

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CATHERINE E. CUSHMAN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEND,
10 *Respondent,*

11 and

12
13
14 BROKEN TOP COMMUNITY ASSOCIATION,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-088

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Bend.

23
24 Stephanie M. Hicks, Bend, filed the petition for review and a cross-respondent's brief
25 and argued on behalf of petitioner. With her on the briefs was Ball Janik LLP.

26
27 No appearance by City of Bend.

28
29 Phillip E. Grillo, Portland, Portland, filed the cross-petition for review and response
30 brief and argued on behalf of intervenor-respondent. With him on the briefs were Lisa D.T.
31 Klemp, Redmond, Edward Fitch, Redmond, Bryant Emerson & Fitch LLP and Miller Nash
32 LLP.

33
34 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
35 participated in the decision.

36
37 REMANDED

11/05/2007

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a hearings officer’s declaratory ruling that petitioner’s use of a building as a real estate sales office adjacent to the Broken Top Planned Unit Development (PUD) is illegal.

REPLY BRIEF

Intervenor-Respondent/Cross-Petitioner Broken Top Community Association (BTCA) moves to file a reply brief to address waiver and other issues raised in the response to BTCA’s cross-petition. We agree that the reply brief is warranted under our rules, and it is allowed.

FACTS

In 1991, Cascade Highlands, Inc. (the developer), applied to the county for conditional use and master plan approval for a proposed PUD located on property outside the City of Bend but within the city’s urban growth boundary. At that time the relevant county ordinances allowed as conditional uses “temporary subdivision tract offices” and “community buildings,” and generally prohibited commercial uses in the applicable zone. The county approved the PUD master plan in 1992 (hereafter, the 1992 PUD). Condition 14 of the 1992 PUD required the developer to obtain site plan approval for a “sales office.”

In 1992, the developer applied for site plan approval for an administrative building, a gate, and a temporary construction office on Tract H of the PUD. Tract H is located at the entrance to the Broken Top PUD, just outside the PUD. In the application, the developer stated that the administrative building would “serve as the information and sales headquarters for the Broken Top Development.” Record 802. The building was to include offices, meeting rooms, reception and sales display area, and a small library. The application also noted that the “building may also serve as a community center at project buildout.” *Id.*

1 The county approved the site plan (hereafter, the 1992 site plan). The 1992 site plan
2 decision notes that the developer had originally proposed a third building, a manufactured
3 home, as a temporary sales office, but had deleted the third building from the site plan. The
4 decision noted that the parking layout had been designed with the temporary sales office in
5 mind, and it “may be changed with the sales office to be combined with the administrative
6 building.” Record 796. The decision approves the site plan for an “administrative
7 building/sales office.” Record 131. The developer then constructed the 5,000-square foot
8 administrative building that is at issue in this appeal.

9 Shortly after the administrative building was constructed, the developer allowed
10 petitioner to operate a real estate sales business in the building, limited to sales of Broken
11 Top PUD properties. Intervenor BTCA also leased a portion of the building for some time.
12 In 1996, petitioner opened a real estate sales office elsewhere in the city and moved her real
13 estate business there. Petitioner continued selling lots within the Broken Top PUD, and also
14 sold property outside the PUD. In 1998, at the request of the developer, petitioner moved her
15 business back into the building on Tract H, with the understanding that she could continue to
16 sell property both within and outside the Broken Top PUD. At that time most of her sales
17 involved Broken Top PUD properties.

18 In 1998, the city annexed the Broken Top PUD. In 1999, the developer put the
19 administrative building on the market as a residential dwelling. The city advised the
20 developer that a master plan amendment would be necessary to convert the use of Tract H to
21 residential use, and the property was taken off the market. In 2001, as part of an update to
22 the PUD master plan, the developer assigned a single unit of residential density to Tract H.
23 That action was one step toward making it possible to use Tract H as a residential lot, but the
24 developer took no further steps. Instead, in 2003, after offers to sell the property to BTCA
25 and a nearby golf club were declined, the developer sold Tract H to petitioner for \$1.3
26 million. Petitioner has continued to operate her real estate business from the building. At the

1 time of the proceedings before the hearings officer, most of her sales involved properties
2 outside the Broken Top PUD.

3 In 2005, the president of the BTCA filed a code complaint with the city, arguing that
4 use of the building for a permanent real estate sales office that is not limited to Broken Top
5 properties is illegal. The city investigated and declined to prosecute, concluding that the
6 1992 PUD and site plan approvals did not specify that the “sales office” cease operations
7 upon build-out and did not expressly limit sales to Broken Top PUD lots.

