BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NAGENDRA TIRUMALI, PARIMALI TIRUMALI, KATELAND WELLS, TONY MILHIZER, CONNY KIENER, GOEFF LAVEAR, JOYCE LAVEAR, EIKO POLITZ, WES ROSS, DOROTHY ROSS, GAIL INGALSBE, RUSS CARSON and ESTHER TOLLS,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2000-005

JERRY L. WARD, NANCY A. WARD, NAGENDRA TIRUMALI, PARIMALI TIRUMALI, KATELAND WELLS, TONY MILHIZER, CONNY KIENER, GOEFF LAVEAR, JOYCE LAVEAR, EIKO POLITZ, WES ROSS, DOROTHY ROSS, GAIL INGALSBE, RUSS CARSON and ESTHER TOLLS,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

LINDA GAETH and STEVEN Y. ORCUTT,
Intervenors-Respondent.

LUBA No. 2000-007

DAVID JUBITZ, MARY JUBITZ, MARY LOU STRIBLING, DONALD BERG, CAROLE A. COOKE, THOMAS MALLOY, ELEANOR MALLOY, JEFFREY M. LANG and RAMONA SVENDGARD,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,
and

LINDA GAETH and STEVEN Y. ORCUTT,
Intervenors-Respondent.

LUBA No. 2000-018

FINAL OPINION
AND ORDER

On remand from the Court of Appeals.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns.

Frank Hudson, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

Steven Y. Orcutt, Portland, represented intervenors-respondent.

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

LUBA Nos. 2000-005 & 007	AFFIRMED	01/03/2002
LUBA No. 2000-018	DISMISSED	

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal three city actions concerning the construction of a single-family dwelling and attached garage.

FACTS

This matter is before us for the second time. In *Tirumali v. City of Portland*, 37 Or LUBA 859, 861-62 (*Tirumali I*), we described the facts as follows:

> "In March 1999, intervenors applied for a building permit for a dwelling on property zoned R-5. The R-5 zone is a residential zone, which permits the siting of dwellings outright, provided the dwellings are in conformance with the city's development regulations and the Oregon Structural Specialty Code.
>
> "The subject property slopes downhill from Fulton Park Boulevard. The slope of the site at the corners of the property is 20 percent, allowing intervenors to take advantage of code provisions allowing for modified setbacks on steeply sloping lots. The maximum height of the dwelling and the garage is based on a formula in the code for buildings sited on steeply sloped lots.
>
> "The building permit for the dwelling was issued in August 1999. During construction, petitioners, who are nearby residents, became concerned that the structure is taller than allowed under the city's zoning ordinance. In the fall of 1999, neighbors complained about the dwelling's design to city employees and elected officials. The neighbors contended that the dwelling violates the city's height and setback requirements, as well as several zoning ordinance policies regarding the purpose of the height and setback requirements. The complaints led to an investigation of the building permit. In a letter dated December 21, 1999, the director of the city's Office of Planning and Development Review (OPDR) responded to the complaints by explaining the process the city used to determine the height of the dwelling and the garage, and how the slope of the property allowed the garage to be sited within a reduced setback. The letter indicated that the director believed staff had correctly applied the applicable code provisions, but that a mathematical error occurred, which resulted in the garage being two feet higher than was permitted by the code. On January 3, 2000, the city issued a building permit that approved revised plans for the garage that conform to the city's reduced height calculations.
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> "Petitioners appeal the issuance of the first building permit (LUBA No. 2000-005), the December 21, 1999 letter (LUBA No. 2000-018) and the second building permit (LUBA No. 2000-007)." (Footnote omitted.)

BACKGROUND

At issue in these appeals are three actions that, petitioners argue, collectively result in the city's approval of a dwelling and attached garage that exceed the city's building height limitations. We summarize the relevant development standards and appellate history below.

