

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

3
4 BRAD ORTMAN and WENDY ORTMAN,
5 *Petitioners,*

6
7 vs.

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9 CITY OF FOREST GROVE,
10 *Respondent,*

11 and

12
13 RICHARD VANDERKIN and BRENDA VANDERKIN,
14 *Intervenor-Respondents.*

15
16 LUBA No. 2007-161

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18 FINAL OPINION
19 AND ORDER

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22 Appeal from City of Forest Grove.

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24 Krista N. Hardwick, Portland, filed the petition for review and argued on behalf of
25 petitioners. With her on the brief were John M. Junkin, and Bullivant Houser Bailey PC.

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27 Pamela J. Beery, Portland, filed a joint response brief and argued on behalf of
28 respondent. With her on the brief were Beery Elsner & Hammond, LLP, Andrew H. Stamp
29 and Andrew H. Stamp, PC.

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31 Andrew H. Stamp, Lake Oswego, filed a joint response brief and argued on behalf of
32 intervenor-respondents. With him on the brief were Pamela J. Beery, Beery Elsner &
33 Hammond, LLP and Andrew H. Stamp, PC.

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

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38 AFFIRMED

12/20/2007

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city denying petitioners' appeal of a letter from the city planning director that interpreted various provisions of the city's zoning ordinance.

MOTION TO INTERVENE

Richard Vanderkin and Brenda Vanderkin (intervenors) move to intervene on the side of respondent in the appeal. There is no opposition to the motion and it is granted.

FACTS

On November 2, 2006, the city issued intervenors a building permit to construct an accessory building on their property, which is located adjacent to petitioners' property. Construction began in December, 2006. On February 5, 2007, petitioners sent a letter to the city's planning director asking the planning director to schedule a site visit to intervenors' property and identifying two potential violations of the city's zoning ordinance, one of which involved zoning provisions relating to setbacks for accessory structures. Record 135-36. On February 13, 2007, petitioners visited the city's planning office and obtained a copy of the November 2, 2006 building permit. On February 21, 2007, petitioners met with the planning director. On February 26, 2007, petitioners sent another letter to the planning director that identified additional alleged zoning and building code violations and requested that the city send an inspector to the site to investigate the alleged violations. Record 137-38.

On March 14, 2007, the planning director sent petitioners a letter that responded to their February 5, 2007 and February 26, 2007 letters. Record 37-42. That letter contained the planning director's interpretation of relevant sections of the city's zoning ordinance, and concluded in relevant part that the city applied the correct setback to intervenors' building permit application. Petitioners appealed the planning director's March 14, 2007 letter to the planning commission.

1 The planning commission determined that petitioners had failed to file a timely
2 appeal to LUBA of the November 2, 2006 building permit, and that the building permit could
3 not be collaterally attacked in the appeal of the planning director's March 14, 2007 letter.
4 The planning commission concluded that petitioners' February 5, 2007 and February 26,
5 2007 letters to the planning director did not constitute appeals of the November 2, 2007
6 building permit. The planning commission therefore addressed only petitioners' challenges
7 to the planning director's March 14, 2007 letter and affirmed the conclusions in that letter.

8 Petitioners appealed the planning commission's decision to the city council, and the
9 city council upheld the planning commission's decision. This appeal followed.

10 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

11 In their first assignment of error, petitioners challenge the city's determination that
12 petitioners failed to timely appeal the building permit decision, and that the building permit
13 could not be collaterally attacked in petitioners' appeal of the March 14, 2007 planning
14 director's letter. In their second assignment of error, petitioners challenge the planning
15 commission's determination that petitioners' February 5 and February 26 letters did not
16 constitute an appeal of the building permit. Because petitioners' first and second
17 assignments of error involve the same legal and factual issues, we address them here
18 together.

19 Petitioners' main argument in support of their first and second assignments of error is
20 that their February 5, 2007 and February 26, 2007 letters constituted a local appeal of the
21 building permit under Forest Grove Zoning Ordinance (FGZO) 9.911(3).¹ As part of this

¹ FGZO 9.911 provides in relevant part:

“(1) An appeal from a decision by the Community Development Director or his designee regarding a requirement of this ordinance may be made by an affected party to the Planning Commission within 21 days of such decision. Any action by the Community Development Director or his designee shall become final 21 days after notice of decision is mailed unless the decision is appealed to the Planning Commission. The Planning Commission shall conduct a public hearing pursuant to

1 argument, we understand petitioners to take the position that the planning director’s March
2 14, 2007 letter constituted an initial decision on their appeal of the building permit, which
3 they then appealed to the planning commission. In the alternative, petitioners argue that their
4 letters constituted “complaints” regarding zoning ordinance violations pursuant to FGZO
5 9.921.²

6 Intervenor and respondent (together, respondents) respond that the city correctly
7 concluded that petitioners did not file a local appeal of the building permit or appeal the
8 building permit to LUBA and consequently that the building permit could not be collaterally
9 attacked in the appeal of the March 14, 2007 planning director’s letter.³ Respondents
10 disagree with petitioners that petitioners’ February letters constituted an appeal of the
11 building permit under FGZO 9.911(3). Respondents argue that there is nothing in either of
12 the letters that would notify the planning director that petitioners were attempting to file an
13 appeal of the building permit. Respondents note that neither of the letters contain the word
14 “appeal,” and instead request, respectively, a site visit (February 5 letter) and an inspection
15 (February 26 letter). Finally, respondents note that as further indication that the letters were
16 not intended as appeals of the building permit, no appeal fee accompanied either letter as

Sections 9.915 and 9.916 of this ordinance to hear the appeal at their next regular meeting, if said appeal is submitted to the Community Development Director or his designee prior to the established submittal date for said meeting.