8 In 2006, BTCA filed an application for a declaratory ruling pursuant to Bend City
9 Code (BCC) 4.1.1400, which permits the property owner, the permit-holder, or the city
10 planning director to request an interpretation of a land use permit “in which there is doubt or
11 a dispute as to its meaning or application.” The city advised BTCA that the application was
12 incomplete and allowed BTCA 30 days to submit the missing information. BTCA did so,
13 and its declaratory ruling application was deemed complete as of October 31, 2006.

14 On November 7, 2006, petitioner’s attorney argued to the city that BTCA is neither
15 the owner of the subject property nor the permit-holder and did not have standing to apply
16 for a declaratory ruling. In a letter dated November 13, 2006, the city planning director
17 informed planning division staff that the planning director “joins” in the BTCA application.
18 Record 655. The planning director did not file an application or otherwise participate in the
19 declaratory ruling proceeding.

20 The hearings officer conducted a hearing on January 25, 2007 and, on March 1, 2007,
21 issued a decision finding that petitioner’s use of the building is unlawful. Petitioner appealed
22 the decision to the city council, which declined to hear the appeal. This appeal followed.

23 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

24 The first three assignments of error raise common issues under BCC 4.1.1410 *et seq.*,
25 and we address them together.

1 BCC 4.1.1410(A) establishes a process to request from the city an interpretation of a
2 comprehensive plan provision or land use regulation, or a provision or limitation in a land
3 use permit, where there is doubt or a dispute regarding the provision’s meaning or
4 application.¹ BCC 4.1.1410(B) and (C) limit the scope and availability of the declaratory
5 ruling process.² Further, BCC 4.1.1415(A) limits the persons who may “initiate a
6 declaratory ruling” to (1) the owner of a property relating to the use of that property, (2) the

¹ BCC 4.1.1410(A) provides in relevant part:

“Subject to the other provisions of this section, there shall be available for the City’s comprehensive plans, zoning ordinances, the subdivision and partition ordinance and this ordinance a process for:

- “1. Interpreting a provision of a comprehensive plan or ordinance (and other documents incorporated by reference) in which there is doubt or a dispute as to its meaning or application;
- “2. Interpreting a provision or limitation in a land use permit issued by the City or quasi-judicial plan amendment or zone change in which there is doubt or a dispute as to its meaning or application[.]

“* * * * *

“Such a determination or interpretation shall be known as a ‘declaratory ruling’ and shall be processed in accordance with this chapter. In all cases, as part of making a determination or interpretation the Planning Director (where appropriate) or Hearings Body (where appropriate) shall have the authority to declare the rights and obligations of persons affected by the ruling.”

² BCC 4.1.1410(B) and (C) provide, in relevant part:

“B. A declaratory ruling shall be available only in instances involving a fact-specific controversy and to resolve and determine the particular rights and obligations of particular parties to the controversy.

“Declaratory proceedings shall not be used to grant an advisory opinion on a specific quasi-judicial land use application. Declaratory proceedings shall not be used as a substitute for seeking an amendment of general applicability to a legislative enactment.

“C. Declaratory rulings shall not be used as a substitute for an appeal of a decision in a land use action or for a modification of an approval. * * *”

1 holder of the permit, where the request is to interpret a permit provision, and (3) the planning
2 director.³ No other person is authorized by BCC 4.1.1415(A) to initiate a declaratory ruling.

3 BCC 4.1.1415(B) describes how a request for a declaratory ruling is initiated, and
4 specifies that each application for a declaratory ruling “shall include the precise question on
5 which a ruling is sought.”⁴ Finally, BCC 4.1.1420 provides that the procedures for making
6 declaratory rulings shall be the same as set forth in the development ordinance for land use
7 actions, and that, in cases where the planning director is the applicant, the planning director
8 bears “the same burden that applicants generally bear in pursuing a land use action.”⁵

9 The hearings officer agreed with petitioner that BTCA did not have standing to
10 initiate a declaratory ruling proceeding under BCC 4.1.1415, because BTCA is neither the

³ BCC 4.1.1415(A) is entitled “Persons Who May Apply” and provides:

“Subsection 4.1.215(B); Application Requirements notwithstanding, the following persons may initiate a declaratory ruling under this chapter:

- “1. The owner of a property requesting a declaratory ruling relating to the use of the owner’s property;
- “2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or
- “3. In all cases arising under Section 4.1.1410; Availability of Declaratory Ruling, the Planning Director.

“No other person shall be entitled to initiate a declaratory ruling.”

⁴ BCC 4.1.1415(B) provides:

“A request for a declaratory ruling shall be initiated by filing an application with the Planning Division and, except for applications initiated by the Planning Director, shall be accompanied by such fees as have been set by the Planning Division. Each application for a declaratory ruling shall include the precise question on which a ruling is sought. The application shall set forth whatever facts are relevant and necessary for making the determination and such other information as may be required by the Planning Division.”

