BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

621 COMPANY, HOWARD SEELIG
and MARTIN SEELIG,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

MAR02'10 PM 2:31 LUBA

SOUTH UNIVERSITY SUSTAINABLE
HOUSING, LLC,
Intervenor-Respondent.

LUBA No. 2009-130

FINAL OPINION
AND ORDER

Appeal from the City of Eugene.

Zack P. Mittge, Eugene, represented petitioners.

Emily N. Jerome, Eugene, represented respondent.

Bill Kloos, Eugene, represented intervenor-respondent.

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

DISMISSED 03/02/2010

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

Opinion by Bassham

NATURE OF THE DECISION

Petitioners appeal a building permit issued by the city approving construction of a 36-unit apartment building in a residential zone.

MOTION TO DISMISS

On January 6, 2010, intervenor moved to dismiss this appeal on the basis that the challenged decision is not a land use decision subject to our jurisdiction. ORS 197.015(10)(a)(A)(iii) defines a "land use decision" as including a "final decision or determination made by a local government * * * that concerns the * * * application of * * * [a] land use regulation." However, ORS 197.015(10)(b)(B) excludes from the definition of land use decision a "building permit issued under clear and objective land use standards[.]" Intervenor argues that the standards the city applied to approve the building permit are clear and objective. On January 19, 2010, the city filed a response agreeing with intervenor that this appeal should be dismissed.

On January 20, 2010, petitioners filed a response arguing that two of the land use regulations that the city applied in approving the building permit are not clear and objective. Petitioners first cite to Eugene Code (EC) 9.2750, a table of residential zone development standards that in relevant part requires a five-foot interior yard building setback or a "minimum of 10 feet between buildings."[1] Petitioners argue that the proposed apartment building is closer than 10 feet to petitioners' building, located on an adjacent lot and for that reason the proposed apartment building does not comply with EC 9.2750. Petitioners allege

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[1] The relevant Table 9.2750 language is "5 feet *or* minimum of 10 feet between buildings." (Emphasis added.) That language is phrased in the disjunctive, suggesting that the interior yard setback is satisfied if the proposed building is five feet from the property line, even if the proposed building is less than 10 feet from the neighboring building on an adjacent lot. There seems no dispute that the proposed building is located five feet from the property line separating petitioners' and intervenor's property. However, the parties appear to understand the relevant code provisions to require compliance with the 10-foot spacing requirement in any event, and we assume, without deciding, that that is the case.

1 that their building was originally slightly closer than five feet to the property line, but
2 intervenor's contractor trespassed onto their property and removed metal siding from the
3 lower part of the exterior wall of petitioners' building to achieve the required 10-foot spacing,
4 leaving the underlying concrete wall exposed. Petitioners argue that under these
5 circumstances the city's determination that the 10-foot spacing standard is satisfied required
6 the exercise of discretion, and therefore the 10-foot spacing standard is not "clear and
7 objective."

8 On January 27, 2010, intervenor filed a reply to petitioners' response, arguing that the
9 issue under ORS 197.015(10)(b)(B) is not whether the city exercised discretion or what
10 factual circumstances gave rise to the 10-foot spacing, but whether the terms of Table 9.2750
11 are clear and objective. According to intervenor, the 10-foot spacing requirement is about as
12 clear and objective as a building permit standard could be.

13 On February 3, 2010, the city also filed a "reply," setting out additional reasons why
14 the appeal should be dismissed. On February 8, 2010, petitioners filed a "surreply," in which
15 petitioners argue that the 10-foot spacing requirement is not clear and objective, because it is
16 ambiguous as applied in the present circumstance, with respect to whether the distance
17 should be measured from the exterior wall of petitioners' building where it existed prior to
18 the removal of the siding, or from the exterior wall where it now exists, after the siding was
19 allegedly removed by intervenor's contractor. Petitioners cite *Tirumali v. City of Portland*,
20 169 Or App 241, 246, 7 P3d 761 (2000), in which the Court of Appeals held that a code
21 standard measuring building height from the "grade" is ambiguous, because it was unclear
22 whether that meant the original grade or the final grade after fill is added. Because the
23 standard was ambiguous and required interpretation on that point, the Court held, the
24 building permit decision does not qualify for the exclusion at ORS 197.015(10)(b)(B).
25 According to petitioners, the present case is similar to *Tirumali*, in that there is ambiguity
26 regarding from what point to measure the minimum spacing. Because the 10-foot spacing

1 requirement is ambiguous on this point, petitioners argue, the permit was not issued under
2 "clear and objective" standards.

