BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID A. EMAMI and DIANA EMAMI,
Petitioners,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

JOHN TERCEK,
Intervenor-Respondent.

LUBA No. 2006-007

DAVID A. EMAMI and DIANA EMAMI,
Petitioners,

vs.

CITY OF LAKE OSWEGO,
Respondent.

LUBA No. 2006-010

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Dana L. Krawczuk, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Stephen T. Janik and Ball Janik, LLP.

Evan P. Boone, Deputy City Attorney, Lake Oswego, filed a response brief and argued on behalf of respondent.

John M. Junkin, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Krista N. Hardwick and Bullivant Houser Bailey, PC.

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

1
2 AFFIRMED 06/07/2006
3
4 You are entitled to judicial review of this Order. Judicial review is governed by the
5 provisions of ORS 197.850.

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioners appeal (1) a staff decision declining to refer their request for revocation of
4 a permit to a local review body and (2) a staff decision declining to allow a local appeal of
5 that referral decision.

6 **MOTION TO FILE REPLY BRIEF**

7 Petitioners request leave to file a reply brief to address alleged new matters raised in
8 the city's response brief. There is no opposition to the motion or reply brief, and it is
9 allowed.

10 **FACTS**

11 On February 23, 2005, intervenor-respondent (intervenor) filed an application with
12 the city seeking Residential Infill Design Review (RID) approval. The application sought
13 approval to demolish an existing dwelling on a residentially-zoned lot and construct a larger,
14 three-story dwelling. The proposed new dwelling required several "exceptions" to applicable
15 zoning requirements, including reductions to the front yard, east and west side yard setbacks,
16 an increase in the allowable floor area ratio, and an increase in the allowable lot coverage. In
17 land use parlance the requested exceptions are essentially "variances," but with less exacting
18 approval criteria than are traditionally applied in granting variances. The existing dwelling
19 does not conform to existing front and side yard setback requirements. The RID criteria
20 allow exceptions to design standards if the applicant demonstrates that the proposed design
21 "results in development that is equal to or better than development that would meet" the
22 existing design standards. Lake Oswego Code (LOC) 50.72.020(2). In making that
23 determination, the city must consider whether "a more compatible, positive relationship
24 between a residential dwelling * * * and the scale, character and privacy of its neighbors can
25 be demonstrated" in ways other than compliance with existing design standards. LOC

1 50.72.020(2)(c).[1] Another consideration is whether the proposed design offers "features that
2 enhance perceived scale, character and privacy relative to adjoining properties." *Id.*

3 Petitioners own the adjacent lot to the east, which is higher in elevation than
4 intervenor's property and developed with a large three-story home that also does not conform
5 with existing side yard setbacks. Petitioners acquired their lot in May 2005 from a bank that
6 had foreclosed on the property.

7 Intervenor's application was deemed complete on June 28, 2005. City staff approved
8 the application, including the requested exceptions, in a preliminary decision made without a
9 hearing. Notice of the decision was mailed to neighboring property owners using mailing
10 labels provided by intervenor, which were based on the most recent property tax assessment
11 rolls. Accordingly, notice of the RID decision was mailed to the bank that formerly owned
12 petitioners' property, not to petitioners. A city policy requires that where the property

---

[1] LOC 50.72.020(2)(c)(ii) provides:

> "Criteria. The City Manager may permit a residential dwelling or accessory structure design to exceed or vary from the standards listed in subsection (2)(c)(i) above when a more compatible, positive relationship between a residential dwelling or accessory structure and the scale, character and privacy of its neighbors can be demonstrated in other ways. The City Manager will evaluate that relationship by considering the degree to which a proposed design offers features that enhance perceived scale, character and privacy relative to adjoining properties. That review will include consideration of:
>
> "1. Distance and visibility from adjoining properties;
>
> "2. Preservation of existing trees and features of perceived value to adjoining properties;
>
> "3. Topography;
>
> "4. Perceived building height, form, proportion, massing and orientation relative to adjoining properties;
>
> "5. Treatment of elevations exposed to adjoining properties;
>
> "6. Perceived sight lines to and from windows, decks and outdoor living spaces;
>
> "7. Fencing or screening; and
>
> "8. Landscaping."

1 address and the owner's address are not the same, notice must be sent to the property address
2 in addition to the owner's address. However, the city failed to send notice of the RID
3 decision to petitioners' address. No comments were received, so the preliminary RID
4 decision became final on August 2, 2005.

5 At some point petitioners learned of the RID decision and, on October 27, 2005,
6 petitioners filed a written request with the city to revoke the RID decision, pursuant to LOC
7 50.86.030, which provides that "[o]n referral by the City Manager," the Development
8 Review Commission (DRC) may hold a hearing to consider revocation of an approved
9 permit where, in relevant part, the applicant "committed a material misrepresentation of fact
10 in the application or the evidence submitted in support of the application."[2] On October 20,
11 2005, after consultation with the city attorney, a city planner sent a letter to petitioners and

---

[2] LOC 50.86.030 provides:

> "Upon referral by the City Manager, the Development Review Commission may hold a hearing pursuant to LOC Articles 50.82 and 50.83 to consider revocation of an approved permit and/or revocation of a certificate of occupancy. The DRC may revoke any permit approval or certificate of occupancy based upon one or more of the following findings:
>
> "1. The applicant or the applicant's representatives either intentionally or unintentionally committed a material misrepresentation of fact in the application or the evidence submitted in support of the application. For the purposes of this section, 'material misrepresentation of fact' means a misstatement of factual information that:
>
> "a. Was submitted by the applicant in support of the application;
>
> "b. Could have been corrected by the applicant at the time of application; and
>
> "c. Formed the sole basis for approval of the application pursuant to an applicable approval criterion.
>
> "A 'material misrepresentation of fact' does not include misstatements of fact made by City staff or caused by failure by another party to appear or adequately testify.
>
> "2. The applicant or successor in interest failed to complete the work within the time or in the manner approved without obtaining an extension of time or modification of the permit from the granting authority.
>
> "3. The applicant or successor in interest failed to maintain or use the property in accordance with the approved permit or conditions of approval."