⁵ BCC 4.1.1420 provides:

“Except as set forth in this chapter or in applicable provisions of a zoning ordinance, the procedures for making declaratory rulings shall be the same as set forth in this ordinance for land use actions. Where the Planning Division is the applicant, the Planning Division shall bear the same burden that applicants generally bear in pursuing a land use action.”

1 owner of the property nor the permit holder.⁶ However, the hearings officer concluded that
2 she had the authority to rule on BTCA's application after the planning director "joined in"
3 the application.⁷ In the first assignment of error, petitioner asserts three challenges to that
4 conclusion. First, petitioner argues the application was void *ab initio* because it was filed by
5 a party that had no standing to initiate a declaratory ruling, and therefore there was nothing to
6 "join." Second, BCC 4.1.1415 specifies that a declaratory ruling proceeding must be
7 initiated by filing an application, and petitioner contends the director filed no application.
8 Finally, petitioner argues the hearings officer erred in presuming that the planning director
9 would have initiated a declaratory ruling or specified the same legal "question on which a
10 ruling is sought," and erred in assuming the planning director would have taken on the
11 burden of proof on the question.

12 Under the second assignment of error, petitioner challenges the hearings officer's
13 finding that a hypothetical application initiated by the planning director "would be based on
14 exactly the same facts and legal issues, and would involve exactly the same parties."
15 According to petitioner, the evidence in the record supports the opposite conclusion, that the
16 planner director disagreed with BTCA over the lawfulness of petitioner's use of the disputed
17 building, and in fact had previously determined it was lawful. Petitioner contends that there

⁶ BTCA filed a cross-petition for review challenging the conclusion that it is not a property owner or permit holder entitled to initiate a declaratory ruling proceeding under BCC 4.1.1415. We address the cross-petition below and conclude that the hearings officer did not err in that respect.

⁷ The hearings officer concluded, in relevant part:

"The property owner argues the city cannot establish its standing to request a declaratory ruling through BTCA's application because [the planning director] did not actually initiate the request through the filing of an application as required by [BCC 4.1.1210(B)]. The property owner apparently does not dispute that [the planning director] could have filed the application himself. The Hearings Officer finds no legitimate purpose would be served by dismissing this proceeding and requiring [the planning director] to file another application and initiate another proceeding that would be based on exactly the same facts and legal issues and would involve exactly the same parties. I find that under these circumstances [the planning director] effectively initiated this declaratory ruling proceeding by submitting his letter." Record 33.

1 is no support in the record for her assumption that a hypothetical application by the planning
2 director would have framed the “precise question” in the manner BTCA did.

3 Under the third assignment of error, petitioner challenges the hearings officer’s
4 finding that the planning director carried his burden of proof.⁸ According to petitioner, the
5 planning director made no appearance below other than the single letter, in which he stated
6 that he did not agree with BTCA regarding the lawfulness of petitioner’s use.⁹ Petitioner

⁸ The hearings officer found, as relevant:

“The applicant [BTCA] submitted a declaratory ruling application on September 26, 2006, accompanied by the required fee. The applicant submitted initial and supplemental burdens of proof as well as supporting evidence and written and oral testimony. The applicant’s burden of proof statements describe in detail the bases of its belief that the existing use on the subject property is unlawful. The Hearings Officer has found that although the applicant did not have standing to initiate this declaratory ruling proceeding, the planning director’s act of joining the applicant’s request effectively initiated these proceedings under [BCC] 4.1.1415.

“As discussed above, the property owner argues that because the planning director did not actually file an application for a declaratory ruling, the procedures required by this paragraph were not followed. In addition, the property owner argues that because the planning director stated the city does not agree with the applicant’s position he therefore did not meet the declaratory ruling applicant’s burden of proof. The Hearings Officer disagrees. The city’s declaratory ruling provisions do not establish traditional approval criteria with which the applicant must demonstrate compliance. Rather, [BCC] 4.1.1410 merely requires the applicant to show the reason for the declaratory ruling request falls within one of the listed categories. In other words, [BCC] 4.1.1410 does not require the declaratory ruling applicant to demonstrate an existing use violates or complies with a previously issued land use permit, but only that there is a dispute about such compliance. Therefore, the burden of proof is identical for the applicant and the planning director, and it does not matter whether they disagree about the lawfulness of the use at issue.” Record 34-35.

⁹ The planning director’s letter states, in full:

“I am writing to confirm that the Community Development Department joins with [BTCA] for the purpose of determining ‘the lawfulness of the commercial use of the premises located at 61999 Broken Top Drive, Bend, Oregon.’

“I have been aware of significant questions raised by [BTCA], and agree with the Association that the history of this matter is sufficiently arguable. While the City does not agree with the Association’s position on the lawfulness of the commercial use, the City does believe that the Declaratory Ruling process is the most appropriate procedural method to resolve the question whether the existing use of the building is lawful.

