BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LOPRINZI'S GYM, ROBERT HILL and
FOREST HOFER,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

ADG III, LLC and STAN AMY,
Intervenor-Respondents.

LUBA No. 2007-100

FINAL OPINION
AND ORDER

Appeal from City of Portland.

William Dickas, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Kell, Alterman & Runstein, LLP.

Peter A. Kasting, Chief Deputy City Attorney, Portland, filed a joint response brief on behalf of respondent. With him on the brief were Corinne S. Celko, Steven L. Pfeiffer and Perkins Coie LLP.

Corinne S. Celko, Portland, filed a joint response brief and argued on behalf of intervenor-respondents. With her on the brief were Peter A. Kasting, Steven L. Pfeiffer and Perkins Coie LLP.

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

REMANDED 03/26/2008

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision that grants an adjustment to a maximum commercial floor space regulation to allow a full service fitness center to occupy an existing 33,000 square foot building.

FACTS

Intervenors own a 20,000 square foot parcel that is located along the south side of S.E. Division Street (Division) between the intersections of S.E. 30th Avenue and Division and S.E. 31st Avenue and Division. The subject parcel is improved with a two-story commercial building that has a total of approximately 33,000 square feet of floor space on the two floors. The building was constructed in 1941 and was recently occupied by a Wild Oats supermarket. The building is now vacant. Intervenors plan to locate a "full service health and fitness center" in the existing building.[1] The proposed facility would be operated by Synergy Health Clubs NW in association with Gold's Gym.

The property is subject to the Portland City Code (PCC) Main Street Corridor Overlay Zone. PCC Chapter 33.460. Under the section of the Main Street Corridor Overlay Zone entitled "Division Street Regulations" there are two sections. The first section, PCC 33.460.300, is entitled "Purpose."[2] The second section, PCC 33.460.310, is entitled "Additional Standards." PCC 33.460.310 imposes a number of standards to achieve the purposes that are stated in PCC 33.460.300. One of the PCC 33.460.310 additional standards

[1] According to the decision, the fitness center will include "a range of health and fitness related uses including a health club, pro shop, community and education meeting room, and sub-leased space for a complementary use such as a juice bar." Record 2.

[2] We set out the purpose section in its entirety later in this opinion.

is PCC 33.460.310(D), which limits individual retail sales and service uses to 10,000 square feet of building area.[3]

Intervenors sought an adjustment to PCC 33.460.310(D), to allow the proposed fitness center to occupy the entire 33,000 square foot building. In a January 31, 2007 decision, the Director of the Bureau of Development Services approved the adjustment. Record 399-412. Petitioners appealed that decision to the city's Adjustment Committee. Record 17. The Adjustment Committee denied the appeal and upheld the Director's decision on April 17, 2007. Record 394-98.

Petitioners filed this appeal to challenge the Adjustment Committee's April 17, 2007 decision. On June 11, 2007, the city withdrew the Adjustment Committee's April 17, 2007 decision for reconsideration pursuant to ORS 197.830(13)(b).[4] The Adjustment Committee held a public meeting to consider adopting revised findings on August 21, 2007, and adopted its final decision on that date. Record 387-93. Thereafter, petitioners reactivated this appeal.

FIRST AND SECOND ASSIGNMENTS OF ERROR

In these assignments of error, petitioners allege the city adopted erroneous interpretations of the PCC in granting the requested adjustment to PCC 33.460.310(D). That section was quoted earlier and is set out again below:

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[3] PCC 33.460.310(D) provides:

> "**Floor area for Retail Sales And Service**. Each individual Retail Sales And Service use is limited to 10,000 square feet of net building area. Supermarkets are exempt from this regulation."

[4] ORS 197.830(13)(b) provides:

> "At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, or, on appeal of a decision under ORS 197.610 to 197.625, prior to the filing of the respondent's brief, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. * * *"

"**Floor area for Retail Sales And Service**. Each individual Retail Sales And Service use is limited to 10,000 square feet of net building area. Supermarkets are exempt from this regulation."

PCC Chapter 33.805 (Adjustments) sets out a procedure whereby "regulations in the [PCC] may be modified * * *." PCC 33.805.010. PCC 33.805.040 sets out a number of approval criteria for granting adjustments. PCC 33.805.040(A) is the only adjustment criterion at issue here and provides as follows:

"Granting the adjustment will equally or better meet the purpose of the regulation to be modified[.]"

