex, the city argues, the city’s action effectively denying the proposed  
22 duplex did not effectively deny the variance.

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<sup>6</sup>We need not and do not decide here whether ORS 227.178(3) has any bearing on whether new or amended land use regulations apply to building permits where a discretionary permit or applicable land use regulations do not specify a definite period of time for seeking or obtaining any required building permits.



1           The city is correct that the present case offers a less compelling circumstance for  
2 application of ORS 227.178(3) than one where the city initially approved a particular use not  
3 allowed outright in the relevant zone. However, although it is a close question, we agree  
4 with petitioner that ORS 227.178(3) should apply in the present circumstances. In order to  
5 obtain a variance, petitioner submitted a proposal for a particular use, along with sufficient  
6 information about that use to allow the city to approve or deny the variance.<sup>7</sup> To approve the  
7 requested variance, the city was required by its ordinance to determine that the proposed  
8 duplex was allowed in the R-5 zone, and the city made that specific determination. The  
9 city’s approval imposed a one-year deadline in which petitioner must commence substantial  
10 construction of the proposed duplex, to avoid expiration of the variance. Petitioner  
11 submitted an application for a building permit to construct the proposed duplex well within  
12 that time frame. The city does not contend that the duplex proposed in the building permit  
13 application differs materially from the duplex proposed in the variance application, such that  
14 the variance approval no longer applies. Under these circumstances, the proposal for a  
15 duplex was a “substantive factor” in the city’s variance approval. *Davenport*, 121 Or App at  
16 141. Consequently, we believe ORS 227.178(3) compels the city to apply a consistent set of  
17 “standards and criteria” to both the variance application and the application to construct the  
18 use proposed in the variance application.

19           The first assignment of error is sustained.  
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<sup>7</sup>At oral argument, the city agreed that it would have rejected an application for a “generic” variance that was not based upon a particular use.

1 **CONCLUSION**

2           Petitioner argues that the city’s decision “violates a provision of applicable law and is  
3 prohibited as a matter of law” and thus must be reversed. OAR 661-010-0071(1)(c). For the  
4 reasons expressed above, the city’s decision violates ORS 227.178(3) and is prohibited as a  
5 matter of law. Accordingly, the city’s decision is reversed.<sup>8</sup>

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<sup>8</sup>In the second and third assignments of error, petitioner argues that the city’s decision with respect to the building permit application was subject to the requirements at ORS 227.173(3) and 227.175(3), which require, respectively, that in approving or denying a “permit” the city must adopt findings and conduct a hearing. Because our resolution of the first assignment of error means that the city’s decision must be reversed, no purpose would be served by considering the second and third assignments of error.