A. The City's Development Standards

Portland City Code (PCC) 33.110.200 to 33.110.285 establish development standards, including height standards, for uses in single-family dwelling zones.[1] PCC 33.110.215.B provides that the maximum height for buildings in the R-5 zone is 30 feet. However, on lots sloping downhill from the street with an average slope of 20 percent or greater, the height limit is the higher of either 23 feet above the average grade of the street, or the height limit as calculated according to the formula set forth in PCC 33.930.050.[2] PCC 33.110.215.D.

PCC 33.930.050 measures the 30-foot height limit from a "base point." For relatively level lots the base point is the *highest* grade on the site.[3] For steeper lots, such as the one at

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[1]PCC 33.110.215.A. provides:

> "* * * The height standards serve several purposes:
>
> "• They promote a reasonable building scale and relationship of one residence to another;
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> "• They promote options for privacy for neighboring properties; and
>
> "• They reflect the general building scale and placement of houses in the city's neighborhoods."

[2]PCC 33.930 explains how measurements are made under the Portland Zoning Code. A substantially identical method of calculating height is found in the Uniform Building Code (UBC) definition of "height of building." UBC (1991 Edition) 27.

[3]PCC 33.910.030 defines "grade" as:

> "The lowest point of elevation of the *finished* surface of the ground, sidewalk or pavement within the area between the building and the property line or, when the property line is more than 5 feet from the building, between the building and a line 5 feet from the building. This is

issue in this appeal, the base point is located 10 feet above the *lowest* grade. In this case, the building permits approve a building height based on the lowest grade. However, the relevant lowest grade was elevated above the original grade as a result of filling in a portion of the lower part of the property.

B. *Tirumali I* and *Tirumali II*

In *Tirumali I*, petitioners argued that the city's application of PCC 33.930.050 failed to comply with the policies contained in PCC 33.110.215.A, because the resulting building height is higher than would be permitted if the city calculated the base point from the original grade. In the alternative, petitioners argued that the city cannot in the first instance use the original grade to determine whether the site is a "steeply sloping lot," and then use the finished grade as the base point for calculating the building height. In both instances, petitioners argued that the city interpreted its zoning ordinance provisions pertaining to "grade" in a manner that was inconsistent with PCC 33.110.215.A.

In *Tirumali I*, we concluded that the disputed building permits were issued based on clear and objective standards and, therefore, the decisions to approve the building permits fell under two of the exceptions to the definition of "land use decisions" found in ORS 197.015(10)(b).[4] Because we concluded the two building permit decisions were not land use

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> the definition used in the Oregon Structural Specialty Code (the Uniform Building Code as amended by the State.)" (Emphasis added.)
>
> The UBC includes an identically worded definition of "**GRADE (Adjacent Ground Elevation)**." UBC (1991 Edition) 26.

[4]ORS 197.015(10)(b) establishes certain exceptions to the statutory definition of the phrase "land use decision." In pertinent part, it provides:

> "['Land use decision' d]oes 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; [or]
>
> "(B) Which approves or denies a building permit issued under clear and objective land use standards[.]"

decisions, we also concluded that the planning director's letter explaining the methodology the city used to calculate the building height was not a land use decision. 37 Or LUBA at 867-68. We therefore dismissed petitioners' appeals because they did not challenge land use decisions. ORS 197.825(1) (LUBA only has jurisdiction to review land use decisions and limited land use decisions).

Our decision was appealed to the Court of Appeals. *Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000) (*Tirumali II*). Petitioners argued to the court that the question of whether the proposed dwelling conformed to the height limits turned on the interpretation of the phrase "finished surface," as it is used in the city's definition of the word "grade" in PCC 33.910.030. The court agreed with petitioners that the building height regulations at issue were ambiguous in that the phrase "finished surface" was susceptible to at least two plausible interpretations. As a result, the court concluded that the building permit decisions did not fall under the exceptions to the definition of "land use decision" found in ORS 197.015(10)(b)(A) and (B) and, therefore, the building permit decisions are "land use decisions" subject to LUBA's jurisdiction. With regard to the planning director's letter, the court determined that resolution of the status of the letter was best left for LUBA to decide on remand. 169 Or App at 246-47.