intervenor setting forth the procedure the city manager or his delegate would use in determining whether to refer the revocation request to the DRC. Under that procedure, petitioners had 10 days to submit written material and argument, followed by a meeting between petitioners, city staff and intervenor to ask questions about petitioners' submissions. Intervenor then had 10 days to submit written material and argument, followed by a similar second meeting. After the second meeting, both parties were given one week to prepare and submit five pages of final written argument. The October 20, 2005 letter also articulated the standard of proof the city would require: the city manager would refer the revocation request to the DRC for a hearing if petitioners established a "reasonable suspicion" that a material misrepresentation had occurred.

The city manager delegated his authority to make the referral decision to the city Community Development Director. On December 27, 2005, after the parties had completed the process set out in the October 20, 2005 letter, the director issued a 34-page decision that declined to refer the matter to the DRC for a revocation hearing. The director found that petitioners failed to demonstrate a "reasonable suspicion" that intervenor committed a "material misrepresentation" in support of the RID application. We refer to the director's December 27, 2005 decision as the "referral decision."

On January 11, 2006, petitioners filed a local appeal of the referral decision. On January 13, 2006, the city rejected petitioners' attempt to file a local appeal of the referral decision, on the ground that the city's code did not provide for appeal of such decisions. We refer hereafter to the January 13, 2006 decision as the "appeal decision." Petitioners appealed both the referral decision (LUBA No. 2006-007) and the appeal decision (LUBA No. 2006-010) to LUBA, and these appeals were consolidated for review.

FIRST AND SECOND ASSIGNMENTS OF ERROR (LUBA NO. 2006-010)

LUBA No. 2006-010 challenges the appeal decision. Under the first assignment of error, petitioners argue that because the underlying *referral* decision is a "permit" decision as

that term is defined at ORS 227.160(2), the city was required by ORS 227.175 to provide an opportunity to appeal the referral decision to a hearing before a review body. Under the second assignment of error, petitioners argue that, even if there is no statutory basis for a local appeal, the referral decision stems from an application for "minor development" as that term is defined in the code, and the city's code provides for a local appeal from a minor development decision.

The city and intervenor (together, respondents) argue, and we agree, that petitioners have not established either a statutory or code-based requirement to provide a local appeal of the referral decision.

A. Statutory Permit

ORS 227.160(2) defines "permit" in relevant part as the "discretionary approval of a proposed development of land." ORS 227.175(10) provides in relevant part that the local government may approve or deny a permit application without a hearing if the local government gives notice of the decision and provides an opportunity for certain persons to file an appeal leading to a *de novo* hearing. Petitioners contend that the RID decision was unquestionably a permit decision, and therefore a decision whether to refer a request to revoke that permit to the DRC under LOC 50.86.030 is also necessarily a permit decision. According to petitioners, because a decision whether to refer a revocation request (1) involves discretion and (2) can effectively determine whether proposed development of land may occur, such a decision is a "permit" as defined by ORS 227.160(2).

Because this issue is one of first impression, petitioners analogize to the circumstances in which the local government decides whether or not to extend a previously approved permit. Petitioners note that LUBA has held, in two such cases, that a decision to extend a permit can itself be a "permit" decision for purposes of ORS 227.160 and 227.175 and their statutory cognates applicable to counties. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 383-84 (2000); *Heidgerken v. Marion County*, 35 Or LUBA 313, 324-26 (1998).

1 Similarly, petitioners argue, a decision whether or not to consider revoking an existing
2 permit may itself be a permit decision, if it involves discretion and is "tantamount to a
3 decision reapproving or denying the underlying permit[.]" *Heidgerken*, 35 Or LUBA at 326.

4 We agree with respondents that *Willhoft* and *Heidgerken* are distinguishable, and
5 provide little guidance in determining whether a decision to refer a request to revoke a permit
6 is itself a permit as defined at ORS 227.160(2). Both of those cases involved applications
7 filed by the land owner/developer to extend permits approving development of land.
8 ORS 227.175 sets out required procedures for processing permit applications, *i.e.*,
9 applications for "discretionary approval of a proposed development of land." While the
10 referral decision certainly involved discretion, we do not see that petitioners' request for a
11 revocation proceeding constitutes an application for "approval of a proposed development of
12 land." Further, we agree with respondents that ORS 227.160 and 227.175 contemplate that
13 applications for a "permit" must be filed by the "owner of land" who is seeking approval for
14 a "development project." *See* ORS 227.175(1) ("an owner of land may apply in writing * * *
15 for a permit or zone changes"); ORS 227.175(2) ("an applicant may apply at one time for all
16 permits or zone changes needed for a development project"). Nothing cited to us in
17 ORS 227.160 or 227.175 suggests that a person who is not the "owner of land" on which
18 development is proposed may apply for a "permit" within the meaning of the statute.

