BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHMOND NEIGHBORS FOR RESPONSIBLE GROWTH, SUSAN LEVINE, JUDAH GOLD-MARKEL, RICHARD MELO, CIARAN LITTLE, AMY LITTLE, LINDA MLYNSKI, JULIE FITZWATER, ELIZABETH VARGAS and KATHY LAMBERT,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

37th STREET APARTMENTS, LLC and SK HOFF CONSTRUCTION,
Intervenors-Respondents.

LUBA No. 2012-061

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Ty K. Wyman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dunn Carney Allen Higgins & Tongue LLP.

Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed a joint response brief and argued on behalf of respondent. With her on the brief was Linly Rees, Deputy City Attorney.

Michael C. Robinson, Portland, filed a joint response brief and argued on behalf of interveners-respondents. With him on the brief were Corinne S. Celko and Perkins Coie LLP.

HOLSTUN, Board Member, and BASSHAM, Board Chair, participated in the decision.

RYAN, Board Member, did not participate in the opinion.

REVERSED 02/20/2013

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

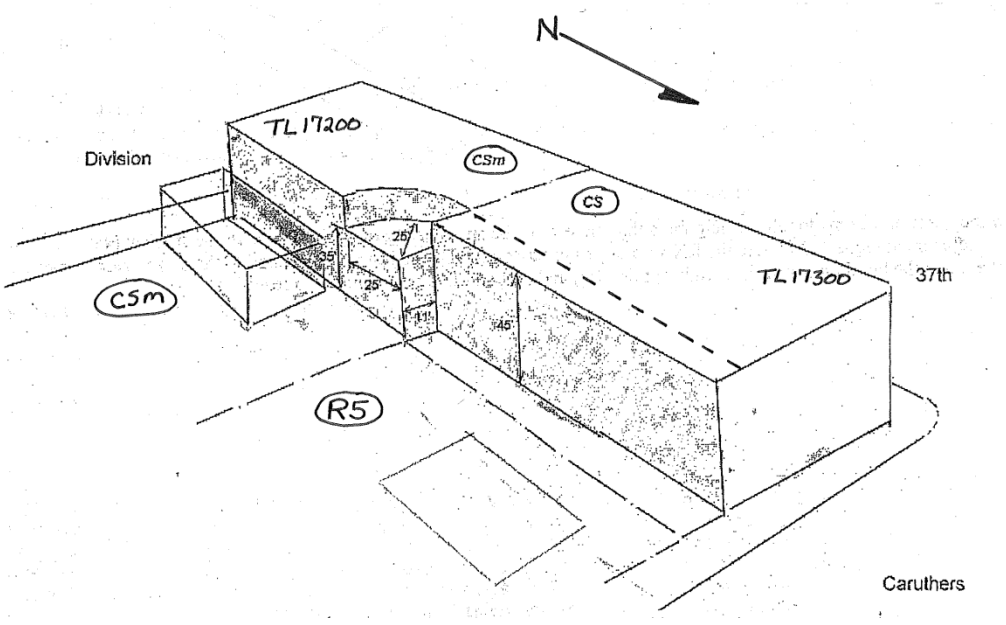
Petitioners appeal a building permit for a 52,000 square-foot, four-story apartment building with 3,000 square feet of commercial space on the ground floor.

MOTION TO INTERVENE

37th Street Apartments, LLC and SK Hoff Construction move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is made up of two tax lots, Tax Lots 17200 and 17300, located in Portland's Richmond Neighborhood. The subject property lies adjacent to and east of SE 37th Avenue, south of SE Caruthers St. and north of SE Division Street. A drawing from the record is included below to show the orientation of Tax Lots 17200 ad 17300 and an outline of the proposed mixed use building.



The drawing is oriented with north to the bottom of the drawing, instead of at the top. Both tax lots 17200 and 17300 are zoned Storefront Commercial (CS), a zone that allows the

proposed residential and commercial uses outright. Tax Lot 17200 is subject to a Main Street Corridor overlay zone, but Tax Lot 17300 is not.[1] As we explain later in this opinion, the Main Street Corridor overlay zone imposes additional requirements and limitations on development, beyond the requirements and limitations of the CS zone.

SECOND ASSIGNMENT OF ERROR

Under their second assignment of error, petitioners argue the city erred by failing to follow statutory procedures that govern approval of statutory permits under ORS 227.175.

ORS 227.175 sets out procedures for review of applications for approval of a "permit," as that term is defined by ORS 227.160(2). As defined by ORS 227.160(2), a permit is "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." In this opinion, we refer to "permit[s]" as defined by ORS 227.160(2), as statutory permits. Under ORS 227.175(3), at least one public hearing is required before a city renders a decision on an application for approval of a statutory permit, unless the city provides notice of a statutory permit decision rendered without a hearing and then provides an opportunity for a local appeal with a *de novo* hearing. ORS 227.175(10). The city did not provide a prior public hearing or an opportunity for a local appeal of the building permit that is the subject of this appeal. We understand petitioners to contend that the building permit that is before LUBA in this appeal qualifies as a statutory permit and that the city erred by failing to provide a public hearing before approving the disputed building permit, or, alternatively, by failing to provide an opportunity for a local appeal with a *de novo* hearing.