JURISDICTION

The city moves to dismiss these appeals, arguing that the challenged actions are not "land use decisions." The city contends that the decision in *Tirumali II* should not be read to say that the building permits are "land use decisions." According to the city, *Tirumali II* merely determines that the building permits do not fall under the two narrow exceptions to the definition of "land use decision" found in ORS 197.015(10)(b)(A) and (B). *See* n 4. The city argues that the two building permits are not land use decisions because land use regulations were not applied during the building permit decision making process. *See* ORS 197.015(10)(a) (the definition of land use decision includes a final decision made by a local

government concerning the application of a land use regulation). With respect to the planning director's December 21, 1999 letter, the city argues that the court clearly indicated that it agreed with our determination that the letter is not a land use decision.[5]

We disagree with the city on both points. The building permits clearly apply PCC 33.930.050, which is part of the city's zoning ordinance, to determine the permissible height of the dwelling. That the zoning ordinance in turn essentially incorporates the UBC definition of finish grade does not mean that the building permits did not apply the zoning ordinance, which is indisputably a land use regulation. Because approval of the building height requires the application of standards found in PCC 33.930.050, and that provision is a part of the city's zoning ordinance, the city decision applying those regulations is a land use decision, unless it falls within one of the exceptions found in ORS 197.015(10)(b). The court has already determined that it does not fall within two of those exceptions, and the city does not argue that the city's actions fall within any other exception.

As for the court's disposition of the December 21, 1999 letter, we disagree with the city that the decision unequivocally endorsed our view that the letter is not a land use decision. Rather, the decision appears to say that we should revisit our determination of the status of the December 21, 1999 letter, given that we dismissed the challenge to the letter by relying on our conclusion in *Tirumali I* that the building permits were not land use decisions.

With that said, we have considered whether the December 21, 1999 letter independently constitutes a land use decision. We conclude that it does not. At most, it provides an explanation of how the building height was calculated for the purposes of

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[5]The city relies on the following statement in *Tirumali II* to support its contention that the court agrees with our disposition of LUBA No. 2000-018:

> "LUBA's opinion suggests * * * that the director's letter may not qualify as a 'land use decision,' for reasons independent of the two [building permits] and of ORS 197.015(10)(b). That suggestion may well be correct. * * *" 169 Or App at 247 n 2.

approving the two building permits. It does not by itself apply a land use regulation. Therefore, LUBA No. 2000-018 is dismissed.[6]

The city's motion to dismiss is allowed in part.[7]

LUBA NOS. 2000-005 AND 2000-007

A. First Assignment of Error

In the first assignment of error, petitioners argue that the building permits constitute "permits" as that term is used in ORS 227.160 and 227.175 because they involve the discretionary approval of the development of land in that discretion was used to determine that the proposed height of the dwelling conformed to PCC 33.930.050.[8] Therefore, petitioners argue, at a minimum the city's decision must be remanded to provide notice and opportunity for a hearing under ORS 227.175.[9]

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[6]However, the letter is still evidence of why the city applied PCC 33.930.050 in the way it did. Therefore, we consider the contents of the letter in our disposition of LUBA Nos. 2000-005 and 2000-007.

[7]One portion of the city's motion to dismiss reiterates arguments the city made regarding the timely filing of the notices of intent to appeal by petitioners. We have already addressed those arguments in an earlier order that denied motions to dismiss submitted by the city. *Tirumali v. City of Portland*, __ Or LUBA __ (Order, June 26, 2001), slip op 5. The arguments do not merit further discussion here.

[8]ORS 227.160(2) defines "permit" as

> "[the] discretionary approval of a proposed development of land under * * * city legislation or regulation."

[9]ORS 227.175 provides, in relevant part:

> "(1) When * * * authorized by a city, an owner of land may apply * * * for a permit * * * in such manner as the city council prescribes. * * *
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> "* * * * *
>
> "(3) Except as provided in [ORS 227.175(10)], the hearings officer shall hold at least one public hearing on the application [for a permit].
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> "* * * * *
>
> "(5) Hearings [pursuant to ORS 227.175] may be held only after notice to the applicant and other interested persons and shall otherwise be conducted in conformance with the provisions of ORS 197.763."