19 In our view, a revocation proceeding is more analogous to an enforcement action than
20 to a permit proceeding. A local government may conduct proceedings to enforce its land use
21 regulations, either on its own motion or at the request of persons who do not own the subject
22 property. Such enforcement actions may be initiated in circuit court, or may be initiated and
23 prosecuted at the local level, pursuant to local procedures. *Putnam v. Klamath County*, 19 Or
24 LUBA 616 (1990). If prosecuted at the local level, such enforcement actions may result in
25 land use decisions, subject to LUBA's exclusive jurisdiction. *Watson v. Clackamas County*,
26 27 Or LUBA 164, 168 (1994). Indeed, depending on how local enforcement procedures are

1 written, a decision *not* to initiate local enforcement of a local government's land use
2 regulations may be a land use decision, if it otherwise meets the statutory definition of "land
3 use decision." *Johnston v. Marion County*, 51 Or LUBA __ (LUBA No. 2005-086, February
4 9, 2006), slip op 5-6. However, we are aware of no authority suggesting that such local
5 enforcement decisions are "permit" decisions or subject to the procedural requirements
6 applicable to statutory permits. Similarly, we know of no authority suggesting that actions to
7 revoke a permit under locally prescribed procedures are "permit" decisions, subject to the
8 requirements governing statutory permit decisions.[3] If a decision whether to revoke a permit
9 is not a statutory "permit" decision, then a decision whether to *refer* a revocation request to
10 further proceedings is also not a statutory permit decision. Consequently, we disagree with
11 petitioners that ORS 227.175 requires the city to provide a local appeal of the referral
12 decision.

13 **B. Minor Development**

14 LOC 50.84.005(1) provides that a final decision of the city manager on a "minor
15 development application" may be appealed to a hearings body. Petitioners attempted to file a
16 local appeal of the referral decision, arguing that it was the city manager's final decision on a
17 "minor development application." The city declined to accept that appeal, taking the
18 position that petitioners' request for a revocation hearing was not a "minor development
19 application."

20 LOC 50.79.020 defines "minor development" as "development which requires a
21 permit from the City that requires a more discretionary level of review than a ministerial
22 decision." Petitioners repeat their arguments that their request for revocation is a "permit"
23 that concerns "development," and therefore their request is a "minor development

---

[3] Presumably, actions to revoke a permit may be subject to minimal due process requirements under the federal constitution, if nothing else. We address below petitioners' argument that the procedures the city used to determine whether to refer the revocation request to the DRC violated minimal due process requirements.

application" and the referral decision may be appealed pursuant to LOC 50.84.005(1). Respondents argue, and we agree, that the city correctly concluded that petitioners' revocation request was not a "minor development application," because it did not seek a "permit" for "development" as those terms are used in the code.

The first and second assignments of error (LUBA No. 2006-010) are denied.

FIRST AND SECOND ASSIGNMENTS OF ERROR (LUBA NO. 2006-007)

LUBA No. 2006-007 challenges the referral decision. These assignments of error challenge the procedures the city manager used to determine whether to refer the revocation request to the DRC for a hearing. The first assignment of error is premised on petitioners' view that the referral decision is a statutory permit and therefore subject to the requirements of ORS 227.173(1). We reject that argument for the reasons discussed above.

Under the second assignment of error, petitioners argue that the absence of code standards governing the city manager's discretion to refer revocation requests to the DRC violates constitutional due process requirements.[4] According to petitioners, the adoption of *ad hoc* procedures and standards for making the referral decision— informally adopted procedures and standards that will not necessarily be used to make future referral decisions— gives the city manager essentially unfettered discretion and creates opportunities for favoritism and biased decision making. Petitioners recognize that they do not have a property interest at issue in the revocation proceeding that is protected by due process, but they assert that intervenor does, and that petitioners may seek remand based on the city's failure to provide due process protection to intervenor, as long as petitioners' substantial rights were also prejudiced by the city's failure.

---

[4] Petitioners do not specify what constitutional provision or even what constitution is violated by the city's actions, but presumably petitioners refer to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Oregon Constitution does not include a Due Process clause.

1 Respondents argue that LOC 50.04 provides that the city manager "may develop
2 regulations and procedures to aid in the implementation and interpretation" of LOC
3 provisions. The city manager appropriately exercised that authority in adopting the
4 procedures used to govern the referral decision, respondents contend. In any case,
5 respondents dispute that petitioners have demonstrated a property interest that is protected by
6 the due process clause or that the *ad hoc* procedures used by the city are inconsistent with
7 due process requirements.

8 In a case cited by petitioners, *Cookman v. Marion County*, 44 Or LUBA 630, 645
9 (2003), we held that the absence of code standards specifically governing local enforcement
10 procedures did not run afoul the due process clause, where the county took the position that
11 code procedures consistent with due process requirements that govern other types of
12 decisions would be applied to any enforcement action. Petitioners attempt to distinguish
13 *Cookman*, arguing that in the present case the city has interpreted its code *not* to provide any
14 procedural or substantive standards governing the referral decision. We understand
15 petitioners to argue that the city manager may make referral decisions consistent with the due
16 process clause only pursuant to promulgated code regulations that set forth the procedures
17 and standards that govern or that can be interpreted to govern the city manager's referral
18 decisions.

19 Petitioners do not argue that the actual procedures and standards the city manager
20 applied in the present case are inconsistent with due process requirements, merely that their
21 provisional and *ad hoc* nature violates the due process clause, apparently because the city
22 manager could apply different procedures and standards in future referral decisions. While
23 *Cookman* is not much on point, it illustrates that where the code does not provide procedures
24 or standards governing a specific decision, a local government may, consistent with the due
25 process clause, essentially borrow procedures and standards applicable to other types of
26 decisions. Here, the city did not borrow other code procedures or standards, but it adopted a