“It is the City’s interpretation of [BCC] 4.1.1415(A)(3), that my joining with this application constitutes my initiation of the Declaratory Ruling process for the purpose of authorizing the filing of the process.” Record 592.

1 argues that by allowing BTCA to present all the evidence supporting the application while
2 the director remained silent, the city wrongfully shifted the burden of proof that
3 BCC 4.1.1420 assigns to the planning director to BTCA.

4 BTCA responds that the hearings officer did not err in allowing the planning director
5 to “join” BTCA’s application and thereby cure whatever lack of authority BTCA might have
6 to initiate the disputed declaratory ruling. According to intervenor, the issue identified in
7 BTCA’s application and the issue identified in the planning director’s November 13, 2006
8 letter are identical: whether petitioner’s current use of the administrative building is lawful.
9 Intervenor agrees with the hearings officer that no purpose would be served by requiring the
10 planning director to submit a new declaratory ruling application or to submit evidence that
11 would simply replicate the evidence that BTCA had already submitted into the record.
12 Intervenor disputes petitioner’s view that BTCA’s application was a “nullity” and void from
13 the outset, noting that the hearings officer had not yet ruled on BTCA’s standing at the time
14 the planning director submitted his letter.

15 Finally, intervenor argues that even if the hearings officer erred in allowing the
16 planning director to “initiate” the application by joining BTCA’s application, the error is at
17 most a procedural error. Intervenor contends that petitioner has not established that any
18 procedural error prejudiced petitioner’s substantial rights to participate in the proceedings
19 below.

20 Although it is a close question, we agree with petitioner that the hearings officer erred
21 in concluding that the planning director’s letter is sufficient to “initiate” a declaratory ruling
22 application, within the meaning of BCC 4.1.1415. Petitioner argues, and we generally,
23 agree, that the city intended the declaratory ruling process to be a rather limited vehicle for
24 resolving land use disputes. BCC 4.1.1410 imposes significant limitations on the types of
25 disputes and the circumstances under which those disputes may be resolved under the
26 declaratory ruling process. BCC 4.1.1415(A) expressly limits the persons who have

1 standing to initiate a declaratory ruling application. Particularly significant here is the fact
2 that BCC 4.1.1415(B) describes, in mandatory terms, the steps that must be taken to initiate a
3 declaratory ruling request. The request “shall be initiated by filing an application with the
4 Planning Division * * *.” That application must “include the precise question on which a
5 ruling is sought” and must “set forth whatever facts are relevant and necessary for making
6 the determination * * *.” The only explicit difference between an application initiated by the
7 planning director and applications initiated by others is that the director need not pay a fee.
8 In all other respects, the county reviews an application filed by the planning director in the
9 same manner as any other application. BCC 4.1.1420.

10 Nothing in the above provisions appears to contemplate or authorize deviations from
11 those mandatory requirements. Neither the planning director nor the hearings officer cite any
12 textual or contextual support for the view that the planning director need not actually
13 “initiate” the request in the way BCC 4.1.1415(B) requires—by filing an application. Just as
14 importantly, neither the planning director nor the hearings officer cite any textual or
15 contextual support for the view that a person who lacks standing to initiate a declaratory
16 ruling can nevertheless do so, and be given the opportunity to carry the burden of proof that
17 BCC 4.1.1420 assigns to persons with standing to initiate declaratory rulings, so long as the
18 planning director states in a subsequently submitted letter that he “joins” the request.¹⁰
19 While nothing in the code prohibits the planning director from joining a previously filed
20 declaratory ruling application, at the same time nothing in the code authorizes treating such
21 “joinder” as equivalent to initiating a declaratory ruling request in the manner that is required
22 by the code, *i.e.*, by filing an application accompanied by the required information.

¹⁰ As petitioner correctly argues, it is inaccurate to say the planning director “joined” BTCA’s request. The planning director simply agreed that there should be some resolution of the dispute between BTCA and petitioner. The planning director never “joined” in the sense of adopting BTCA’s proposal for carrying the burden of proof that BCC 4.1.1420 assigned to the planning director, and the planning director made no attempt to carry that burden of proof himself.