The Court of Appeals has already determined that the standards under which the challenged building permits were issued are ambiguous and therefore require interpretation. The question before us is whether the interpretational exercise that causes the building permit decisions to fall outside the exceptions to the definition of "land use decision" necessarily means the decisions are also statutory permit decisions. For the following reasons we conclude it does not.

The cases where this Board or the Court of Appeals has determined that approval or denial of a building permit involves the kind of discretion that renders it a "permit" as defined in ORS 227.160 or 215.402 have tended to involve circumstances where there is some question as to the nature of the proposed use or whether the use is permitted at all in the zone. *See Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986) (a determination whether a dwelling is customarily provided to support a farm use requires significant factual, policy and legal judgment and is therefore a permit); *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991) (determination that a methadone clinic is a permitted use as a "medical clinic" in a commercial zone requires significant discretion and is therefore a permit); *Pienovi v. City of Canby*, 16 Or LUBA 604, 606 (1988) (nonconforming use determination is a permit decision).[10] Each of the decisions in those cases, and many others like them found to be permit decisions under ORS 227.160 or ORS 215.402, involve exercise of legal, factual or policy discretion of a kind that brings them within the ambit of a statutory "permit." However, as far as we can tell, we have never held that a building permit for a use that is unquestionably a permitted use in the applicable zone is also a statutory "permit," solely because in issuing that building permit the local government interpreted an ambiguous term in a land use regulation that applies to that

[10]Under the current statute, a decision such as that made in *Hollywood Neigh. Assoc.* would be categorized as a zoning classification decision under ORS 215.402(4)(b) or 227.160(2)(b). Such decisions, if applied to land within an urban growth boundary, are subject to LUBA's review but are no longer "permits" as defined by the statute.

permitted use. Here, the only "discretion" the city exercised involved an interpretation whether the term "finished surface" in the code definition of the term "grade" is limited to a paved surface or also includes nonpaved surfaces where fill has been placed. We do not believe that an interpretation of such a code provision under such circumstances is the type of "discretionary approval" that results in a "permit" under ORS 227.160(2).

That conclusion is supported by ORS 227.215(2) and (3), which in relevant part allow a city to adopt a development ordinance that distinguishes between permits that are granted "as of right" on compliance with the terms of the ordinance, and permits that are granted "discretionarily" in accordance with the requirements of ORS 227.173.[11] The requirements of ORS 227.173 apply only to a statutory "permit" as defined in ORS 227.160(2) and to expedited land divisions. The parallelism and cross-references between ORS 227.160(2), 227.173 and 227.215(3)(b) indicate that the category of permits described in ORS 227.215(3)(b) includes those defined by ORS 227.160(2), *i.e.*, "discretionary approval of a proposed development of land." The strong implication is that the other categories of permits described in ORS 227.215(3) are *not* "permits" as defined in ORS 227.160(2). Therefore, one way to approach the question before us in this case is to ask

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[11]ORS 227.215 provides in relevant part:

> "(2) A city may plan and otherwise encourage and regulate the development of land. A city may adopt an ordinance requiring that whatever land development is undertaken in the city comply with the requirements of the ordinance and be undertaken only in compliance with the terms of a development permit.
>
> "(3) A development ordinance may provide for:
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> "(a) Development for which a permit is granted as of right on compliance with the terms of the ordinance;
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> "(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173;
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> "(c) Development which need not be under a development permit but shall comply with the ordinance; and
>
> "(d) Development which is exempt from the ordinance."

whether the city's development ordinance categorizes the building permits issued in this case as something other than ORS 227.215(3)(b) permits. If the answer to that question is yes, then that would support the conclusion that those building permits are not "permits" as defined by ORS 227.160(2).

