

NATURE OF THE DECISION

Petitioner appeals a decision granting conditional use and site plan approval for multi-unit dwellings.

FACTS

On October 16, 2006, intervenor submitted applications for conditional use and site plan approval to construct 62 multi-unit dwellings on 6.2 acres of property. Record 541-45.

On October 31, 2006, the city notified intervenor that the applications were incomplete. Record 539-40. The city listed nine items that intervenor needed to furnish in order for the city to consider the application complete. The city's notice included the following statement:

“The city may deem your applications complete after thirty days from the above date and take action on this development using only the information that you've provided; however, you cannot go more than 180 days from the date that you submitted the applications.” Record 540.

On January 18, 2007, intervenor sent a written request to the city that requested withdrawal of the application and reimbursement of application fees. Record 536. Subsequently, the city did not treat the application as withdrawn, but rather as “on hold.” Record 535. Thereafter, on April 3, 2007, intervenor transmitted a facsimile to the city that stated in part that a traffic study would be provided. On April 19, 2007, the city received the referenced traffic study.

On April 25, 2007, the city sent a letter to intervenor requesting the remaining items that the city had previously advised needed to be submitted to the city, including a deed showing the current ownership, and a burden of proof statement that addressed the conditional use approval criteria. On April 25, 2007, intervenor sent an electronic mail message to the city that responded to and indicated the delivery status of the items requested by the city, including the requested “burden of proof” statement. Record 489-90. On May 9, 2007, the city sent a letter to intervenor that the application was “complete and ready for

1 review.” The city scheduled a public hearing on the application, and the hearings officer
2 subsequently issued a decision approving the application with conditions. This appeal
3 followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 In her first assignment of error, petitioner argues that the city erred in approving
6 intervenor’s applications after the time period set forth in ORS 227.178(4) had expired. ORS
7 227.178 provides in relevant part:

8 “(1) Except as provided in subsections (3) and (5) of this section, the
9 governing body of a city or its designee shall take final action on an
10 application for a permit, limited land use decision or zone change,
11 including resolution of all appeals under ORS 227.180, within 120
12 days after the application is deemed complete.

13 “(2) If an application for a permit, limited land use decision or zone change
14 is incomplete, the governing body or its designee shall notify the
15 applicant in writing of exactly what information is missing within 30
16 days of receipt of the application and allow the applicant to submit the
17 missing information. The application shall be deemed complete for
18 the purpose of subsection (1) of this section upon receipt by the
19 governing body or its designee of:

20 “(a) All of the missing information;

21 “(b) Some of the missing information and written notice from the
22 applicant that no other information will be provided; or

23 “(c) Written notice from the applicant that none of the missing
24 information will be provided.

25 “(3)(a) If the application was complete when first submitted or the applicant
26 submits the requested additional information within 180 days of the
27 date the application was first submitted and the city has a
28 comprehensive plan and land use regulations acknowledged under
29 ORS 197.251, approval or denial of the application shall be based
30 upon the standards and criteria that were applicable at the time the
31 application was first submitted.

32 “* * * * *

1 “(4) On the 181st day after first being submitted, the application is void if
2 the applicant has been notified of the missing information as required
3 under subsection (2) of this section and has not submitted:

4 “(a) All of the missing information;

5 “(b) Some of the missing information and written notice that no
6 other information will be provided; or

7 “(c) Written notice that none of the missing information will be
8 provided.”

9 Petitioner argues that the city erred in approving the applications because they were
10 void on April 14, 2007, the 181st day after intervenor submitted them. Petitioner argues that
11 intervenor did not take steps sufficient under ORS 227.178(4)(a) though (c) to prevent the
12 applications from becoming void on the 181st day after the applications were submitted,
13 because intervenor did not provide all of the missing information, provide some of the
14 missing information and notify the city in writing that no other information would be
15 provided, or notify the city in writing that no other information would be provided.
16 Petitioner argues that, accordingly, the city’s decision must be reversed because the decision
17 was prohibited as a matter of law and it exceeded the city’s jurisdiction. ORS
18 197.835(9)(a)(A); OAR 661-010-0071(1)(a).

