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**NATURE OF THE DECISION**

Petitioners appeal the city’s limited land use decision granting design review approval for an addition to a church.

**MOTION TO INTERVENE**

Murray Hills Christian Church (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

**STANDING**

The city and intervenor (respondents) challenge petitioner Faurot’s (Faurot’s) standing. According to respondents, Faurot did not appear below, either in person or in writing, as is required by ORS 197.830(2)(b). Petitioners do not dispute respondents’ argument.

ORS 197.830(2)(b) provides that “a person may petition [LUBA] for review of a \* \* \* limited land use decision if the person [a]ppeared before the local government\* \* \* orally or in writing.” Absent some argument that Faurot did appear before the city or that her failure to appear is excused for some reason, we agree with respondents that Faurot does not have standing to appear before LUBA.<sup>1</sup>

**FACTS**

Intervenor owns a 3.88-acre parcel located within the city’s Urban Standard Residential (R-5) zone. The parcel is developed with a 12,510 square foot church, with associated parking and landscaping. A Montessori school is operated within the existing church, pursuant to a conditional use permit granted in 1994. In 2001, intervenor sought, and obtained, conditional use approval to construct the 13,342 square foot addition. The

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<sup>1</sup>As a practical matter, this will have little effect on the disposition of petitioners’ assignments of error, because petitioners filed a joint petition for review, and no one challenges petitioner Sattler’s standing to bring this appeal.

1 conditional use permit also allowed the proposed addition to exceed the building height  
2 limitation in the zone.<sup>2</sup>

3 The proposed addition extends south from the existing church down the slope of a  
4 hill. It features a pitched roof that connects with the gable end of the roof of the existing  
5 structure below that structure's dome. Because of the slope, the elevation of the proposed  
6 addition above the grade varies from 23 feet at the northern end, where it connects to the  
7 existing structure, to 42 feet at the southern end.<sup>3</sup> The addition is set back 100 feet from the  
8 nearest property line to the south.

9 Petitioner owns a dwelling to the south of the subject property. Petitioner appeared  
10 during the proceedings below and argued against intervenor's proposal, contending that the  
11 current structure and its addition are not compatible with the surrounding single-family  
12 residential uses. The city's board of design review proceedings resulted in a deadlock, which,  
13 under the city's interpretation of its code, meant that the application was denied. Intervenor  
14 appealed the design review decision to the city council. The city council approved the design  
15 review application. This appeal followed.

16 **FIRST ASSIGNMENT OF ERROR**

17 Beaverton Development Code (BDC) 40.10.15.3.A sets out the procedures the city  
18 board of design review is to follow when it considers Type III applications. Type III  
19 applications are defined as "major" development actions, and include building additions with  
20 an increase of over 50 percent of the existing building area. BDC 40.10.15.3(e). In its appeal  
21 to the city council, intervenor cited BDC 40.10.15.3.A as a code section being challenged. In  
22 its decision, the city council determined that the proper reference to proceedings before the  
23 board in its Type III reviews is BDC 50.30.3.B.1. BDC 50.30.3.B.1 is part of the procedures

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<sup>2</sup>Petitioner challenged the city's conditional use approval in *Sattler v. City of Beaverton*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2001-113, November 28, 2001). We affirmed the city's decision.

<sup>3</sup>The building height limitation in the R-5 zone is 30 feet.

1 chapter in the BDC, and the procedural requirements set out in BDC 50.30.3.B.1 duplicate  
2 BDC 40.10.15.3.A.

3 Petitioner argues that the city improperly aided intervenor when it corrected the  
4 procedural reference. According to petitioner, the BDC places the burden on the applicant to  
5 show that all relevant approval criteria have been met. In addition, petitioner explains that  
6 when an appeal of a board of design review decision is filed, the appellant must specify, by  
7 code section number, the criteria that are at issue in the appeal.

8 Respondents argue that the council's consideration of the correct code section, rather  
9 than the substantially identical code section that was identified in intervenor's local appeal  
10 did not result in an improper shifting of the burden of proof. Instead, respondents argue that  
11 the city council's decision after *de novo* review was merely to correct a referential error that  
12 occurred during the board proceedings. Respondents contend that petitioner has not  
13 articulated a reason why the city council's code reference correction provides a basis for  
14 remand of the city's decision. Finally, respondents argue that the code section does not  
15 matter in this instance, because the city council denied intervenor's challenge that was based  
16 on the disputed code provision.

17 The city's decision quotes intervenor's challenge:

18 "[BDC] 40.10.15.3.A requires that applications such as [intervenor's] 'shall  
19 be approved by the Board of Design Review as soon as the appropriate level  
20 of review has occurred to determine compliance with the requirements and  
21 conditions of this ordinance.' The [Board of Design Review] therefore erred  
22 in not approving the application. Moreover, the [Board of Design Review]  
23 exceeded and/or violated its authority in taking no action whatsoever to  
24 approve or deny the application." Record 4.