1 written set of procedures and standards that significantly cabins the city manager's discretion
2 and that appears to offer all participants a reasonable opportunity to present evidence and
3 legal argument. As noted, we do not understand petitioners to argue otherwise. Instead,
4 petitioners focus on the *ad hoc* and impermanent nature of those written procedures and
5 standards and the fact that the city is not necessarily bound to apply the same procedures and
6 standards in future referral proceedings. However, petitioners have not demonstrated that the
7 due process clause prohibits adoption of one-time, temporary procedures and standards that
8 otherwise satisfy minimum due process requirements, simply because those procedures and
9 standards are not permanent and might not be applied in other cases. If there is any authority
10 for that proposition, petitioners have not cited it to us.
11 The first and second assignments of error (LUBA No. 2006-007) are denied.
12 **THIRD ASSIGNMENT OF ERROR (LUBA NO. 2006-007)**
13 Under this assignment of error, petitioners challenge the manner in which the city
14 applied the "reasonable suspicion" standard adopted by the city manager to govern the
15 referral decision.
16 Petitioners explain that the "reasonable suspicion" standard appears to be borrowed
17 from criminal law, and in that context represents a standard that is less than probable cause,
18 which is itself less than the ultimate standard of proof—beyond reasonable doubt—necessary
19 to obtain a conviction. We do not understand petitioners to challenge adoption of the
20 "reasonable suspicion" standard itself under this assignment of error. However, petitioners
21 argue that, notwithstanding the city's representation that it would apply the relatively low
22 "reasonable suspicion" standard, the city in fact applied a higher, more rigorous standard in
23 determining whether to refer the revocation request to the DRC. According to petitioners,
24 the city in fact improperly applied the same standard that the DRC would apply in
25 determining whether to revoke the RID permit, under LOC 50.86.030. *See* n 2. Petitioners
26 argue that the director essentially required petitioners to prove conclusively that the applicant

1 had made at least one material misstatement of fact, instead of requiring petitioners to prove
2 only a "reasonable suspicion."

3 The referral decision discusses each of the alleged misrepresentations of fact, makes
4 findings of fact, and then asks and answers four questions with respect to each allegation:
5 (1) was there a misstatement of fact; (2) was that misstatement of fact submitted by the
6 applicant or the applicant's representative; (3) could the misstatement of fact have been
7 corrected by the applicant; and (4) did the misstatement of fact form the sole basis for
8 approval of the application pursuant to applicable criteria? Only if the answer to all four
9 questions is "yes" would the director conclude that petitioners had demonstrated a
10 "reasonable suspicion" that a material misrepresentation of fact had occurred, and that the
11 revocation request should be forwarded to the DRC. While the director concluded in some
12 cases that there were misstatements of facts by the applicant that could have been corrected,
13 in no case did the director conclude that any misstatements were material, *i.e.*, formed the
14 sole basis for approval.[5]

---

[5] As an example, we quote portions of the director's findings addressing allegations of misrepresentations on the site plan submitted in support of the RID application. All record citations in this opinion are to the record in LUBA No. 2006-007.

> "*Was there a misstatement of fact?* The purpose of the site plan, together with the elevations, and roof plan, is an attempt to depict a three-dimensional structure by use of two-dimensional tools, *i.e.*, pen and paper. In order to focus on critical elements of the proposed structure vis-à-vis the code criteria, the omission or de-emphasis from view of the 'rearward' portions of the structure, when looking at a specific elevation, cannot be characterized as a 'misstatement' of fact unless it is so inaccurate, vague or difficult for staff to ascertain the nature, layout, or dimensions of the proposed structure relative to surrounding structures. In other words, if staff could fairly ascertain the elements and locations of the proposed structure from the various elevations and roof form so as to be able to ascertain the three-dimensional characteristics of the proposed structure, there was no misstatement of fact.
>
> "* * * * *
>
> "i. Boathouse: Yes. The depiction of the Emami boathouse on the south (lake) elevation was not correctly shown on the south (lake) elevation and was not shown on any other elevation or on the site plan.
>
> "* * * * *

1 Respondents argue that the city correctly applied the reasonable suspicion standard,
2 which intervenor explains means "a belief that is reasonable under the totality of the
3 circumstances." Intervenor-Respondent's Brief 16 (quoting *State v. Jacobus*, 318 Or 234,
4 239, 864 P2d 861 (1993)). In most cases, respondents argue, the director found *no* evidence
5 whatsoever suggesting that any misrepresentation at all had occurred. With respect to three
6 allegations, the director found misrepresentations, but for the reasons explained in the
7 findings concluded that the evidence failed to support a reasonable belief that the
8 misstatement was material, *i.e.*, was the sole basis for permit approval. Intervenor notes that
9 the ultimate standard for revocation under LOC 50.86.030 is an extremely difficult standard

---

"v. Height: No. Although building height, as a criterion, will be discussed under the 'stamped survey criterion' below, as to the failure to tie the surveyed 42 ft. difference between the Tercek's *existing* deck to the ridge of the Emami's residence to the *proposed* Tercek residence, it is at best an omission of statement, not a misstatement of fact. Even if made, a comparison of height between an existing—but to be shortly destroyed—structure and the adjacent structure is not a statement of fact relating to the building height of the *proposed* structure and *its* effect on the adjacent, existing structure.

"* * * * *

"*Was that misstatement of fact submitted by the applicant or the applicant's representative?* As to the boathouse, yes. The other statements were not 'misstatements of fact.'

"*Could the misstatement of fact have been corrected by the applicant*? As to the boathouse, yes. The other statements were not 'misstatements of fact.'

"*Did the misstatement of fact form the sole basis for approval of the application pursuant to applicable criteria?*

"i. Boathouse: No. The Emamis use the failure to correctly depict the location of the boathouse as evidence that the design drawings are generally inaccurate. The 4-foot error in depiction of the location of the Emami boathouse relative to the side yard did not affect, positively or negatively, the 'scale, character and privacy of its neighbors' of the proposed Tercek residence to the existing Emami residence. There is no relation or effect as to the requested exceptions for the Tercek residence to the scale, character and privacy to the Emami residence, and the Emamis have not cited any.

"* * * * *

iii. Remaining items. The other statements [on the site plan] were not 'misstatements of fact." Record 17-19.