3 Finally, on February 10, 2010, intervenor filed an objection to petitioners' surreply,
4 arguing that petitioners introduce a new legal theory based on *Tirumali*, and did not respond
5 to any new issue raised in intervenor's reply to petitioners' response to the motion to dismiss.
6 Intervenor argues that LUBA should not allow petitioners multiple opportunities to
7 demonstrate that the challenged decision falls within LUBA's jurisdiction. Because
8 petitioners' initial response did not cite *Tirumali* or assert that the 10-foot spacing
9 requirement is ambiguous, intervenor argues, LUBA should ignore those arguments. On the
10 merits, intervenor argues that the identified "ambiguity" is manufactured, and that it is clear
11 under the city's code that compliance with the 10-foot spacing requirement must exist at the
12 time of permit issuance, and it is irrelevant that the spacing requirement would not have been
13 met based on past circumstances or how the required spacing was achieved.

14 We need not rule on intervenor's objection to petitioners' surreply, because even
15 considering the arguments in the surreply we agree with intervenor that the 10-foot spacing
16 requirement in EC 9.2750 is clear and objective, for purposes of ORS 197.015(10)(b)(B). As
17 intervenor observes, a numeric standard such as "minimum of 10 feet between buildings" is
18 about as clear and objective as land use code language can be, given the inherent imprecision
19 of language. While few sets of words are completely free of potential ambiguity, in order to
20 demonstrate that a numeric standard such as the 10-foot spacing requirement is not "clear and
21 objective" for purposes of ORS 197.015(10)(b)(B), petitioners must demonstrate that a key
22 word or phrase in the standard "can plausibly be interpreted in more than one way."
23 *Tirumali*, 169 Or App at 146.

24 The code language at issue in *Tirumali* is illustrative of a circumstance where a key
25 word or phrase is capable of more than one plausible interpretation. At issue was a code
26 standard that on steep lots limited building height to 30 feet over a "base point," located 10

1 feet above the "lowest site grade." The city allowed the applicant to place fill to effectively
2 raise the lowest site elevation and establish a higher base point, and thus allow a taller
3 building than would be permitted if the original grade were used to establish the base point.
4 The city code defined "grade" to mean "finished surface of the ground, paving or sidewalk,"
5 but did not clarify whether that meant a finished surface such as pavement over the original
6 grade, or a finished surface over an elevation as augmented by fill. The petitioner noted that
7 with no limit on whether the base point can be raised by fill, there is no effective limit on
8 building height, thus rendering the planning purpose for the provision at issue meaningless.
9 The Court concluded that the city's interpretation and petitioners' contrasting interpretation
10 of the relevant code terms were both plausible, and therefore the height standard was not
11 clear and objective for purposes of ORS 197.015(10)(b)(B).

12 Here, petitioners do not identify what key terms in the phrase "minimum of 10 feet
13 between buildings" are ambiguous or capable of more than one plausible meaning. Possibly,
14 petitioners would argue that the term "buildings" is ambiguous as applied in the present
15 circumstances, because it does not specify whether it takes into account petitioners' building
16 prior to or after the siding was removed. However, we agree with intervenor that any
17 ambiguity on that point is manufactured. Petitioners cite nothing in the text or context of EC
18 9.2750 suggesting a temporal element to the term "building" that would require the city to
19 consider building features that have been removed and no longer are present, in determining
20 compliance with the spacing requirement. Petitioners have not established that the
21 circumstances leading to removal of the siding or how the 10-foot spacing requirement was
22 actually achieved have any bearing on the city's determination that the spacing requirement is
23 met.