19 Intervenor’s response is three-fold. Intervenor argues that the applications were
20 deemed complete on April 3, 2007 because the applicant’s facsimile received by the city on
21 that date was sufficient to meet the requirements of ORS 227.178(2)(b) and (4)(b).
22 According to intervenor, that facsimile provided the city with “written notice that no other
23 information would be provided.” ORS 227.178(4)(b); ORS 227.178(2)(b).

24 We quote the text of the April 3, 2007 facsimile in its entirety:

25 “Wayne - Attached are 10 copies of the site plan and building elevations for
26 Wickiup Landing, as well as 3 copies of floor plans. A traffic study has been
27 ordered, and will be forwarded to you upon receipt. [The applicant’s
28 representative] informs me that this will complete his application per your
29 conversation of yesterday. Call/email with any questions.” Record 533.

1 Intervenor relies primarily on the statement at the end of the facsimile that “[the applicant’s
2 representative] informs me that this will complete his application per your conversation of
3 yesterday.” Intervenor argues that that statement implies that the applicant and the city had a
4 conversation in which the city indicated that the applicant did not need to submit any
5 remaining items.

6 We disagree with intervenor that the above-quoted facsimile can be read as providing
7 the city with “written notice that no other information would be provided.” The facsimile
8 states “[a] traffic study has been ordered, *and will be forwarded to you upon receipt.*”
9 (Emphasis added.) This sentence indicates that the applicant did in fact intend to provide
10 additional information. The referenced traffic study was received by the city on April 19,
11 2007.

12 Further, the record demonstrates that after sending the April 3, 2007 facsimile, the
13 applicant continued to provide additional information to the city. The city sent a letter to the
14 applicant on April 25, 2007 with a list of remaining items that were missing from the
15 applications. Record 491. The applicant responded to that letter with an electronic mail
16 message and indicated that the additional information was either attached to the electronic
17 mail message or would be provided at a later date. Record 489. All of those
18 communications and actions, taken together, indicate that the applicant did not intend to
19 provide in its April 3, 2007 facsimile “written notice that no other information would be
20 provided” in a manner sufficient to deem the applications complete under ORS
21 227.178(2)(b).

22 Intervenor’s next arguments rely in part on our decision in *Caster v. City of Silverton*,
23 54 Or LUBA 441 (2007), and in part on an argument that it would be unfair to void the
24 application of an applicant who attempts to comply with a local government’s continuing
25 requests for submission of more information after the 180th day. Intervenor argues that ORS
26 227.178(4) as well as our decision in *Caster* mean that cities have discretion to decide

1 whether to treat an application as void if the provisions of ORS 227.178(4)(a) through (c)
2 have not been satisfied on the 181st day after an application is filed.

3 In *Caster*, no party disputed that the city had deemed the application complete.¹
4 After the application was deemed complete, in its final decision the city denied the
5 application based on the city's determination that certain items that were required to be
6 submitted as part of the application materials were not in fact submitted. We held that the
7 city could not deny the application on that basis. 54 Or LUBA at 450-51. However, in a
8 portion of the decision, we explained:

9 "Finally, even if petitioner in this case failed to provide the notice required by
10 ORS 227.178(2)(b), the city elected to proceed with review of the permit
11 application rather than treat the permit application as void under ORS
12 227.178(4). In that circumstance, the city may not thereafter simply cite an
13 alleged failure on petitioner's part to provide requested information as a basis
14 for denying a permit application. Having elected to proceed with the
15 application notwithstanding petitioner's failure or refusal to provide the
16 requested information, the city owes petitioner at least some explanation for
17 why it believes petitioner's evidentiary submittal falls short of demonstrating
18 the proposal complies with the relevant approval criteria. * * *" *Id.* at 451-52.

19 Whether all of the application materials were actually submitted, or whether, when, or how
20 the application was deemed complete was not clear in *Caster*, and was not at issue in that
21 case. *Id.* at 450. However, to the extent the language quoted above suggests that the city had
22 discretion to continue processing the applications after the 180-day statutory period under
23 ORS 227.178(1) had passed without the applicant fulfilling any of the requirements of ORS
24 227.178(4)(a) through (c), we now disavow that suggestion.

