

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

3
4 CHRISTINE YUN,
5 *Petitioner,*

6
7 and

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9 BUCKMAN COMMUNITY ASSOCIATION,
10 *Intervenor-Petitioner,*

11
12 vs.

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14 CITY OF PORTLAND,
15 *Respondent,*

16
17 and

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19 JOHN NELMS and
20 MERIDIAN GROUP NW, LLC,
21 *Intervenors-Respondent.*

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23 LUBA No. 2007-003

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25 FINAL OPINION
26 AND ORDER

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28 Appeal from City of Portland.

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30 Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of
31 petitioner and intervenor-petitioner.

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33 Peter A. Kasting, Chief Deputy City Attorney, Portland, filed a response brief and
34 argued on behalf of respondent.

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36 John M. Junkin, Portland, filed a response brief and argued on behalf of intervenors-
37 respondent. With him on the brief was Bullivant Houser Bailey, PC.

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39 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
40 participated in the decision.

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42 DISMISSED

04/24/2007

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

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NATURE OF THE DECISION

Petitioner appeals a decision interpreting code provisions relating to pedestrian access issues and amenity bonuses for a multi-use development, made as part of a decision to approve an adjustment to city loading space standards.

MOTIONS TO INTERVENE

Buckman Community Association (intervenor-petitioner) moves to intervene on the side of petitioner in this appeal. John Nelms and Meridian Group NW, LLC (intervenor) move to intervene on the side of respondent in this appeal. There is no opposition to either motion, and they are granted.

REPLY BRIEF

Petitioner and intervenor-petitioner (petitioners) move to file a reply brief to respond to jurisdictional issues raised in intervenors’ response brief. The reply brief is allowed.

FACTS

Intervenor applied for an adjustment to reduce the size of the required on-site loading zone spaces in connection with proposed construction of a mixed-use building. City planning staff issued an administrative decision partially approving the adjustment, based on staff’s finding that the proposed adjustment met the criteria set forth in Portland City Code (PCC) Section 33.805.040.¹

¹ PCC 33.805.040 provides in relevant part:

“* * * All other adjustment requests will be approved if the review body finds that the applicant has shown that either approval criteria A. through F. or approval criteria G. through I., below, have been met. Adjustments to the ground floor window requirements of this Title must also meet the additional requirements stated in the ground floor window sections in the base zones.

“A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and

1 In response to issues raised by opponents of the project relating to pedestrian access
2 and the future availability of amenity bonuses, city staff included interpretations of other
3 provisions of the PCC in the adjustment decision. After analyzing and rejecting the
4 opponents' position regarding those provisions, the city stated:

5 "In response to [intervenor-petitioner's] letter, this report provides a detailed
6 written response that identifies the specific code provisions that contradict
7 [intervenor-petitioner's] reading of the code. If interested persons or the
8 applicant disagrees with the [Bureau of Development Services'] findings and
9 decision for this adjustment request, the decision may be appealed to the
10 City's Adjustment Committee. The appeal will be conducted in a public
11 hearing. *If interested persons or the applicant disagree with other*
12 *information of this report they may appeal the BDS' interpretation [of the*
13 *PCC] to the State Land Use Board of Appeals (LUBA)." Record 8 (emphasis*
14 *added).*

15 Pursuant to that statement, petitioners appealed the staff adjustment decision to LUBA, in
16 order to challenge the PCC interpretations in that decision. At the same time, petitioners
17 appealed the staff adjustment decision to the city adjustment committee, which has
18 jurisdiction to hear local appeals of staff adjustment decisions. In that appeal to the city
19 adjustment committee, petitioners challenge the staff decision regarding compliance with the
20 adjustment criteria.

"B. If in a residential zone, the proposal will not significantly detract from the livability
or appearance of the residential area, or if in an OS, C, E, or I zone, the proposal will
be consistent with the classifications of the adjacent streets and the desired character
of the area; and

" * * * * *

"D. City-designated scenic resources and historic resources are preserved; and

"E. Any impacts resulting from the adjustment are mitigated to the extent practical;
* * *."