1 to meet, requiring proof that a misstatement of fact "[f]ormed the sole basis for approval of
2 the application pursuant to an applicable approval criterion." In applying the threshold
3 "reasonable suspicion" standard, intervenor argues, the director must necessarily ask whether
4 the evidence provides a reasonable basis to conclude that any misrepresentations formed the
5 sole basis for approval under the applicable criteria. Because the ultimate standard is so
6 difficult, intervenor argues, it is not surprising that petitioners perceive that the director
7 misapplied the *relatively* lower, but still difficult to satisfy, "reasonable suspicion" standard.
8 The director found three misrepresentations, with respect to (1) the mailing list, (2)
9 the depicted location of the boathouse on petitioners' property, and (3) the calculation of
10 gross floor area average. In all three cases, the director concluded that there was no reason to
11 believe that the misrepresentation was material, *i.e.*, formed the sole basis for approval under
12 the applicable criteria. While the manner in which the director asked and answered the four
13 questions with respect to each allegation does not expressly distinguish between the
14 "reasonable suspicion" standard and the ultimate standard under LOC 50.86.030, it is
15 reasonably clear from the decision as a whole that the director understood the difference and
16 applied the former rather than the latter. *See* Record 9 ("I have reviewed the evidence and
17 argument to determine whether there is a reasonable suspicion that there was a 'material
18 misrepresentation of fact' in the application materials or the evidence submitted in support of
19 [the] application").
20 Further, we agree with intervenor that, because the ultimate standard is so difficult to
21 satisfy, the reasonable suspicion standard will also be somewhat difficult to surmount.
22 Petitioners must show some reason to believe that the alleged misrepresentation was the
23 "sole basis" for approval. While the "reasonable suspicion" standard (is there any reason to
24 believe) may itself be a low standard, the predicate evidentiary proof (sole basis for
25 approval) is so difficult to satisfy that application of the threshold standard to the evidence
26 results in a relatively difficult standard to satisfy.

1 The director concluded that petitioners had shown no reason to believe that any
2 misrepresentation was material. We address, below, petitioners' challenges to specific
3 findings. However, we do not agree with petitioners' broader argument that the director
4 misapplied the reasonable suspicion standard.

5 The third assignment of error (LUBA No. 2006-007) is denied.

6 **FOURTH ASSIGNMENT OF ERROR (LUBA NO. 2006-007)**

7 Under this assignment of error, petitioners contend that the director misconstrued the
8 applicable law in finding that an omission of information on an application is not a
9 "misstatement of fact" for purposes of LOC 50.86.030.

10 With respect to four allegations, the director concluded that while there may have
11 been an omission of required information in the RID application, such omissions did not
12 constitute a "misstatement of fact." The director found that omission of an "occupant"
13 mailing label could be construed as a misstatement of fact that the owner's mailing address is
14 the same as the property address, but found that such omission did not relate to any approval
15 criterion. Record 13. The director also characterized as an omission the failure to relate a
16 survey showing the elevation between the deck of the *existing* house on the subject property
17 and the ridge of petitioners' dwelling to the elevation between the *proposed* dwelling and
18 petitioners' dwelling, but found that omission irrelevant to the approval criteria. Record 18
19 (*see* findings quoted at n 5). The director further found that failure to show structures on
20 abutting lots on the stamped survey as required by RID regulations was not a misstatement of
21 fact, or at least not a material misstatement, given that the structures were depicted on other
22 drawings.[6] Finally, the director found that failure to state the lot sizes of comparison

---

[6] We quote here those findings addressing the allegation that the stamped survey does not show "structures on abutting lots" as the RID code provisions require, because those findings include the most extensive discussion why the director believes omitted items do not constitute "misstatements of fact."

> "*Was there a misstatement of fact?* No. There is an *omission* of submission, not a misstatement of fact. Neither the un-exhibited Thurston survey nor the Thurston stamped

1 properties in a table used in part to determine the lot coverage variance was an omission, not
2 a misstatement, and in any case staff did not use lot size comparisons in approving the lot
3 coverage variance. Record 31-32.

4 Petitioners contend that under the common law nondisclosure of material facts can be
5 a form of misrepresentation where (1) there is a duty to speak, or (2) other representations
6 made would be misleading without full disclosure of the omitted information. According to
7 petitioners, because intervenor had a duty to provide the required information, and because
8 other representations were misleading without the omitted information, the director erred in
9 failing to evaluate whether the omitted information constitutes a material misstatement of
10 fact.

11 Respondents agree with petitioners' understanding of the circumstances wherein
12 omission of material facts can be a misrepresentation. However, respondents argue that the
13 director in fact acted consistently with the common law rule regarding omissions and
14 correctly concluded that there was no reason to believe that the alleged omissions were
15 "material misstatements of fact" for purposes of LOC 50.86.030. According to respondents,
16 the findings indicate that the director believed an omission could be material misstatement of
17 fact when the omitted information was necessary to determine whether the proposal

---

survey, Exhibit E-2, depicts the placement of the residences on the abutting parcels. If something is not submitted, and, is therefore not stated, it cannot be a misstatement of fact because it is, in fact, no statement.

"* * * * *

"*Did the misstatement of fact form the sole basis for approval of the application pursuant to applicable criteria?* Not applicable, having concluded that there was no misstatement of fact. As discussed above, this is also the corollary to omitted information: omitted information cannot be the basis for approval, since it did not exist.