25 The parties do not cite any other cases and we are aware of no other case interpreting
26 the meaning of ORS 227.178(4). We ascertain its meaning according to the analytical
27 template for statutory construction set forth in *PGE v. Bureau of Labor and Industries*, 317

¹ We noted that the applicant had provided only some of the information requested by the city, and that it was unclear whether the applicant provided written notice that it would not provide additional information. 54 Or LUBA at 450.

1 Or 606, 859 P2d 1143 (1993) (*PGE*). Under *PGE*, the first level of analysis is looking at the
2 text and context of the statute. If the meaning of the statute is clear from the text and
3 context, then the analysis ends.

4 ORS 227.178(4) provides in relevant part that “[o]n the 181st day after first being
5 submitted, the application *is void* * * *” unless the applicant takes certain actions set forth in
6 subsections (a) through (c). (Emphasis added.) Black’s Law Dictionary defines “void” in
7 relevant part as: “1. Of no legal effect; null. * * *” *Blacks Law Dictionary*, 1745 (8th ed.
8 2004). In *Willhoft v. City of Gold Beach*, 38 Or LUBA 375, 397-98 (2000), we held that a
9 provision of the city’s code that provided that a conditional use permit “shall be void after
10 one year” unless certain steps were taken meant that the permit was automatically void on
11 the one year anniversary of the permit issuance, where there was no dispute that the required
12 steps had not been taken. We explained that to construe the code provision in another
13 manner would make the limitation imposed by the provision illusory. *Id.* at 398.

14 We think that the text of ORS 227.178(4) is unambiguous in providing that an
15 incomplete application “is void” on the 181st day after submission if the applicant has not
16 taken any of the three steps provided by the legislature to preserve the application from
17 becoming void. To construe ORS 227.178(4) as providing a city with the discretion to either
18 treat an application as void or continue processing it, in the way that intervenor urges, would
19 require us to add words to the statute where none exist, something we are prohibited from
20 doing under ORS 174.010.²

21 Further, we are not persuaded by intervenor’s argument that because the city
22 continued requesting additional information from the applicant after the 181st day, that

² ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 somehow it would be unfair to find that the applications became void on that day. Under the
2 statute, the legislature has given applicants control of rescuing an incomplete application
3 from becoming void by acting in any one of the three ways specified in the statute. The fact
4 that a local government continues to ask for missing information beyond the 181st day does
5 not change the statutory requirement that the applicant must take one of those three steps in
6 order to save an incomplete application from becoming void.³

7 Because we have determined that the applicant did not take any of the required steps
8 provided under ORS 227.178(2)(a) through (c) or (4)(a) though (c) to ensure that the
9 applications were not void, the applications became void on the 181st day after they were
10 filed. The city exceeded its jurisdiction in approving void applications.

11 The first assignment of error is sustained.

12 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

13 Petitioner's second assignment of error assigns error to the city's failure to withdraw
14 the application when the applicant requested withdrawal of the applications on January 18,
15 2007. Petitioner's third assignment of error argues that the city did not provide proper notice
16 for the public hearing concerning the proposed development. Because we have determined
17 in the first assignment of error that the city exceeded its jurisdiction in approving the
18 applications after they became void on April 14, 2007, we need not address the remaining
19 assignments of error.

20 The city's decision is reversed.

³ We need not and do not decide here whether ORS 227.178 would prevent a city, before the 180-day deadline in ORS 227.178 expires, from (1) modifying or withdrawing a previously issued notice that information is missing and (2) declaring the application complete under ORS 227.178(2)(a) without the applicant furnishing the previously requested information. Even if a city could do so under ORS 227.178, the city did not do so in this case. Similarly, we are not called upon to decide here whether a city could accept or would be obligated to accept additional information from an applicant during hearings on a permit application, where that information had been requested by the city under ORS 227.178(2) and the permit applicant refused to provide requested information under ORS 227.178(2)(b) or (c).