24 Petitioners may have redress against intervenor for any alleged trespass or property
25 damage in another forum, and the outcome in that forum might provide a basis for the city to
26 revisit its decision to issue the disputed building permit or to require corrective action by

intervenor. We express no view on whether such an action is possible or its possible outcome. However, the issue in this appeal is whether EC 9.2750 constituted a clear and objective standard at the time the city issued the building permit. It is undisputed that at the time the city issued the building permit, construction of intervenor's proposed apartment building at the location proposed would result in a building that is 10 feet from petitioners' building, as it existed at the time the building permit was issued. Petitioners have not established that the 10-foot spacing requirement can be plausibly interpreted to require measuring the 10-foot spacing from building features that are no longer present and were not present when the city approved the building permit.

In their initial pleading, petitioners identified a second code provision that they argue is not clear and objective, specifically EC 9.5500(7), which provides:

> "Building Articulation.[2]
>
> "(a) Articulation Requirement. *To preclude large expanses of uninterrupted wall surfaces, exterior elevations of buildings shall incorporate design features such as offsets, projections, balconies, bays, windows, entries, porches, porticos, or similar elements.*
>
> > "1. Horizontal Surface. At least 2 of the design features outlined above shall be incorporated along the horizontal face (side to side) of the structure, to be repeated at intervals of no more than 40 feet.
> >
> > "2. Vertical Surface. At least 2 of the design features outlined above shall be incorporated along the vertical face (top to bottom) of the structure, to be repeated at intervals of no more than 25 feet.
>
> "(b) When offsets and projections are used to fulfill articulation requirements, the offset or projection shall vary from other wall surfaces by a minimum of 2 feet. Such changes in plane shall have a minimum width of 6 feet.

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[2] EC 9.0050 defines "Building Articulation" as "[t]he design emphasis given to architectural elements such as walls, windows, balconies, and entries that serve to provide visual interest and elements of scale."

"(c) *Individual and common entry ways shall be articulated by roofs, awnings, or porticos.*

"(d) Criteria for Adjustment. Adjustments to the standards in this subsection may be made, based on criteria of EC 9.8030(8)(b)." (Italics and underlining added.)

Intervenor's proposed building uses metal awnings to meet the articulation standard. Petitioners argue that awnings are not among the examples of building articulation listed in EC 9.5500(7)(a) and is dissimilar to those listed, because unlike offsets, projections, balconies, bays, windows, entries, porches, porticos, etc., awnings are not part of the structure and can easily be removed. Petitioners argue that the city was required to interpret EC 9.5500(7)(a) in order to determine that awnings were acceptable design features. According to petitioners, because the city was required to interpret the standard on this point, it is not clear and objective.

We might be inclined to agree with petitioners that the EC 9.5500(7) could be plausibly interpreted in more than one way—awnings are permissible or awnings are not permissible—and therefore the standard is not clear and objective, if we only considered EC 9.5500(7)(a). EC 9.5500(7)(c), however, eliminates any reasonable doubt that awnings are acceptable building articulation design features by specifically listing awnings as such. Given that EC 9.5500(7)(c) specifically lists awnings as an articulation design feature, we do not see that EC 9.5500(7)(a) can be plausibly interpreted in more than one way regarding whether awnings may satisfy the building articulation requirement. Because there is not more than one plausible interpretation of EC 9.5500(7) on that point, it is not ambiguous, and therefore petitioners have not demonstrated that it is not a clear and objective standard for purposes of ORS 197.015(10)(b)(B). Consequently, petitioners have not established that the challenged building permit decision is a land use decision subject to our jurisdiction.

1 Accordingly, this appeal is dismissed.[3]

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[3] Because we dismiss this appeal, we do not address the pending record objections, the parties' dispute over an affidavit submitted by petitioners, or petitioners' alternative motion to take evidence not in the record.