PCC 33.700 sets forth procedures for review and approval of building permits for uses "allowed by right." PCC 33.700.010. That language parallels ORS 227.215(3)(a) and is an indication that PCC 33.700 is intended to reflect that statutory provision. PCC 33.730 sets forth procedures for uses that require at least some degree of discretionary approval, and describes three types of procedures (Type I, II and III) to reflect increasing levels and kinds of discretion. PCC 33.730 appears to include the kind of permits described in ORS 227.215(3)(b). There is no dispute or reasonable question in the present case that the challenged decisions are building permits for a use allowed "as of right on compliance with the terms of the ordinance." That the city's development ordinance categorizes the type of permits at issue in this case under PCC 33.700, and does not categorize them under PCC 33.730, supports the conclusion that the subject permits are not ORS 227.215(3)(b) permits. That in turn supports the conclusion that the subject permits are not "permits" as defined by ORS 227.160(2).

In sum, because the challenged decisions involve building permits for a use allowed by right, as reflected in the city's development ordinance, and do not involve the "discretionary approval of a proposed development of land" within the meaning of ORS 227.160(2), the challenged building permits are not "permits" defined by ORS 227.160(2). Because the challenged building permits are not permits that are subject to the procedures set out in ORS 227.175, petitioners' assignment of error provides no basis for reversal or remand. The first assignment of error is denied.[12]

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[12]After oral argument, we issued an order requesting memoranda from the parties as to whether the challenged decisions could be characterized as "limited land use decisions." ORS 197.015(12). We agree with

B. Second Assignment of Error

Petitioners argue that the city's interpretation of its ordinance—to allow additional fill to be placed on the property and then use the resulting surface elevation to increase the base point from which the height of the dwelling is calculated—is contrary to the express purpose of the underlying policies in the city's height regulations and, therefore, as a matter of law must be reversed. *See* ORS 197.829(1)(b). According to petitioners, the city's interpretation of PCC 33.930.050.A violates the purpose of the ordinance, in that it is possible for a dwelling to be constructed on fill of infinite height, with the resulting dwelling height completely dwarfing neighboring dwellings. *See* n 1 (setting out the purposes of the height requirements). Petitioners argue that this is in fact what has happened in this case—fill was placed at the lower elevation of the property in order to justify the higher base point for the dwelling. Petitioners contend the correct interpretation is one where the only finished surface that could affect the building height calculations involves streets, sidewalks and other hard surfaces. Petitioners contend that this interpretation is more consistent with the approach for calculating the base point described in PCC 33.930.050.A.1.[13]

In addition, petitioners argue that even if we agree with the city that the base point may be calculated from unpaved fill, the city's decision errs in that it calculated the base point from the elevation at the base of the dwelling, not five feet from the base of the dwelling as is required by PCC 33.910.030. *See* n 3. According to petitioners, if the base point is calculated from the finished grade located five feet from the base of the dwelling, the permitted height of the dwelling would be five feet shorter than was approved in the building

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the point that petitioners make in their memorandum: that the arguments in the petition for review do not raise this issue. Therefore we do not resolve that question here. *See Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 507, 4 P3d 765 (2000) (LUBA does not review land use decisions *per se*; it reviews arguments the parties make about land use decisions).

[13]PCC 33.930.050.A.1 describes the first way to calculate building height as "[b]ase point 1," and describes "[b]ase point 1" as "the elevation of the highest adjoining sidewalk or ground surface within a 5-foot horizontal distance of the exterior wall of the building when such sidewalk or ground surface is not more than 10 feet above lowest grade."

permits. Petitioners argue that the city and intervenors may not, after the fact, add fill to the lower portion of the property in order to raise the lowest grade and, as a result, raise the base point for calculating height.

The city responds that the Court of Appeals acknowledged in *Tirumali II* that there were at least two equally supportable interpretations of the term "finished surface" in the city's code, and those two interpretations were the crux of the parties' arguments. 169 Or App at 246-47. The city argues that its interpretation—that "finished surface" means the *final* elevation as approved by the city—is a reasonable interpretation. The city also contends that the interpretation allows additional fill to be placed at the base of a structure to increase the grade, if such fill is necessary to comply with height requirements, provided that the fill complies with building code regulations. *See* n 3.