1 The hearings officer found that “no legitimate purpose would be served” by
2 dismissing BTCA’s application and requiring the director “to file another application and
3 initiate another proceeding that would be based on exactly the same facts and legal issues
4 and would involve exactly the same parties.” Record 33. However, nothing “requires” the
5 planning director to file such an application. It may be, of course, that the planning director
6 would in fact choose to do so, but that is certainly not a given. Nor is it clear that the
7 planning director would (1) frame the “precise question” in the same manner that BTCA did,
8 (2) include in the application the same information “necessary for making the determination”
9 that BTCA did, or (3) attempt to satisfy the applicant’s burden as BTCA did. As petitioner
10 notes, the planning director apparently disagrees with BTCA’s view of the lawfulness of the
11 petitioner’s use of the building, although the director submitted no testimony or evidence
12 explaining why. While the city’s practice apparently is to interpret its code to allow third
13 parties to participate in declaratory ruling proceedings, it is clear that it is the application
14 filed by the persons authorized by BCC 4.1.1415(A) that frames the issues to be resolved.
15 That application must include the information required by BCC 4.1.1415(A), and that
16 information, at least initially, provides the information “necessary” to resolve those issues.

17 The hearings officer also found that the applicant for a declaratory ruling has no
18 particular burden of proof other than to show that the declaratory ruling request falls within
19 one of the categories listed in BCC 4.1.1410, and that there is a “dispute” about compliance
20 with the applicable law. Again, there is simply no textual authority cited for that conclusion.
21 BCC 4.1.1420 provides that the planning director bears the same burden as applicants
22 generally bear in pursuing a land use action. As petitioner notes, BCC 4.1.830 provides that
23 “[t]hroughout all local land use proceedings the burden of proof rests on the applicant.”
24 While the hearings officer is correct that the declaratory ruling provisions do not set out
25 “approval criteria” as such, it seems reasonably clear that the applicant for a declaratory
26 ruling carries the initial and ultimate burden of proof and persuasion with respect the “precise

1 question” submitted. It seems inconsistent with those provisions to allow the planning
2 director or other proper applicant under BCC 4.1.1415(A) to simply demonstrate that there is
3 an interpretative “dispute,” but leave it to others who do not have standing to initiate the
4 declaratory ruling to take a position in that dispute and provide information or evidence to be
5 used to resolve the dispute, so that the dispute will be resolved based solely on legal
6 argument and information supplied by third parties to the application.

7 Finally, with respect to intervenor’s argument that any error is procedural in nature
8 and that petitioner failed to demonstrate any prejudice to her substantial rights, it is not clear
9 to us that the hearings officer’s error is accurately characterized as procedural. To invoke the
10 hearings officer’s authority to issue a declaratory ruling, a person with standing to do so must
11 “initiate” a declaratory ruling request, that is, file an application. The hearings officer
12 determined that the application before her was not filed by a person with standing to initiate a
13 declaratory ruling request, but the hearings officer nonetheless proceeded to exercise her
14 authority under the declaratory ruling provisions based on the planning director’s joinder.
15 For the reasons stated above, that approach was error. As a result of that error, the hearings
16 officer had no proper declaratory ruling request before her, and therefore had no legal
17 authority to issue a declaratory ruling. The hearings officer’s error in concluding otherwise
18 is not accurately characterized as a mere procedural error that may be overlooked absent a
19 demonstration of prejudice to petitioner’s substantial rights.

20 The first, second and third assignments of error are sustained.

21 We do not reach or resolve the remainder of petitioner’s assignments of error, which
22 challenge the merits of the declaratory ruling. As explained below in addressing BTCA’s
23 cross-petition for review, we must remand the hearings officer’s decision to provide an
24 interpretation and adopt more adequate findings regarding whether BTCA has standing under
25 BCC 4.1.1415(A)(2) to initiate a request for a declaratory ruling. Only if the hearings officer
26 determines on remand that BTCA does have standing under BCC 4.1.1415(A)(2) will the

1 merits of the declaratory ruling be at issue. Accordingly, it is unnecessary, or at least
2 premature, to address petitioner’s challenges to the merits of the declaratory ruling in this
3 opinion.

4 **CROSS-PETITION FOR REVIEW**

5 In its cross-petition for review, BTCA assigns error to the hearings officer’s
6 conclusion that BTCA does not have standing as a property owner “requesting a declaratory
7 ruling relating to the use of the owner’s property” or as the “holder of the permit” under
8 BCC 4.1.1415(A)(1) or (2).¹¹ We address each contention in turn.

9 **A. BCC 4.1.1415(A)(1): Property Owner**

10 BTCA argues that, as an owner of property within the Broken Top PUD, it has
11 standing to initiate a declaratory ruling request as “[t]he owner of property requesting a
12 declaratory ruling relating to the use of the owner’s property.” BCC 4.1.1415(A)(1).
13 According to BTCA, its declaratory ruling request regarding the lawfulness of petitioner’s
14 use of Tract H also “relates” to the use of BTCA’s property within the PUD. BTCA
15 contends that it has a fiduciary responsibility to its members to ensure that property subject
16 to the 1992 PUD approval is used in a manner consistent with prior land use approvals and
17 applicable covenants, conditions and restrictions.

¹¹ BCC 4.1.1415(A) is quoted above at n 3. We quote it here again for convenience.