The central question in this appeal is whether granting an adjustment to the PCC 33.460.310(D) 10,000 square foot regulation to allow a 33,000 square foot full service athletic facility will "equally or better meet the purpose of the regulation to be modified." The first step in determining the answer to that question is to identify the "purpose of the regulation to be modified."

As noted earlier, the purpose of the Main Street Corridor Overlay Zone Division Street Regulations is set out at PCC 33.460.300. PCC 33.460.300 provides:

"33.460.300 **Purpose**

"These regulations promote development that fosters a pedestrian- and transit-oriented main street and reinforces the pattern of older industrial, commercial, and residential buildings along the street. These regulations ensure that development:

"■ Activates Division Street corners and enhances the pedestrian environment;

"■ Steps down building heights to reduce the negative impacts of larger scale buildings on the adjoining single-dwelling zones;

"■ Is constructed with high quality materials in combinations that are visually interesting;

"■ *Consists of retail that is small in scale*; and

"■ Provides neighbors with the opportunity to give early input to developers on significant projects." (Emphasis added.)

All parties appear to agree that the fourth of the above bulleted purposes is the purpose of PCC 33.460.310(D). Again that purpose is to ensure that development along Division "[c]onsists of retail that is small in scale."

To assist it in determining the meaning of "retail that is small in scale," the Adjustment Committee looked to the Division Green Street/Main Street Plan. That plan includes commentary on PCC 33.460.310(D), which is set out below:

> "**[PCC 33.460].310(D)** The community places a high value on retaining the local scale of retail along Division. Although this does not prohibit chain stores less than 10,000 square feet, it sends a message that the scale of retail along Division is local serving, rather than providing a regional draw. Supermarkets require larger floor area to provide local services and are exempt from this regulation." Division Green Street/Main Street Plan 44.

Based on the above PCC language and plan commentary, the Adjustment Committee adopted the following interpretive findings:

> "* * * The [fourth] purpose of the regulation, 'Consists of retail that is small in scale' relates directly to the 10,000 square foot limitation in [PCC] 33.460.310(D), for which the applicant is requesting an Adjustment. To determine what 'small in scale' means, the Adjustment Committee is relying upon the code commentary for [PCC] 33.460.310(D) in the Division Green Street / Main Street Plan (Plan), because the adoption of the Plan resulted in the [PCC] Regulation that is the subject of this Adjustment.
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> "We find that per the code commentary on page 44 of the Plan, the floor area size limitation for Retail Sales and Service of 10,000 square feet specified in [PCC] 33.460.310(D) is intended to create a local scale of retail rather than a regional scale of retail. We find that the term 'local' as it's used in the Plan code commentary is intended to focus on the service area of the business, and not the ownership of the business." Record 388-89.

To summarize, as the Adjustment Committee interprets PCC 33.460.300, the purpose of the PCC 33.460.310(D) 10,000 square foot floor area regulation is to ensure that retail sales or service uses along Division will have a local "service area," in other words, a "local scale of retail rather than a regional scale of retail." The focus is on the retail market area or customer base, not the size of the building or the square feet of floor space of individual

businesses. In the words of the commentary, the desired retail sales and services uses must be "local serving."

We understand petitioners to argue in their first two assignments of error that the city's interpretation erroneously renders the size of a proposed retail sales or service use irrelevant, so long as it can be shown that the proposed retail sales or service use "will attract 'local' customers" (first assignment of error) or "will attract a substantial percentage of local customers" (second assignment of error). Petition for Review 6. Petitioners contend that interpretation has the effect of reading the notion that retail sales and service uses should be small in scale out of the PCC 33.460.300 purpose statement.

Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993) we must first look at the text and context of PCC 33.460.300. If the meaning of PCC 33.460.300 is clear from its text and context, then the analysis ends. *Id*. We turn first to the text of the central purpose that PCC 33.460.310(D) was adopted to achieve, to determine whether it is ambiguous. Again, that purpose is to ensure that "development" along Division "[c]onsists of retail that is small in scale." Based solely on the text of PCC 33.460.300, we tend to agree with petitioners that the language of PCC 33.460.300 seems to be talking about the scale of the retail development itself (*i.e.*, the building or floor area it occupies) rather than the local customers or the small geographic area that such retail development is intended to serve. We note that the second of the bulleted purposes in PCC 33.460.300 clearly is concerned with "larger scale buildings" "adjoining single-dwelling zones." However, even if we limit our consideration to the text of PCC 33.460.300, we cannot say PCC 33.460.300 establishes an *unambiguous* purpose of ensuring that the buildings or floor space that retail sales and service uses occupy are small. Petitioners appear to believe that is the case, but we do not agree. The reference in PCC 33.460.300 to "retail that is small in scale" could be talking about small buildings or floor space area but it could also be talking about a small or local market area.

PCC 33.460.300 must be viewed in context, and we view the Division Green Street/Main Street Plan and its commentary as appropriate context. That commentary purports to explain the purpose of PCC 33.460.310(D), which is the critical inquiry here. That commentary provides context to determine the meaning of the fourth bullet under PCC 33.460.300. We believe that commentary supports the interpretation the city adopted.

The commentary lends support to the city's interpretation, because the reference to "local scale of retail along Division" and the reference to "local serving, rather than providing a regional draw" in the second sentence of the commentary suggests that the purpose of PCC 33.460.310(D), as stated in the fourth bullet under PCC 33.460.300, is to encourage businesses that depend on a local customer base and to discourage businesses that depend on a regional customer base. That sentence of the commentary can also be read to recognize that the 10,000 square foot limit presumptively achieves that purpose, although arguably it is an imperfect way of achieving that ultimate purpose, because it still might allow a 10,000 square foot chain store that is regionally rather than locally oriented.[5] The exemption for supermarkets that are locally oriented even though they need more than 10,000 square feet of space is also consistent with interpreting PCC 33.460.300 to express an ultimate purpose of encouraging businesses that depend primarily on a local customer base while discouraging businesses that depend on a regional customer base.

Petitioners appear to argue that the commentary supports their view that PCC 33.460.300 express a purpose of limiting the building size or floor space of retail sales and service uses and that the commentary simply acknowledges that the ultimate planning consequence of such a policy may or may not be locally oriented businesses. While the commentary might lend some support for such an interpretation of PCC 33.460.310(D) and 33.460.300, we believe it lends more support to the city's interpretation.

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[5] Conversely a highly specialized or unique business like a primitive art gallery might easily include less than 10,000 square feet of floor space and yet appeal to a regional or statewide clientele.

The first and second assignments of error are denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

The city adopted the findings quoted below to explain why it concluded that allowing the proposed 33,000 square foot health and fitness club will equally or better meet the purpose of PCC 33.460.310(D). Again, that purpose is to ensure that retail sales or service uses along Division will be local serving.

> "[W]e are persuaded by the letter from Stan Amy, dated March 27, 2007 * * *, which sets forth the trade area of this proposed Gold's Gym as a one-mile radius and a capture rate of seventy percent (70%) of the trade area. Specifically, the Committee finds that based upon all of the evidence in the record, it is reasonable to expect this Gold's Gym to draw members from the immediate vicinity, and to be local-serving." Record 389.

Under the city's interpretation, to establish that the proposal satisfies PCC 33.805.040(A) the city must find that allowing a 33,000 square foot health and fitness center will "equally or better meet the purpose of" PCC 33.460.310(D), which is to ensure that retail sales or service uses along Division will be local serving.

Petitioners argue:

> "There was no evidence at all before the [Adjustment] Committee showing how many total customers a 10,000 square foot gymnasium/health club could or would serve. There was no evidence showing how many of those customers would be 'local' so as to foster a 'pedestrian-transit oriented main street," or how many would be 'regional' customers' customers (if any).
>
> "One can intuitively conclude that many fewer than 2,000 weekly regional customer visits would be drawn to a smaller 10,000 foot facility. It was the burden of the applicant, however, to prove the contrary, and it failed completely in carrying that burden. It did not even acknowledge the question." Petition for Review 11.