"Failure to submit the requested information is not, in and of itself, cause of denial of an application. The question is whether there is evidence submitted from which the decision-maker *can* determine whether the proposed structure complies with the criteria. Here the applicant showed the architect's schematics of the relationship between the proposed Tercek residence and the existing Emami residence; issues relating to whether those schematics constituted a material misstatement of fact will be addressed in the 'Elevations' section." Record 27-28 (emphasis original).

complied with approval criteria. Respondents contend that the director properly concluded that an omission is not a misstatement, or not a material misstatement, where the omitted material had nothing to do with the approval criteria (*e.g.*, the mailing labels), or other information in the record was sufficient to allow staff to determine whether the proposal complied with the approval criteria (*e.g.*, the lack of depicted structures on adjoining lots on the stamped survey, where that information was provided in other drawings).

While some of the director's findings can be read to take the categorical view that omission of information can never constitute a misstatement of fact for purposes of LOC 50.86.030, we agree with respondents that the director in fact went on to consider whether particular omissions were material misstatements of fact and concluded in each case that if the omission was a misstatement it was not material. Thus, even if the director misconstrued the applicable law with respect to omissions, any such error would not provide a basis for reversal or remand if the alternative findings adequately demonstrate that the omissions were not material. We address below petitioners' challenges to specific findings. For present purposes, even if petitioners are correct that the director misconstrued the applicable law with respect to omissions, petitioners have not demonstrated that any misconstruction of law provides a basis for reversal or remand.

The fourth assignment of error (LUBA No. 2006-007) is denied.

FIFTH ASSIGNMENT OF ERROR (LUBA NO. 2006-007)

Under this assignment of error, petitioners argue that the record does not support the director's conclusion that there was no reason to believe intervenor made a material misstatement of fact with respect to building and floor elevations.

According to petitioners, the proposed dwelling will interfere with the view from two western windows on the main floor of petitioners' dwelling, presenting a close-up view of windows on the top story of the proposed dwelling's east facade. Petitioners contend that the RID application included three misstatements of fact with respect to building and floor

elevations that staff relied upon in concluding that the reduced setbacks necessary for the proposed dwelling are consistent with the RID criteria, which require a finding that "the proposed design offers features that enhance perceived scale, character and privacy relative to adjoining properties." *See* n 1. The position of the proposed dwelling in relation to petitioners' home was a critical approval factor in the RID decision, petitioners contend.

The three alleged misstatements are (1) a 42-foot measurement from the deck of the existing dwelling on the property to the ridge of petitioners' dwelling, and the failure to "tie" that measurement to the proposed dwelling, (2) misleading and inaccurate statements about relative elevations in the elevation drawings and in "Table A," and (3) failure to submit a stamped survey depicting structures on petitioners' lot. Petitioners contend that these misstatements and omissions were critical elements in the staff decision to approve the RID application. Petitioners also fault the director for addressing each of these alleged misstatements or omissions individually, and not considering their cumulative impact on the RID decision.

A. 42-Foot Measurement

With respect to the first alleged misstatement, the 42-foot measurement from the deck of the existing dwelling to the ridge of petitioners' dwelling, petitioners contend that this measurement "purported to establish a consistent baseline for comparing the relative elevations of dwellings on the two properties." Petition for Review 28. Petitioners argue that this measurement is ambiguous, because it is not clear to which "ridge" the distance was measured, or what relation the ridge has to petitioners' floor elevations.

The director adopted the following finding addressing the 42-foot measurement (quoted above in n 5 and here reproduced):

> * * * as to the failure to tie the surveyed 42 ft. difference between the Tercek's *existing* deck to the ridge of the Emami's residence to the *proposed* Tercek residence, it is at best an omission of statement, not a misstatement of fact. Even if made, a comparison of height between an existing—but to be shortly destroyed—structure and the adjacent structure is not a statement of

fact relating to the building height of the *proposed* structure and *its* effect on the adjacent, existing structure." Record 18 (italics and underline emphasis in original).

If we correctly understand the alleged misstatement and the director's finding, the director apparently viewed the measured 42-foot height between the existing deck and petitioners' ridge as being irrelevant to the approval criteria, and characterized the failure to "tie" that measurement to the elevations of the *proposed* dwelling and petitioners' dwelling as immaterial. We do not understand petitioners to dispute the first conclusion, that the elevation difference between the existing (to be demolished) deck and petitioners' dwelling is irrelevant to any RID approval criteria for the proposed dwelling. Petitioners appear to argue instead that the RID decision relied on the 42-foot measurement as a "baseline" to measure the elevation difference between the proposed dwelling and petitioners' dwelling. However, petitioners do not explain why that is the case. Petitioners cite nothing in the RID decision that relies on or even mentions the 42-foot measurement from the existing deck to the ridge of petitioners' dwelling. Indeed, petitioners assert that the RID decision did *not* use the 42-foot measurement to calculate the relative elevations of the proposed dwelling and petitioners' dwelling. Petition for Review 28. Petitioners have not demonstrated that the director's findings with respect to the 42-foot measurement from the existing deck to the petitioners' dwelling are not supported by substantial evidence.

B. Preliminary Development Plan, Elevation Drawings, and Table A

The actual source of the elevation figures used in the RID decision, petitioners and respondents appear to agree, is the preliminary development plan, elevation drawings and "Table A." Petitioners complain that the plan, drawings and figures are approximate, inaccurate and fail to convey the real impact of the proposed dwelling. The preliminary development plan (Record 100) lists the elevations for each floor of the proposed dwelling and petitioners' dwelling. The elevation drawings (Record 101) depict north, south, east and west elevations of the proposed building and petitioners' dwelling, with floor elevations for

each floor of the proposed dwelling. Table A is apparently based on the plan and elevation drawings, and lists the floor elevations of both the proposed dwelling's three floors above sea level (97 feet, 107 feet and 118 feet) and petitioners' dwelling (110, 120 and 131 feet). Record 26. Table A indicates that petitioners' dwelling is 44 feet tall. *Id.* In the RID decision, staff relied on the elevation drawings, Table A and other evidence to conclude that the reduced side setback complied with RID criteria, in part because there remained a significant "transition in height" between the two dwellings.