“[T]he following persons may initiate a declaratory ruling under this chapter:

- “1. The owner of a property requesting a declaratory ruling relating to the use of the owner’s property;
- “2. In cases where the request is to interpret a previously issued quasi-judicial plan amendment, zone change or land use permit, the holder of the permit; or
- “3. In all cases arising under Section 4.1.1410; Availability of Declaratory Ruling, the Planning Director.

“No other person shall be entitled to initiate a declaratory ruling.”

1 Petitioner responds that this issue was never raised below and is thus waived.
2 ORS 197.763(1).¹² BTCA replies that it argued below that it “stood in the shoes” of the
3 original PUD developer, and that argument applies to both the “permit holder” and “property
4 owner” prongs of BCC 4.1.1415(A). According to BTCA, that argument as it applies to the
5 “property owner” prong was raised with sufficient specificity to allow the hearings officer
6 and the parties an adequate opportunity to respond to it. Indeed, BTCA argues that the
7 hearings officer addressed both prongs and found that BTCA had standing under neither,
8 which suggests that the hearings officer recognized that an issue had been sufficiently raised
9 regarding BTCA’s standing under the property owner prong.

10 In our view, making the argument that BTCA “stands in the shoes” of the original
11 developer and is thus a “permit holder” under BCC 4.1.1415(A)(2) is not sufficient to raise
12 the very different issue of whether BTCA is a “property owner” entitled to request a
13 declaratory ruling regarding the use of petitioner’s property, under the theory that the use of
14 petitioner’s property “relates” to the use of the BTCA’s property under BCC 4.1.1415(A)(1).
15 The two theories of standing are sufficiently dissimilar that we cannot say a reasonable
16 decision maker would recognize one in the other. While the hearings officer concluded that
17 BTCA is “neither the property owner nor the ‘holder of the permit,’” the findings exclusively
18 address BTCA’s “permit holder” theory, and make no mention of any other theory. The
19 hearings officer’s finding that BTCA is not “the property owner” appears to be an effort to
20 comprehensively address all the standing provisions, even those that are not invoked, rather

¹² ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 than an indication that the hearings officer recognized that an issue was raised regarding
2 BTCA’s standing under BCC 4.1.1415(A)(1).

3 Even if the issue were not waived, we agree with petitioner’s arguments on the merits
4 that BTCA has not established that it is a “property owner” within the meaning of
5 BCC 4.1.1415(A)(1). The declaratory ruling that a property owner is authorized to seek
6 under BCC 4.1.1415(A)(1) must “relat[e] to the use of the owner’s property[.]” The
7 declaratory ruling that BTCA sought and was granted does not relate to BTCA’s property.
8 Rather, the declaratory ruling that BTCA sought and was granted relates to Tract H, which is
9 petitioner’s property. While petitioner is authorized by BCC 4.1.1415(A)(1) to seek a
10 declaratory ruling regarding the propriety of operating an unrestricted real estate sales office
11 on tract H, BCTA is not. The fact that the disputed declaratory ruling might have some
12 indirect bearing on properties that were not the subject of the requested declaratory ruling
13 does not mean the declaratory ruling “relat[es] to the use of” those other properties, within
14 the meaning of BCC 4.1.1415(A)(1). We reject BTCA’s argument to the contrary. This
15 subassignment of error is denied.

16 **B. BCC 4.1.1415(A)(2): The Holder of the Permit**

17 BTCA claimed standing to initiate the declaratory ruling under BCC 4.1.1415(A)(2),
18 as the “holder of the permit,” specifically, as one of the successors in interest to the 1992
19 PUD and 1992 site plan approvals granted to the original developer. The hearings officer
20 rejected that argument, finding:

21 “[BTCA] argues it has standing to initiate this declaratory ruling proceeding
22 because it stands in the shoes of the ‘holder of the permit’—i.e., the original
23 developer of the Broken Top PUD—because the BTCA assumed
24 responsibility for the Broken Top common areas and for enforcement of the
25 Broken Top CC&Rs. The property owner responds that the BTCA does not
26 own or manage the *subject property* which is not Broken Top common area,
27 and consequently the BTCA cannot be considered the ‘holder of the permit’
28 with respect to the subject property. In addition, the record includes a letter
29 dated February 1, 2007 from Broken Top Partners, LLC, stating that as the
30 owner of the Broken Top golf course and clubhouse *it* is the successor to the

1 original Broken Top developer. The letter goes on to state Broken Top
2 Partners supports use of the subject property for the existing real estate
3 brokerage office. For these reasons, the property owner argues this
4 declaratory ruling proceeding should be dismissed.

5 “The Hearing Officer finds the BTCA does not have standing to request a
6 declaratory ruling because it is neither the property owner nor the ‘holder of
7 the permit’ *with respect to the subject property*. * * *” Record 32-33
8 (emphases in original).