Petitioners apparently argue that under the PCC 33.805.040(A) "equally or better" standard the city was required to find whether allowing a 33,000 square foot health and fitness center will equally or better result in retail that is local serving (the purpose of PCC 33.460.310(D)) as compared to applying PCC 33.460.310(D) and requiring that the proposed health and fitness center be limited in size to be no larger than 10,000 square feet. We

understand petitioners to argue the city simply failed to do so. We also understand petitioners to argue that comparison will require evidence of how many local and non-local customers would utilize a 10,000 square foot facility, because without that evidence the city cannot know whether the 33,000 square foot facility will "equally or better" meet that purpose.

Petitioners appear to understand the purpose of PCC 33.460.310(D) to be to ensure that retail sales and service uses along Division are as locally serving as possible, or that they are at least as locally serving as a 10,000 square foot retail sales and service use would be. If that is how the city interprets the purpose of PCC 33.460.310(D), then petitioners are almost certainly correct that the expected membership breakdown of local vs. non-local members for a 10,000 square foot facility and the proposed 33,000 square foot facility must be compared to determine if the 33,000 square foot facility will equally or better meet the purpose of achieving retail that is as locally serving as possible or at least as locally serving as a 10,000 square foot facility. But we doubt the city shares petitioners' apparent understanding of the purpose of PCC 33.460.310(D).

It seems likely to us that the city does not view the purpose of PCC 33.460.310(D) to be to ensure that retail sales and service uses along Division are either as locally serving as possible or as locally serving as 10,000 square foot retail sales and service uses would be. For example it may be that the city believes that the purpose of PCC 33.460.310(D) is to produce retail sales or service uses that can be expected to draw at least a minimum threshold percentage of customers from the immediate neighborhood, so that they qualify as "local serving." If that is what the city means by local serving, it might be necessary to know what the expected local vs. non-local membership breakdown of the proposed 33,000 square foot facility will be, to see if it exceeds the threshold percentage and is therefore properly viewed as local serving under that interpretation. If the 33,000 square foot facility would be expected to satisfy that threshold percentage, it might be possible for the city to find that the

33,000 square foot floor area will be equal to or better than PCC 33.460.310(D) in producing health and fitness facilities whose membership satisfies that threshold percentage, since even if a 10,000 square foot facility would presumptively satisfy that threshold percentage, so would the 33,000 square foot facility.

The city could easily have other ideas about what the purpose of PCC 33.460.310(D) is, *i.e.*, what it means to be "a local scale of retail rather than a regional scale of retail" or local serving. That is the primary problem with the city's findings. Those descriptions of the purpose of PCC 33.460.310(D) are simply too vague and are inadequate to allow the city to apply a standard like PCC 33.805.040(A). The "equally or better" language in PCC 33.805.040(A) seems to call for some sort of comparison to determine whether the requested modification will "equally or better" meet that purpose. The findings quoted above simply offer brief description of the methodology set out in the March 27, 2007 letter and conclude that the letter shows the proposed gym will be local serving.[6] Those findings have two serious defects. First, the city's findings offer no workable explanation of what the city thinks "local serving" means, only that the city believes the proposed gym will be "local serving." Second, the city's findings simply fail to address the "equally or better" requirement of PCC 33.805.040(A) at all. On remand, the city must provide a better explanation of the purpose of PCC 33.460.310(D), and the city must provide an explanation of why the city believes the "equally or better" requirement of PCC 33.805.040(A) is satisfied here.

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[6] The assumptions in the March 27, 2007 letter are as follows: (1) Gold's will have 3000 members, (2) the primary trade area (PTA) is where 75 percent of Gold's members (*i.e.*, 2,225 members) will live, (3) 13.1% of the general population belongs to health clubs; (4) Gold's will have a 70 percent capture rate within its PTA, (5) based on assumptions one through four, Gold's will have a PTA with a population of 24,537, (6) the population within a one-mile radius of Gold's Gym is 29,905 and the population of the four recognized neighborhoods around Division is 34,420. Record 340-43. From those six assumptions, the March 27, 2007 letter conclude that because the PTA population is smaller than the population living within a one-mile radius or the four surrounding neighborhoods it follows that the PTA "is clearly compact and Local Serving." Record 343.

