

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RICHARDSON SHOEMAKER
5 and CAROL SHOEMAKER,
6 *Petitioners,*

7
8 vs.

9
10 TILLAMOOK COUNTY,
11 *Respondent,*

12
13 and

14
15 BILL LOVEJOY
16 and CONSTANCE LOVEJOY,
17 *Intervenors-Respondent.*

18
19 LUBA No. 2003-154

20
21 FINAL OPINION
22 AND ORDER

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24 Appeal from Tillamook County.

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26 Robert C. Shoemaker, Jr., Corbett, filed the petition for review and argued on behalf of
27 petitioners.

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29 No appearance by Tillamook County.

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31 Christopher P. Koback, Portland, filed the response brief and argued on behalf of
32 intervenors-respondent. With him on the brief was Davis Wright Tremaine, LLP.

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

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37 DISMISSED

02/06/2004

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

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NATURE OF THE DECISION

Petitioners challenge two building permits that allow the construction of a single-family dwelling and attached parking deck.

MOTION TO INTERVENE

Bill Lovejoy and Constance Lovejoy (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

The subject property is a 6,691 square foot lot that overlooks Netarts Bay to the west and is zoned Netarts High Density Urban Residential (NT-R3.) The property has access to Pearl Street, which is located on the property’s east boundary. However, Pearl Street is topographically elevated above the subject property. In November 2001, intervenors were issued a building permit to construct a three-story dwelling on the subject property (the dwelling permit). The plans filed with the building permit application depict a garage on the top floor of the structure, with the living areas located below. The dwelling permit approved a building height of 34 feet, 8 inches. The building height includes the garage. Record 15. The permit application also states that a 440 square foot “deck” will be constructed in conjunction with the dwelling.¹

In 2002, the county required that intervenors obtain a variance from setback requirements in order to build a parking deck connecting the garage with Pearl Street. Petitioners, who own property to the east of the subject property across Pearl Street, appeared at the variance hearing, and argued that the building height approved by the 2001 dwelling permit exceeded applicable height limits. According to petitioners, the subject property is a bay-front lot and, as such, is subject

¹ The “deck” is not specifically identified in the site plan attached to the building permit application at Record 17. However, it is fairly clear that the 440 square foot deck referred to in the dwelling permit application is a parking deck connecting the proposed dwelling with Pearl Street.

1 to a 24-foot building height limit.² Therefore, petitioners argued, the county could not approve a
2 parking deck that would connect to a garage that would be located above the 24-foot height limit.

3 The planning commission decided that the proposed building height was not relevant to the
4 setback variance request. Nevertheless, in response to petitioners' arguments, the planning
5 commission concluded that the subject property did not fall within the county's definition of bay-
6 front lot and, therefore, the 35-foot height limitation applied. In the same decision, the planning
7 commission approved the setback variance to allow the parking deck to be built within the front-
8 yard setback (variance decision). Petitioners did not appeal the 2002 variance decision.

9 On September 16, 2003, the county issued a building permit for the parking deck (parking
10 deck permit.) Petitioners filed a notice of intent to appeal with LUBA on October 1, 2003. That
11 notice states, in relevant part:

12 "Notice is hereby given that petitioners intend to appeal that land use decision of
13 respondent entitled Building Permit[] Nos. 01-453 [dwelling permit] and 03-180R
14 [parking deck permit] which became final on September 16, 2003, and which
15 involves permission to build a residence and integrated parking structure at 1930
16 Pearl Street, Netarts, Oregon." Notice of Intent to Appeal 1.

17 **REPLY BRIEF**

18 Petitioners move to file a five-page reply brief to respond to an argument made by
19 intervenors in their response brief that LUBA does not have jurisdiction to review the issuance of
20 the 2001 dwelling permit. Intervenors object, arguing that the reply brief is merely an expansion of
21 arguments petitioners made in their petition for review that the dwelling permit and the parking deck
22 permit are one "integrated" decision for the purposes of an appeal to LUBA.

23 A reply brief is appropriate to respond to a jurisdictional challenge raised in a response
24 brief. *Boom v. Columbia County*, 31 Or LUBA 318 (1996). We agree with petitioners that a

² Tillamook County Land Use Ordinance (TCLUO) 3.342 provides, in relevant part, that the maximum building height for property located within the NT-R3 zone is 35 feet. However, if a lot or parcel is a "bay front lot," the maximum building height is 24 feet. TCLUO Article 1 defines "bay front lot" as a lot "which abuts the Estuary Planning Boundary of non-riverine waterways or a lot where there is no buildable lot between it and estuarine bay waters." Netarts Bay is an estuarine bay.

1 reply brief is appropriate in this circumstance to respond to arguments intervenors presented in their
2 response brief regarding our jurisdiction to review the dwelling permit. Accordingly, it is allowed.