We review the city's interpretation to determine whether it is correct. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995); *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988). In so doing, we look to the city's interpretation for instruction, but independently decide, as a matter of law, whether the city's interpretation is correct. *Id.*

In this case, we agree that the city's interpretation is correct. As stated previously, "grade" is defined in PCC 33.910.030 as "the lowest point of elevation of the finished surface of the ground, paving or sidewalk within the area between the building and * * * a line [five] feet from the building." That definition is identical to the UBC definition of "Grade (Adjacent Ground Elevation)." *See* n 3. The PCC definition of "Grade" and the UBC definition of "Grade (Adjacent Ground Elevation)" work in concert with the PCC and UBC provisions for measuring the height of buildings. *See* n 2. Simply stated, as relevant in this appeal, those provisions require that the city identify "the lowest point of elevation of the finished surface of the ground, paving or sidewalk" at any point within five feet of the dwelling. The relevant base point for measuring building height is an imaginary point 10 feet

above that lowest "finished surface" elevation. Petitioners' concern that under the city's interpretation these provisions could be manipulated to obtain approval for a taller structure is legitimate, but not inevitable. Moreover, even under petitioners' interpretation, it would appear that the applicant need only apply paving to the lowest surface grade identified by the city. As long as that were done, the same kind of manipulation that petitioners argue has occurred here under the city's interpretation could also occur under petitioners' interpretation. Petitioners' "possibility of manipulation" argument provides no basis for finding that their interpretation is correct and the city's interpretation is incorrect.

It would appear that the only real limits on possible maximum building height on steeply sloped lots are (1) any physical and technical constraints that may be associated with constructing retaining walls and placing fill on any particular piece of property and (2) the city's willingness to approve requests to place fill on the property where doing so will artificially elevate the lowest "finished surface" and thereby increase the permissible building height. Petitioners do not argue that the first limit has been exceeded here. Although there may be such standards, petitioners identify no legal standards that limit the city's authority to allow fill to be placed on the property in cases where the purpose or incidental effect of that fill is to increase permissible building height. Other parts of the UBC make it quite clear that while any fill that is placed on the property must comply with approved plans, altering the surface elevation of property through placement of fill is expressly anticipated.[14]

With regard to whether the city incorrectly located the base point at the dwelling rather than five feet from the dwelling, petitioners point out that the planning director's December 21, 1999 letter takes the position that the error in doing so can be remedied by

[14]Chapter 70 of the UBC sets out "rules and regulations to control excavation, grading and earthwork construction, including fills and embankments; establishes the administrative procedure for issuance of permits; and provides for approval of plans and inspections of grading construction." UBC (1991 Edition), Section 7002.

approving amended plans that allow the builder to raise the finish grade at the rear of the dwelling, to ensure that the dwelling is in compliance with the height limitation.[15] Petitioners also point out that, at the request of one petitioner, the city conducted a code enforcement action with respect to this issue. Consistent with the position expressed in the director's December 21, 1999 letter, the city inspector reported no code violation as long as the builder constructed a proper retaining wall to raise the grade. Record 1. The position taken in the director's December 21, 1999 letter is based on, and consistent with, the interpretation of relevant code provisions that we sustained above. If that interpretation is correct, as we have held, then the relevant code provisions also allow the city to approve plans to raise the finished grade in a manner consistent with that interpretation. In short, petitioners have not demonstrated that the city's method of remedying its error in calculating building height in this case is impermissible under its code or otherwise should result in reversal or remand.

The second assignment of error is denied.

The decisions challenged in LUBA Nos. 2000-005 and 2000-007 are affirmed.

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[15]The director's December 21, 1999 letter states:

> "If the builder needs to raise the grade at the rear of the house to ensure that the base point as measured 5 feet from the house is in compliance with the code height limitations, then we will require plans showing compliance with the building code. Those plans need to address the structural design of the retaining wall and the crawl space wall to support the new grade, appropriate materials for earth contact, and crawl space ventilation." Record 26.