We do not agree with petitioners that the city necessarily will need to require evidence concerning "how many local or regional customers would utilize a conforming 10,000 square foot facility." Petition for Review 6. That will depend on whether the city adopts petitioners' understanding of the purpose of PCC 33.460.310(D) or some other interpretation of that purpose that makes such evidence necessary. Neither do we agree with petitioners that their understanding of the purpose of PCC 33.460.310(D) is compelled by the text of PCC 33.460.300 or the commentary noted above. However, we do agree with petitioners that the city's findings provide an inadequate explanation of the purpose of PCC 33.460.310(D) and provide an inadequate explanation for why the city believes the proposed modification "equally or better" meets the purpose of PCC 33.460.310(D). Therefore, remand is required under the third and fourth assignments of error, albeit for reasons that are different from those that petitioners advance under those assignments of error.

The third and fourth assignments of error are sustained.

FIFTH ASSIGNMENT OF ERROR

As we noted in our statement of the facts above, the city's attorney withdrew the Adjustment Committee's April 17, 2007 decision pursuant to ORS 197.830(13)(b). The applicant's attorney submitted proposed findings, and parts of those proposed findings were adopted without substantial revision by the Adjustment Committee in the August 21, 2007 decision that is the subject of this appeal. Petitioners also submitted proposed findings, and petitioners argue it was error for the city not to provide petitioners' proposed findings to the Adjustment Committee.

Our resolution of the third and fourth assignments of error likely makes it unnecessary to resolve the fifth assignment of error. However, because we cannot be certain

that such is the case, we will resolve the fifth assignment of error as well. ORS 197.835(11)(a).[7]

The record does not disclose precisely why or how the city decided to withdraw the Adjustment Committee's April 17, 2007 decision. But the notice that preceded the August 21, 2007 meeting at which it adopted the final decision in this matter made it clear that the city was only proposing to adopt revised findings:

> "* * * This is a notice to inform you that the Adjustment Committee will hold a public meeting for the sole purpose of consideration of revised findings to support its previous decision of approval with conditions. The Adjustment Committee's consideration of revised findings will be based solely on the existing record. No oral or written public testimony will be taken." Record 374.

Although we cannot be sure, it appears that the city's attorney, planning staff, or Adjustment Committee (or some combination of the three) made a decision to withdraw the Adjustment Committee's April 17, 2007 decision so that revised findings could be adopted to support the decision. Certainly the notice that was given was consistent with that intent. While we see no reason why the Adjustment Committee could not have decided at its August 21, 2007 meeting that it would give additional notice and reopen the record for additional argument, written evidence or oral testimony, it did not do so, and we are aware of no legal requirement that would compel the Adjustment Committee to do so.

In *Adler v. City of Portland*, 24 Or LUBA 1, 12-13 (1992) we relied on *Sunnyside Neighborhood v. Clackamas Co. Comm*, 280 Or 3, 21, 569 P2d 1063 (1977) in holding that there is nothing improper with a local government orally adopting a decision and then allowing the prevailing party to prepare findings to support the local governments final

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[7] ORS 197.835(11)(a) provides:

> "Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(14), [LUBA] shall decide all issues presented to it when reversing or remanding a land use decision * * *."

written decision. In *Adler* we rejected petitioner's argument that under Article I, Section 20 of the Oregon Constitution petitioners must be given an opportunity to present competing findings or object to the findings proposed by the prevailing party. *Id*. Although petitioners do not cite or rely on the Article I, Section 20 equal privileges and immunities clause, they cite no other authority that would call for a different result here. At the time the April 17, 2007 decision was withdrawn for reconsideration, the city had already decided the adjustment request in the applicant's favor. Just as petitioners had no legal right to participate in preparing and adopting the findings that were adopted by that April 17, 2007 decision, they had no right to participate in preparing and adopting the revised findings.

Petitioners cite ORS 197.763(7) which provides:

> "When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

We fail to see how ORS 197.763(7) supports petitioners' argument under the fifth assignment of error. The statute simply allows parties to raise new issues if a local government "reopens a record to admit new evidence, arguments or testimony." Although the city may have reopened the local record, the city did not reopen the "record to admit new evidence, arguments or testimony." The city reopened the record to adopt revised findings, not "to admit new evidence, arguments or testimony." To the extent petitioners argue those proposed revised findings must be characterized as "arguments," we do not agree.

The fifth assignment of error is denied.

The city's decision is remanded.