9 BTCA argues that the above finding is conclusory, fails to adequately identify the
10 pertinent “holders of the permit,” for purposes of BCC 4.1.1415(A)(2), or explain why
11 BTCA is not one of the “holders” of the relevant permits. BTCA notes that, unlike
12 BCC 4.1.1415(A)(1), subsection (A)(2) includes no language requiring that the permit holder
13 own the property. We understand BTCA to argue that there is no express language in
14 BCC 4.1.1415(A)(2) that limits the scope of “permit holder,” qualifies what kind of
15 “permits” may be the subject of a request for a declaratory ruling, or requires that the permit
16 have any particular kind or degree of relationship to property the use of which is the subject
17 of a declaratory ruling request.

18 According to BTCA, it is the fee title owner to various tracts, common areas, private
19 streets and pathways that were created or regulated through a number of different land use
20 permits granted to the original Broken Top PUD developer, including the 1992 PUD and
21 1992 Master Plan approvals. BTCA argues that when it acquired those properties, it stepped
22 into the shoes of the original developer and the original permit holder, by virtue of
23 BCC 4.1.1330(A), which provides that “[a] land use action permit shall be deemed to run
24 with the land and be transferable to [the] applicant’s successors in interest.” BTCA argues
25 that it became one of the “holders” of those permits, and is therefore is entitled to request a
26 declaratory ruling to request an interpretation from the city as to whether petitioner’s use of
27 Tract H is lawful under those permits.

28 Petitioner responds that the hearings officer correctly rejected BTCA’s claims to
29 standing as the “holder of the permit.” According to petitioner, the only permit that governs

1 use of the subject property for purposes of determining whether petitioner’s use of Tract H is
2 lawful is the 1992 site plan decision that approved the building on Tract H. Petitioner argues
3 that the 1992 site plan decision is specific to Tract H, and that she acquired that permit from
4 the original developer when she bought Tract H in 2003. Therefore, petitioner concludes,
5 she is the sole “holder” of that permit.

6 Further, petitioner argues that BCC 4.1.1415(A) is intended to grant standing to
7 initiate a declaratory ruling request only to a very limited set of persons. We understand
8 petitioner to contend that the intent of BCC 4.1.1415(A)(1) and (2) is to limit standing to
9 initiate declaratory ruling requests to persons who have the most at stake in how the subject
10 property is used, specifically the property owner or the person who holds a permit or land use
11 approval to use the property. We understand petitioner to argue that the city did not intend
12 the declaratory ruling process to be a vehicle for other private third parties, for example,
13 neighboring subdivision lot owners, to seek rulings on the permissible use of other lots in the
14 subdivision. That intent would be undermined, petitioner contends, by BTCA’s broad view
15 of the scope of the “holder of the permit,” under which any subdivision lot owner would be
16 one of potentially hundreds of other “holders of the permit” (*i.e.*, the subdivision approval),
17 and thus entitled to seek declaratory rulings with respect to the permissible use of any other
18 lot in the subdivision.

19 We agree with BTCA that the above-quoted finding by the hearings officer is
20 inadequate, and fails to explain the hearings officer’s conclusion that BTCA is not “the
21 holder of the permit.”¹³ It is not clear what the hearings officer meant by concluding that
22 BTCA is not a permit-holder “with respect to the subject property.” As the parties note,
23 there are at least several “permits” that the original developer obtained that have some

¹³ To be fair, the hearings officer may have felt no need for an extended analysis of BTCA’s standing, given her conclusion that the planning director’s joinder in BTCA’s application was sufficient to initiate the proceeding under BCC 4.1.1415(A)(3).

1 potential bearing on the permissible use of Tract H. Some of those permits apply specifically
2 to Tract H and no other properties, and others are general PUD or master plan approvals that
3 apply broadly to the Broken Top PUD and have a less specific bearing on the use of Tract H.
4 The hearings officer made no findings as to which persons are the “holders” of which
5 permits, for purposes of establishing BTCA’s standing under BCC 4.1.1415(A)(2). The
6 hearings officer’s finding that BTCA is not a holder of the permit “with respect to the subject
7 property” suggests that it may matter under BCC 4.1.1415(A)(2) which persons hold what
8 permits, but the hearings officer does not explain or expand on that suggestion.