It is not clear to us why petitioners believe the elevations in the plan, elevation drawings and Table A were "misstatements of fact." Petitioners argued to the director that the reported 44-foot height of petitioners' dwelling did not match that dwelling's building plans. The director adopted findings explaining that at the time petitioners' dwelling was constructed height was measured differently, to the mid-point of the gable rather than to the ridge, and concluding that the reported height of petitioners' dwelling is not a "misstatement of fact." Record 28. Petitioners do not challenge that finding.

Petitioners complain that the west elevation drawings are inaccurate in suggesting that the roof of the proposed dwelling will not partially obscure the view from the upper story of petitioners' dwelling. The director found that the west elevation drawings are accurate. Record 33-34. If petitioners challenge those findings or the evidence supporting them, we do not understand the argument. Petitioners have not demonstrated that the director's findings regarding elevations and height are not supported by substantial evidence.

C. Stamped Survey

Petitioners argue next that failure to provide a stamped survey showing structures on petitioners' lot should be considered a misrepresentation. As noted above, the director adopted alternative findings concluding that, even if the omission of adjoining structures on the stamped survey is a misrepresentation, that misrepresentation was not material, because the preliminary development plan, elevation drawings and other documents in the record

1 accurately depicted adjoining structures and were sufficient to allow staff to determine
2 whether the proposed dwelling complies with RID criteria. *See* findings quoted at n 6.
3 Petitioners do not challenge that finding or related findings, other than to repeat their
4 assertion that the other documents relied upon are inaccurate. Petition for Review n 15. We
5 reject that assertion for the reasons expressed above.

6 **D. Cumulative Misstatements**

7 Finally, as noted, petitioners fault the director for isolating each alleged misstatement
8 and failing to consider the combined effect of multiple misstatements regarding elevations.
9 Although respondents do not respond to this argument, petitioners have not demonstrated
10 that failure to consider the combined effect of alleged misstatements regarding elevations is a
11 basis to reverse or remand the referral decision. The director concluded that two of the three
12 alleged misstatements regarding elevations were not misstatements at all, and we have
13 affirmed those findings. The third alleged misstatement, omission of adjacent structures on
14 the stamped survey, the director found was not material, even if it is considered a
15 misstatement, and we have affirmed that finding. It is not clear to us that LOC 50.86.030
16 requires the city to consider the combined effect of multiple misstatements that individually
17 do not constitute "material misstatement(s) of fact." Assuming without deciding that it does,
18 there is only one potential misstatement of fact with respect to elevation, not multiple
19 misstatements. Petitioners have not demonstrated that the director erred in failing to consider
20 multiple misstatements with respect to elevation.

21 The fifth assignment of error (LUBA No. 2006-007) is denied.

22 **SIXTH ASSIGNMENT OF ERROR (LUBA NO. 2006-007)**

23 As noted above, the director found three misstatements of fact with respect to (1) the
24 mailing list, (2) the depicted location of the boathouse on petitioners' property, and (3) the
25 calculation of gross floor area average. In all three cases, the director concluded either that
26 the misstatement had nothing to do with approval criteria or was otherwise not material, *i.e.*,

1 not the sole basis for approval under the applicable criteria. Under this assignment of error,
2 petitioners argue that the combined impact of these misrepresentations should be evaluated,
3 as well as the individual and combined impact of other alleged misrepresentations.

4 **A. Cumulative Impact**

5 We again assume, without deciding, that LOC 50.86.030 can be read to require the
6 city to consider the combined effect of multiple misstatements that individually may not
7 constitute "material misstatement(s) of fact." Even with that assumption, however, we agree
8 with the city that petitioners have not demonstrated reversible error. To have any "combined
9 effect," it would seem that multiple misstatements must in some way relate to each other, or
10 at least involve the same requested variance. Here, petitioners do not claim that the alleged
11 misstatements regarding mailing labels, the location of the boathouse, and the floor area ratio
12 calculations have anything to do with each other, and we do not see that they do.
13 Accordingly, we perceive no error in failing to address their combined effect. We address
14 below petitioners' arguments with respect to each individual misstatement.

15 **B. Mailing Labels**

16 As noted, the director found that the mailing labels have no relation to any RID
17 approval criteria. Under LOC 50.86.030, a material misstatement of fact must form the "sole
18 basis for approval of the application pursuant to an applicable approval criterion." While the
19 failure to provide notice to petitioners may have prevented petitioners from commenting on
20 the RID application, petitioners do not explain how the failure to mail notice itself formed
21 the "sole basis for approval" pursuant to the applicable RID approval criteria.[7]

---

[7] The director also adopted alternative findings concluding that the LOC does not require that notice be sent to occupants, such as petitioners, who are not listed as owners on the most recent property tax assessment roll. The parties do not discuss this alternative finding, and we do not consider it further.

C. Boathouse

With respect to the boathouse, the south elevation erroneously showed petitioners' boathouse located four feet from the property line, instead of right on the property line. Petitioners argue that the RID standards require evaluation of impacts of reduced setbacks on "outdoor living spaces," and that the boathouse is part of their outdoor living space. In the findings quoted at n 5, the director concluded that that error "did not affect, positively or negatively" the relationship between the proposed dwelling and petitioners' residence. Record 19. The director also adopted findings noting that the proposed dwelling is located some distance north of the boathouse, and would not affect the use of the boathouse, regardless of whether the boathouse is on the property line or set back four feet. Record 17. Petitioners apparently disagree with those conclusions, but do not identify any reason to believe the four-foot difference in the depicted location of the boathouse on the south elevation was the "sole basis for approval of the application."