The city processed the adjustment application according to its procedures for issuing Type II decisions. See PCC 33.730.020.

1 **JURISDICTION**

2 ORS 197.015(11) requires that a land use decision subject to LUBA’s jurisdiction be
3 a “final” decision.² In several previous decisions, we have rejected local governments’ and
4 parties’ attempts to separate a single land use decision into two components, one that is final
5 and appealable to LUBA and one that is not final or appealable to LUBA. *See Ratzlaff v.*
6 *Polk County*, __ Or LUBA __ (March 13, 2007) (a county decision denying a motion to
7 dismiss filed during a local land use appeal is not a land use decision subject to an appeal to
8 LUBA); *Riddell Farms, Inc. v. Polk County*, 41 Or LUBA 47, 51 (2001) (same); *Tylka v.*
9 *Clackamas County*, 20 OR LUBA 296, 302 (1990) (hearings officer’s decision affirming in
10 part and remanding in part a planning director’s decision was not a final decision concerning
11 portions of the decision that the hearings officer affirmed).

12 In *Besseling v. Douglas County*, 39 Or LUBA 177, 180-81 (2000), the county board
13 of commissioners issued a decision in which it remanded a planning commission decision
14 that approved comprehensive plan and zoning map amendments but also purported to be a
15 final decision concerning other issues in the appeal such that the board of county
16 commissioner’s resolution of those issues would be immediately appealable to LUBA. We
17 dismissed the appeal to LUBA, concluding that the county’s decision regarding the requested
18 comprehensive plan and zoning map amendments would not be “final,” within the meaning

² ORS 197.015(11)(a)(A) provides that a “land use decision” includes:

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

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation; * * *.” (Emphasis added).

1 of ORS 197.015(11) until all issues had been resolved locally and all local appeals had been
2 exhausted.

3 The present case is similar to *Besseling*. One application was before the city, for an
4 adjustment to the city's loading standards. The city staff adopted a single decision in
5 response to that application and have included language in that decision that purports to
6 make part of that decision final, and immediately appealable to LUBA while making part of
7 that decision subject to a local appeal to the adjustment committee, and therefore not a final
8 decision. The city cannot break up a single decision into "final" and "non-final" components
9 so that the decision is appealable in part to LUBA and in part locally. The city staff decision
10 was not a final decision and is therefore not a "land use decision" within the meaning of ORS
11 197.015(11) regarding any of the issues.

12 In response to petitioners' assignments of error, intervenor argues that LUBA lacks
13 jurisdiction over the city staff decision for two additional reasons. Intervenor contends that
14 the staff code interpretations that led to this appeal are not related to the approval criteria for
15 the adjustment to the loading zone standards, have no bearing on the decision on the
16 adjustment application, and are merely advisory dicta with no final binding effect
17 whatsoever. Intervenor also argues that petitioners failed to exhaust all remedies before
18 petitioning LUBA for review. ORS 197.825(2)(a). Our conclusion that the challenged staff
19 decision is not a final decision and thus not a land use decision makes it unnecessary to
20 consider intervenor's exhaustion arguments. With respect to the staff interpretations, we
21 note that the city adjustment committee has now rendered a decision on petitioners' appeal of
22 the staff adjustment decision, and that adjustment committee decision has been appealed to
23 LUBA. That adjustment committee decision is the city's final decision on the application. It
24 is not clear whether that adjustment committee decision includes or incorporates the
25 underlying staff interpretations of the PCC provisions unrelated to adjustment criteria. In
26 any case, it is unnecessary in this appeal and possibly premature to address intervenor's

1 arguments concerning the nature of those staff interpretations, which may be issues in the
2 appeal of the adjustment committee decision.

3 The appeal is dismissed.