9 At this point we have more questions than answers. It is not clear to us that BTCA is
10 correct that by operation of BCC 4.1.1330(A) the owner of an individual lot or tract within
11 the Broken Top PUD is properly viewed as one of the successors in interest to the original
12 developer, such that an individual lot owner such as BTCA is one of the “holder[s] of the
13 permit” and thus entitled to seek a declaratory ruling under BCC 4.1.1415(A)(2) to interpret
14 the terms of those permits with respect to the use of lots that BTCA does not own. Even if
15 BTCA is properly viewed as one of the “holder[s] of the permit” with respect to some of the
16 permits that the hearings officer considered, it does not appear that BTCA is a holder of all of
17 the permits that the hearings officer interpreted in her declaratory ruling. As petitioner points
18 out, it is at least arguable that only petitioner and not BTCA is the “holder of the permit”
19 with respect to the 1992 site plan. If that is the permit or one of the permits BTCA asked the
20 hearings officer to interpret under BCC 4.1.1415(A)(2), BTCA may not have had standing to
21 seek a declaratory ruling regarding that permit.

22 As BCC 4.1.1415(A)(2) is drafted, it is certainly possible that a “holder of the
23 permit” may only have standing to request a declaratory ruling regarding the meaning of a
24 “land use permit” that the person holds. Unlike BCC 4.1.1415(A)(1), which specifically
25 allows a property owner to request a declaratory ruling “relating to the use of the owner’s
26 property,” which may be subject to many permits, and BCC 4.1.1415(A)(3), which broadly

1 allows the planning director to initiate a declaratory ruling “[i]n all cases arising under
2 Section 4.1.1410,” BCC 4.1.1415(2) can be read to grant standing to a “holder of the permit”
3 only to request an interpretation of the permit that that person holds, not to seek declaratory
4 rulings on the meaning of other permits or other contested legal issues, such as whether a
5 particular use is “lawful” under applicable ordinances and other permits that the person does
6 not hold. In other words, unlike under BCC 4.1.1415(A)(1) and (3), it may not be possible
7 under BCC 4.1.1415(A)(2) to obtain a *complete adjudication* on the issue of what a
8 particular lot or parcel may be used for. Arguably, a declaratory ruling initiated under
9 BCC 4.1.1415(A)(2) serves a much more limited purpose. Where several plan amendments,
10 zone changes or permits govern the use of a particular property, the holder of only one
11 permit might at best obtain a ruling that the particular plan amendment, zone change or
12 permit that he or she owns does not authorize a disputed use of the property. Under this
13 view, the permit holder could not seek a definitive declaratory ruling regarding the meaning
14 of other permits not held, or to more general issues such as whether the disputed use is
15 consistent with the city’s zoning ordinance. As we said earlier, we have more questions than
16 answers.

17 We conclude that remand is necessary for the hearings officer to provide more
18 adequate findings and any necessary interpretations with respect to BTCA’s contention that it
19 is the “holder of the permit” with respect to the various permits that relate to the use of Tract
20 H. If this matter is to proceed any further based solely on BTCA’s application for
21 declaratory ruling, the hearings officer will first need to clearly identify the permit or permits
22 that BTCA requested that the hearings officer interpret in its application for a declaratory
23 ruling. After that step is concluded, the hearings officer will be in a position to explain why
24 she believes that BTCA either is or is not the “holder” of that permit or those permits, within
25 the meaning of BCC 4.1.1415(A)(2). Without attempting to exhaustively set out the hearings
26 officer’s options once she has determined whether BTCA is or is not the holder of the permit

1 or permits that are the subject of the disputed declaratory ruling, we set out below what
2 appear to us to be three possibilities.

3 The hearings officer may determine that BTCA is the holder of *all* the permits that
4 are the subject of the application for declaratory ruling. In that event, she may simply adopt
5 or readopt her prior decision regarding the meaning of those permits with any additional
6 elaboration she may feel is appropriate.

7 Alternatively, the hearings officer may determine that BTCA is not the holder of *any*
8 of those permits. In that event, BTCA may not initiate a declaratory ruling under
9 BCC 4.1.1415(A)(2) to interpret those permits and the hearings officer should dismiss or
10 deny the application.

11 Finally, the hearings officer may determine that BTCA is the holder of *some but not*
12 *all* of the permits that are the subject of its requested declaratory ruling. In that event, the
13 hearings officer will need to determine whether she can proceed with an application for a
14 declaratory ruling that is initiated under BCC 4.1.1415(A)(2), where the applicant is not the
15 “holder” of *all* the permits that are the subject of the declaratory ruling. If the hearings
16 officer concludes that she cannot proceed with such an application, she should either dismiss
17 or deny the application or permit BTCA to amend the application to omit any permits for
18 which it is not the holder. But if the hearings officer concludes that she can proceed with
19 such an application, notwithstanding that BTCA is not the holder of all the permits the
20 hearings officer is asked to interpret, it seems likely that issues will arise regarding the legal
21 effect, if any, of such a declaratory ruling with regard to permits that the applicant does not
22 hold. The hearings officer may wish to address that question directly.

23 This subassignment of error is sustained. The cross-petition is sustained, in part.

24 The city’s decision is remanded.