[1] The Main Street Corridor overlay zone is shown on the city's zoning map by adding the letter "m" after the base zoning designation. In this case the zoning map designation for tax lot 17200 is CSm. Tax lot 17300, which is not subject to the Main Street Corridor overlay zone, is shown on the zoning map with only its base zoning designation, CS.

Starting with the ORS 227.160(2) definition of "permit," a statutory permit is "discretionary approval of a proposed development of land, *under ORS 227.215 or city legislation or regulation*." ORS 227.215(2) authorizes cities to adopt development ordinances, and the Portland Zoning Code is a development ordinance. ORS 227.215(3) provides that a city's development ordinance may distinguish between development "for which a permit is granted as of right on compliance with the terms of the ordinance" and "[d]evelopment for which a permit is granted discretionarily[.]"[2] As we have already noted, under the CS zoning applied to the subject property, the proposed mixed residential and commercial use is allowed as of right, provided the applicable development standards are met. Under the Portland Zoning Code, a discretionary permit is not required. Under the Portland Zoning Code, a building permit for a mixed residential/commercial use in the CSm zone is not treated as a statutory permit.

Petitioners contend that although the Portland Zoning Code authorizes the city to approve building permit applications for mixed residential and commercial use in the CS zone ministerially, without the public hearing or notice and right to local appeal that is required for statutory permits, the building permit decision in this appeal required the exercise of significant discretion and therefore qualifies as a statutory permit, so that the city erred by failing to follow the procedures that govern city decisions on statutory permits.

For many years, the Court of Appeals and LUBA have considered petitioner's arguments that building permits and other permits that a local government approved

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[2] ORS 227.215(3) provides in part:

> "A development ordinance may provide for:
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> "(a) Development for which a permit is granted as of right on compliance with the terms of the ordinance;
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> "(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173[.]"

ministerially under its acknowledged comprehensive plan and land use regulations, *i.e.*, without the public hearing and without notice and a right to a local *de novo* appeal that are required for statutory permits, should have been approved as statutory permits following the procedures required for approval of statutory permits. *Flowers v. Klamath County*, 98 Or App 384, 388, 780 P2d 227 (1989) (counties may not avoid the notice and hearing mandates of ORS 215.416 by failing to give notice or failing to provide hearings); *Doughton v. Douglas County*, 88 Or App 198, 202, 744 P2d 1299 (1987) (same); *Keith v. Washington County*, ___ Or LUBA ___ (LUBA No. 2011-104, August 8, 2012) (decision that proposed use qualifies as a farm stand qualifies as a statutory permit); *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295, 303 (2007) (denial of permit to replace billboards with electronic signs is a statutory permit); *Frymark v. Tillamook County*, 45 Or LUBA 486, 491 (2003) (sign permit required the exercise of significant discretion and qualified as a statutory permit); *Flowers v. Klamath County*, 18 Or LUBA 647, 649 (1990) (site plan approval for bio-medical waste incinerator required the exercise of significant discretion and qualified as a statutory permit); *Pienovi v. City of Canby*, 16 Or LUBA 604, 606 (1988) (decision that existing use qualifies as a nonconforming use is a statutory permit); (*Doughton v. Douglas County*, 15 Or LUBA 576, 580 (1987) (decision that proposed dwelling qualifies as a dwelling customarily provide in conjunction with farm use qualifies as a statutory permit).

However, it is one thing to say applying an ambiguous land use regulation in issuing a building permit has the legal effect of making the building permit a "land use decision" as defined by ORS 197.015(10)(a) that is not excluded from LUBA's jurisdiction under the ORS 197.015(10)(b) exclusions for certain nondiscretionary decisions.[3] *Tirumali v. City of*

[3] Under ORS 197.015(10)(b), the following decisions that would otherwise qualify as land use decisions under ORS 197.015(10)(a) are exempted from the ORS 197.015(10)(a) definition of "land use decision:"

> "(b) "[The ORS 197.015(10)(a) definition of land use decision d]oes not include a decision of a local government:

Portland, 169 Or App 241, 246, 7 P3d 761 (2000). But it is quite another thing to say that applying an ambiguous land use regulation in all cases has the legal effect of converting a building permit decision into a statutory permit that requires a public hearing or notice and an opportunity for a local appeal with a *de novo* hearing. As we explained in *Tirumali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519 (2002):