D. Floor Area Ratio

The application erroneously calculated the average floor area ratio for surrounding homes. In the RID decision, staff noted the error and corrected it. In the referral decision, the director found the misstatement immaterial, because staff did not rely on it. Petitioners do not dispute that conclusion, but argue that the error nonetheless contributed to a "pattern of misstatements" that, when considered cumulatively, were a significant basis for the RID decision. As explained above, even assuming that misstatements that are individually immaterial may have a cumulative material impact under LOC 50.86.030, to have a combined impact the misstatements must relate in some way to the each other, or at least support the same variance. None of the other alleged misstatements relate to the requested floor area ratio variance, and the erroneous calculation has nothing to do with any other variance.

1 **E. Other Alleged Misstatements or Omissions**

2 The director addressed other alleged misstatements or omissions regarding (1)
3 existing trees, (2) rear-yard improvements, and (3) failure to depict the main floor windows
4 of petitioners' dwelling on the west elevation drawing, and concluded that they were not
5 misstatements at all. Petitioners also argue under this assignment of error that the director
6 erred in concluding that these alleged individual misstatements were not misstatements, and
7 in failing to consider their combined effect.

8 **1. Trees**

9 With respect to trees, petitioners explain that LOC Article 55 regulates removal of
10 trees 5 inches or more in diameter, and LOC 55.02.035 requires that compliance with LOC
11 Article 55 is a criterion of approval of any development permit that "would require or result
12 in tree removal[.]"[8] The RID application stated that no regulated trees were located on the
13 property. The RID decision noted that there is a 20-inch plum tree in the public right of way,
14 the tree protection zone of which is within the construction zone. The director found that
15 there was no misstatement regarding the plum tree, because it is not on the subject property
16 and not proposed for removal. Although petitioners appear to dispute that the plum tree is
17 located in the public right of way, that finding is supported by substantial evidence.
18 Petitioners have not demonstrated reversible error with respect to the plum tree.

---

[8] LOC 55.02.035 provides, in relevant part:

> "If a Major or Minor Development Permit applied for pursuant to LOC Article 50.79 would require or result in tree removal and/or a tree cutting permit as defined in this Chapter, compliance with LOC 55.02.080 shall be a criterion of approval of such development permit. Tree removals in conjunction with a Major or Minor Development Permit shall be considered in conjunction with such permit and shall be subject to the application, notice, hearing and appeal procedures applicable to the proposed Major or Minor Development pursuant to LOC Articles 50.82 and 50.84. The required Notice for Major or Minor Developments that would require or result in tree removals shall include a site plan indicating the location of any trees proposed for removal on the subject site. The proposed trees shall also be flagged with yellow flagging tape on site. * * * Subsequent tree removals that have not been reviewed through either Major or Minor Development procedures shall be reviewed as provided in this Chapter."

1 Apparently there is also a 5-inch cedar tree in the rear yard of the property that staff
2 did not know about when issuing the RID approval. The director found that the cedar tree
3 was not proposed for removal under the RID permit, or as a result of development, and
4 therefore failure to list the tree as proposed for removal was not a misstatement of fact. In
5 the alternative, the director noted that the cedar tree can be removed at any time under a
6 ministerial permit process, and even if such future removal was required by the proposed
7 dwelling, such future removal would not be the "sole basis for approval" of the RID decision
8 because the RID decision was not contingent on the cedar tree remaining.
9 Petitioners respond that compliance with LOC Article 55 is a criterion for any
10 development permit that requires tree removal, the proposed dwelling clearly requires
11 removing the cedar tree, and thus staff were required to apply LOC Article 55 and issue a
12 tree removal permit in approving the RID application. We understand petitioners to argue
13 that omission of a proposal to remove the cedar tree was the "sole basis" for staff's failure to
14 apply the LOC Article 55 standards and to issue a tree removal permit as part of the RID
15 decision.
16 As far as we can tell from the drawings in the record, construction of the proposed
17 dwelling will probably require removal of the cedar tree. However, the city appears to be
18 correct that the RID application did not propose removing the tree, that under
19 LOC 55.02.035 any "[s]ubsequent tree removals" that were not reviewed as part of the RID
20 review process may be approved under an separate administrative procedure, and that the
21 cedar tree played no role one way or another in approving the RID application. While there
22 may have been an omission with respect to the cedar tree, petitioners have not demonstrated
23 that the director erred in concluding that any misstatement of fact regarding the tree was not
24 the "sole basis for approval of the [RID] application."

2. Rear-Yard Improvements

With respect to rear-yard improvements, petitioners argue that intervenors plan to construct a pool and other improvements in the rear yard. The director found that no such improvements were proposed or approved in the RID application, and whether intervenors in fact intend to construct such improvements, presumably pursuant to a future permit application, has no bearing on the challenged decision. Petitioners have not identified any reversible error in that finding.

3. Main Floor Windows

Finally, with respect to the alleged failure to depict the main floor windows of petitioners' dwelling on the west elevation drawing, we understand petitioners to argue that due to that alleged omission the planning staff were unaware of the west windows and the impact of the proposed dwelling on those windows. The director found that there was no misrepresentation, in that the west elevation accurately shows the proposed dwelling obstructing the main floor windows of petitioners' dwelling, and in any case other drawings show the windows. Further, the director noted that the RID decision includes a discussion of the windows and the impact of the dwelling on those windows, based on a site visit, indicating that staff were well aware of the windows. We agree with respondents that petitioners have not demonstrated reversible error with respect to the main floor windows.

In sum, petitioners have not demonstrated that the director erred in concluding that there is no reasonable suspicion that "material misstatements of fact" occurred with respect to existing trees, rear-yard improvements, or the main floor windows of petitioners' dwelling. Nor have petitioners demonstrated that these alleged omissions have any "combined impact" that the director should have evaluated.

The sixth assignment of error (LUBA No. 2006-007) is denied.

The city's decisions are affirmed.