“ * * * * *

“(3) A written notice of an appeal shall be filed with the Community Development Director or his designee.”

² FGZO 9.921 provides:

“Whenever a violation of this ordinance occurs, or is alleged to have occurred, any person may file a signed, written complaint. Such complaints stating fully the causes and basis thereof shall be filed with the Community Development Director or his designee. He shall record properly such complaints, investigate and take action thereon as provided by this ordinance.”

³ Respondents argue that the building permit is properly viewed as a land use decision, as that term is defined at ORS 197.015(11), once it became final. Joint Response Brief 1. Petitioners do not dispute that argument and we therefore assume that is the case.

1 required by FGZO 9.914. Respondents agree that petitioners' February letters are more
2 properly viewed as complaints under FGZO 9.921, and argue that petitioners' argument is an
3 admission that the letters are not an appeal under FGZO 9.911(3).

4 We agree with respondents that the city correctly concluded that petitioners' February
5 5, 2007 and February 26, 2007 letters were not an appeal of the building permit. Those
6 letters do not use the word appeal or otherwise indicate that petitioners were attempting to
7 appeal the decision to approve the November 2, 2006 building permit. Their February 26,
8 2007 letter, written after petitioners obtained a copy of that building permit, contained only a
9 statement that "[p]ermits issued only contain the signature of the applicant. There is not an
10 issuer's signature from the city." Record 138. Moreover, neither letter was accompanied by
11 an appeal fee. Finally, appeals of permits are adjudicated by the planning commission, not
12 the planning director. Nothing in either of the letters requests a hearing or decision by the
13 planning commission, or otherwise suggests that petitioners were attempting to file an appeal
14 of the building permit decision to the planning commission. Thus, the planning director's
15 March 14, 2007 letter could not be, as petitioners' argument necessarily presumes, an initial
16 decision on that appeal. We agree with respondents that the planning director most likely
17 understood petitioners' letters to be complaints regarding zoning code violations under
18 FGZO 9.921 and processed them as such, rather than as appeals of the building permit.

19 The first and second assignments of error are denied.

20 **THIRD ASSIGNMENT OF ERROR**

21 In its decision, the planning commission determined that the 5-foot setback standard
22 found at FGZO 9.852(1)(d), rather than the 3-foot setback standard found at FGZO 9.624(7)
23 that was applied to intervenors' permit application, should apply to accessory structures such
24 as intervenors' structure. However, the planning commission concluded that it could not
25 retroactively require that the 5-foot setback standard be applied in this case because

1 respondents' building permit approved the 3-foot setback and that building permit was not
2 appealed.⁴ Record 9.

3 In their third assignment of error, petitioners argue that the city erred in concluding
4 that it did not have the authority to change the setback standards that applied to respondents'
5 permit application. Petitioners' arguments in support of the third assignment of error cite
6 provisions of FGZO 9.921 regarding enforcement of the FGZO by the planning director after
7 a complaint is filed regarding a violation of the zoning ordinance. However, petitioners cite
8 nothing in the city's code or complaint process standards that purports to authorize the city to
9 retroactively change the standards that applied in a final, unappealed land use decision, and
10 require that a structure that was built in conformance with the standards applied in that
11 decision be moved, in order to comply with a different setback that the city did not apply in
12 making that unappealed land use decision.

13 Respondents respond that the third assignment of error amounts to an improper
14 collateral attack on the building permit and that the city correctly decided that it could not
15 require a different setback than the setback that was approved by the building permit. As we
16 have already noted, no party disputes that the building permit qualified as a land use
17 decision, as ORS 197.015(11) defines that term, once the decision became final. We also do
18 not understand any party to dispute that petitioners had a right to seek a local appeal of that
19 building permit decision under FGZO 9.911. As we explain above, petitioners failed to
20 perfect such an appeal and the decision therefore became final. Therefore, we agree with
21 respondents that petitioners' third assignment of error amounts to a collateral attack on a
22 final, unappealed land use decision and that, based on that unappealed land use decision, the

⁴ The planning commission also concluded that ORS 227.178(3) prohibited the city from applying the three-foot setback standard. Because we agree with the city's determination that the terms of the building permit could not be collaterally attacked, we need not review the city's alternate rationale.

1 city correctly decided that it could not require a different setback standard be applied to
2 intervenors' structure.

3 The third assignment of error is denied.

4 The city's decision is affirmed.