25 The city council's finding in response to this challenge states:

26 "In response to this statement, the [city council] finds that BDC 50.30.3.B.1 is  
27 the more correct citation to the process [before the Board of Design Review];  
28 it states that 'the Board [of Design Review] after public hearing, shall  
29 approve, approve with conditions, or reject the plans of the applicant...' and  
30 that the Board [of Design Review] may continue an application for a  
31 reasonable time. At the July 26, 2001, Design Review Board hearing, the

1 Board entertained two motions, one for approval with conditions, the other for  
2 denial. Neither motion received the requisite majority of votes necessary to  
3 pass. The Board [of Design Review]’s failure to approve was the equivalent of  
4 a denial as the applicant for a land use permit has the burden of proof and  
5 persuasion. [Intervenor’s] implication that the Development Code section  
6 cited in its Notice of Appeal requires the Board [of Design Review] to  
7 approve all applications coming before the Board, is incorrect. In any case,  
8 the [city council] on *de novo* review finds that the application does comply  
9 with all relevant requirements of the Development Code for Design Review as  
10 further stated below.” *Id.*

11 As the city council’s finding makes clear, the city council denied intervenor’s  
12 proffered interpretation of BDC 40.10.15.3.A on its merits. The city council’s identification  
13 of the correct procedural section did not shift the burden of proof or otherwise affect the city  
14 council’s disposition of intervenor’s challenge under BDC 40.10.15.3.A.

15 The first assignment of error is denied.

16 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

17 BDC 40.10.15.3.C.2 provides standards for review of the proposed site design. The  
18 standards include requirements that:

19 “(a) [I]n relationship to the existing surroundings and future allowed uses,  
20 the location, size, shape, height and spacial and visual arrangement of  
21 the uses and structures are compatible, with consideration given to  
22 increased setbacks, building heights, shared parking, common  
23 driveways and other similar considerations; [and]

24 “\* \* \* \* \*

25 “(g) [T]he quality, location, size and aesthetic design of walls, fences,  
26 berms, traffic islands, median areas, hedges, screen planting and  
27 landscape areas are such that they serve their intended purposes and  
28 have no adverse effect on existing or contemplated abutting land  
29 uses.”

30 The city’s findings to address BDC 40.10.15.3.C.2(a) state, in relevant part:

31 “As to \* \* \* BDC 40.10.15.3.C.2, Design Standards, (a), the applicant’s  
32 landscape plan will partially screen the new addition from the view from  
33 neighboring properties, not only when the trees are fully mature but also from  
34 the time of planting.” Record 5.

35 The council also adopted the findings in the staff report, which state:

1           “The applicant’s narrative responds to [BDC 40.10.15.3.C.2(a)] by noting that  
2           the building expansion will use the same materials, architectural language,  
3           and guiding horizontal and vertical dimension of the existing Church building.  
4           The applicant believes the architecture will ‘fit in’ with the residential  
5           neighborhood. In response to this criterion, staff notes that an increase in the  
6           height of the building is part of the Conditional Use proposal. Due to the slope  
7           of the site, it is important that the applicant’s landscape plan address visual  
8           screening for adjacent residential properties. The applicant’s landscape plan  
9           has been designed, in part, for visual screening purposes. Recommended  
10          Condition No. 1 requires all landscaping to be carried out in accordance with  
11          the approved landscape plan. In addition, staff recommends three other  
12          conditions, No[s]. 5, 7 and 13, [that] require certain revisions to the landscape  
13          plan and establish minimum planting heights. By adopting proposed  
14          Conditions 1, 5, 7, and 13, \* \* \* visual screening is provided and will not  
15          adversely impact surrounding properties.” Record 173.

16           In the second assignment of error, petitioner argues that the first finding quoted above  
17          does not address BDC 40.10.15.3.C.2(a), and instead is associated with the findings required  
18          by BDC 40.10.15.3.C.2(g). In addition, petitioner argues that the finding is not supported by  
19          substantial evidence, in that there is testimony in the record where intervenor’s landscape  
20          architect states that within 10 years of planting, the trees will become a heavy screen, both in  
21          height and density.

22           In the third assignment of error, petitioner argues that BDC 40.10.15.3.C.2(a) also  
23          requires that the city consider the height of the building in its determination that the proposed  
24          addition is compatible with “the existing surroundings and future allowed uses.” According  
25          to petitioner, the city’s findings merely note that the height of the proposed addition is part of  
26          intervenor’s conditional use permit proposal, and that this reference alone does not satisfy  
27          BDC 40.10.15.3.C.2(a). In addition, petitioner argues that, to the extent the city’s findings  
28          are responsive to the criterion, the findings are not supported by substantial evidence.

29           It does not matter whether the challenged findings are more responsive to BDC  
30          40.10.15.3.C.2(g) than to BDC 40.10.15.3.C.2(a). Neither BDC 40.10.15.3.C.2(a) nor BDC  
31          40.10.15.3.C.2(g) requires that the necessary screening be achieved from the date the design  
32          is approved, or from the date the landscaping is planted. The findings quoted above are

1 sufficient to demonstrate that the proposed site design (1) is compatible in relationship to the  
2 surrounding residential uses; (2) will serve its purpose in that, over time, the trees and other  
3 vegetation will screen the church and the addition from the neighbors to the south; and (3)  
4 will not adversely affect neighboring properties. Petitioner does not argue that either standard  
5 requires more.

6 With respect to the height of the structure, contrary to petitioner's argument, the  
7 findings do more than reference the companion conditional use decision. Fairly read, the  
8 findings set out why, despite the height of the addition, the proposal will be compatible with  
9 surrounding uses. Petitioner has not established how the city's decision misconstrues the  
10 applicable law or is otherwise inadequate to address BDC 40.10.15.3.C.2(a).

11 Finally, respondents point to evidence in the record, including descriptions of the  
12 types of vegetation to be planted and how those plantings will provide a buffer between the  
13 church and addition and the surrounding single-family dwellings. According to respondents,  
14 this evidence is sufficient to support the city's finding. We agree.

15 The second and third assignments of error are denied.

16 The city's decision is affirmed.