3 **DECISION**

4 Intervenor move to dismiss this appeal, arguing that (1) the parking deck permit is
5 independent of the dwelling permit and variance decision, and an appeal of the parking deck permit
6 does not allow petitioners to also challenge either the dwelling permit or the variance decision; (2)
7 the 2003 parking deck permit is not a land use decision; and (3) petitioners have not demonstrated
8 that they are adversely affected by the challenged decision and therefore do not have standing to
9 appeal the county's decision to LUBA.

10 In response, petitioners filed a motion pursuant to OAR 661-010-0045(1), asking that
11 LUBA consider evidence not in the record to support their contentions that (1) they are adversely
12 affected by the county's approval of the dwelling height; and (2) the property is a bay-front lot. In
13 the alternative, petitioners move to supplement the record with that same evidence.

14 **A. Separate Decisions**

15 Intervenor argue that the issuance of the 2003 parking deck permit does not allow
16 petitioners to challenge prior decisions regarding dwelling height. Intervenor argue that to the extent
17 a county decision regarding dwelling height constitutes a land use decision the relevant land use
18 decision was made either at the time the dwelling permit was issued in 2001, or at the latest, when
19 the county concluded during its variance proceedings that the subject property is not a bay front lot
20 and therefore a dwelling height of up to 35 feet is allowed. Intervenor contend that petitioners may
21 not, at this juncture, appeal that building height decision by appealing the parking deck decision.

22 Petitioners concede that they were aware that the 2001 dwelling permit and the 2002
23 variance decision had been made more than 21 days prior to filing the October 1, 2003 notice of
24 intent to appeal. However, petitioners argue that until the county approved the parking deck permit,
25 petitioners had no way of knowing that the county would abide by its advisory determination in the
26 variance proceedings that the subject property is not a bay-front lot. Petitioners argue that the

1 dwelling permit application included a 440 square foot deck, that it is undisputed that the deck is the
2 parking deck that is the subject of the 2003 building permit, and that without the deck, intervenors
3 cannot build the proposed dwelling according to the approved plans. Therefore, petitioners argue,
4 the two permits must be considered an “integrated” permit for the purposes of an appeal to LUBA.

5 A development application may involve several separate land use decisions. In this case, it is
6 fairly clear that the parking deck permit is separate from the dwelling permit. The parking deck
7 permit does not purport to allow construction of the dwelling; it merely identifies how the parking
8 deck will be constructed to meet county engineering standards. Accordingly, we agree with
9 intervenors that an appeal of the 2003 parking deck permit does not allow petitioners to challenge
10 the 2001 dwelling permit. *See Sahagian v. Columbia County*, 27 Or LUBA 341 (1994) (in an
11 appeal to LUBA from one local government decision, petitioners may not collaterally attack an
12 earlier, separate local government decision); *Headley v. Jackson County*, 19 Or LUBA 109, 115
13 (1990) (same). Because petitioners offer no other explanation for why petitioners’ October 1, 2003
14 appeal of the 2001 dwelling permit is timely and otherwise within our jurisdiction, we conclude that
15 we lack jurisdiction over petitioners’ appeal of that decision. Because we do not consider
16 petitioners’ challenge to the 2001 dwelling permit, we need not consider the evidence petitioners’
17 proffer to support their contention that the subject property is a bay-front lot and therefore is
18 subject to the 24 foot-height limitation.

19 **B. 2003 Parking Deck Permit**

20 According to intervenors, the 2003 parking deck permit was issued pursuant to clear and
21 objective standards and therefore falls within the exception to “land use decision” set out in ORS
22 197.010(10)(b)(B).³ As a result, intervenors argue, LUBA does not have jurisdiction over the

³ ORS 197.015(10)(b)(B) provides that the definition of “land use decision” does not include a decision of a local government “[w]hich approves or denies a building permit issued under clear and objective land use standards[.]”

1 parking deck permit because it is not a land use decision. *See* ORS 197.825(1)(LUBA has
2 exclusive jurisdiction to review “land use decisions.”)

3 Petitioners do not respond to intervenors’ argument, and we will not make petitioners’
4 jurisdictional arguments for them. *See Neighbors for Livability v. City of Beaverton*, 168 Or App
5 501, 507, 4 P3d 765 (2000) (LUBA reviews the arguments that the parties make about land use
6 decisions and does not review land use decisions *per se*). It is petitioners’ burden to demonstrate
7 that we have jurisdiction to review a land use decision. *Billington v. Polk County*, 299 Or 471,
8 475, 703 P2d 232 (1985); *Hanby v. City of Jefferson*, 22 Or LUBA 1, 2 (1991). Petitioners
9 have not done so here. Therefore, this appeal must be dismissed.⁴

⁴ Because we conclude that we do not have jurisdiction to review either the dwelling permit or the parking deck permit, we do not address intervenors’ argument that petitioners have failed to demonstrate they are adversely affected by the city’s issuance of those permits. Nor do we consider petitioners’ evidence to support their contention that they are adversely affected.