> "The cases where this Board or the Court of Appeals has determined that approval or denial of a building permit involves the kind of discretion that renders it a 'permit' as defined in ORS 227.160 or 215.402 have tended to involve circumstances where there is some question as to the nature of the proposed use or whether the use is permitted at all in the zone. *See Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986) (a determination whether a dwelling is customarily provided to support a farm use requires significant factual, policy and legal judgment and is therefore a permit); *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991) (determination that a methadone clinic is a permitted use as a 'medical clinic' in a commercial zone requires significant discretion and is therefore a permit); *Pienovi v. City of Canby*, 16 Or LUBA 604, 606 (1988) (nonconforming use determination is a permit decision). Each of the decisions in those cases, and many others like them found to be permit decisions under ORS 227.160 or ORS 215.402, involve the exercise of legal, factual or policy discretion of a kind that brings them within the ambit of a statutory 'permit.' However, as far as we can tell, we have never held that a building permit for a use that is unquestionably a permitted use in the applicable zone is also a statutory 'permit,' solely because in issuing that building permit the local government interpreted an ambiguous term in a land use regulation that applies to that permitted use. Here, the only 'discretion' the city exercised involved an interpretation whether the term 'finished surface' in the code definition of the term "grade" is limited to a paved surface or also includes nonpaved surfaces where fill has been placed. We do not believe that an interpretation of such a code provision under such circumstances is the type of 'discretionary

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> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
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> "(B) That approves or denies a building permit issued under clear and objective land use standards[.]"

approval' that results in a 'permit' under ORS 227.160(2)."[4] (Footnote omitted.)

Petitioner appears to understand our decision in *Tirumali* to turn on the *complexity* of the land use regulations that are applied in approving the decision ("By all appearances, the Decision [in this appeal] was governed by zoning codes and criteria far more complex than in Tirumali * * *."). Petition for Review 16. If so, petitioners misread *Tirumali*. The question of whether a decision that applies ambiguous land use regulations constitutes a statutory permit under our reasoning in *Tirumali* turns on whether the ambiguity concerns the nature of the proposed use or whether the use is among the uses that are identified as permitted. If it does, then the decision is correctly viewed as a statutory permit, notwithstanding that the applicable comprehensive plan and land use regulations treat it as a ministerial decision that requires neither a public hearing nor notice and an opportunity for a *de novo* local appeal.

In the present case, as we have already explained, there is no dispute that the proposed mixed commercial and residential use is allowed outright in the CSm zone. All of the Portland Zoning Code ambiguities that petitioners have identified in this case concern regulation of the development of the mixed commercial and residential use that no party disputes is permitted outright in the CSm zone. Those Portland Zoning Code ambiguities mean the ORS 197.015(10)(b) exceptions from the statutory definition of land use decision for certain nondiscretionary decisions do not apply here, and the challenged building permit, which admittedly applies city land us regulations, is therefore a "land use decision" that is subject LUBA review. *See* n 3 and related text. However, because there is no question that the proposed mixed commercial and residential building is permitted outright under the city's

[4] Our citation in *Tirumali* to *Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986) was erroneous. The citation should have been to *Doughton v. Douglas County*, 88 Or App 198, 202, 744 P2d 1299 (1987). And our citation in *Tirumali* to *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991) was also erroneous. Although other LUBA decisions could have been cited, in *Hollywood Neigh. Assoc.* LUBA concluded that the decision on appeal was a land use decision, but LUBA did not conclude that the decision was a statutory permit.

land use regulations, under *Tirumali*, the city's building permit decision is not a statutory permit. We reject petitioners' arguments to the contrary.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners' legal theory under the third assignment of error appears to be that the city's decision inadequately addresses the potential transportation system impacts of the proposed development. We consider each of the Portland City Code (PCC) standards that petitioners cite in support of their third assignment of error.[5]

A. PCC 17.88.020

PCC 17.88.020(A) and (B) require that proposed buildings must have "direct access by frontage or recorded easement with not less than 10 feet width of right-of-way to a street used for vehicular traffic" and that if the street adjacent to a proposed building "does not have a standard full width improvement" the applicant "shall provide for such an improvement or a portion thereof as designated by the Director of the Bureau of Transportation, in accordance with provisions elsewhere in this Title."[6] However, petitioners

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[5] Title 33 of the PCC is the Portland Zoning Code. Title 17 of the PCC is entitled "Public Improvements."

[6] PCC 17.88.020 requires in part:

> "All building permits and planning actions are subject to the following:
>
> **"A.** No single family, multiple dwelling, industrial or commercial building shall be constructed, or altered so as to increase its number of occupants, or make significant alterations to a building without resulting in increased occupancy, on property that does not have direct access by frontage or recorded easement with not less than 10 feet width of right-of-way to a street used for vehicular traffic.
>
> **"B.** If such street or any other street adjacent to the property does not have a standard full width improvement, including sidewalks, the owner as a condition of obtaining a building permit, conditional use, zone change, land partition or adjustment, shall provide for such an improvement or a portion thereof as designated by the Director of the Bureau of Transportation, in accordance with provisions elsewhere in this Title."

do not allege that the proposal lacks the direct street access required by PCC 17.88.020(A) or that the city streets that adjoin the subject property lack the "standard full width improvement" required by PCC 17.88.020(B) and it does not appear that either of those circumstances are present here. Without a more developed argument from petitioners, we reject petitioners' contentions regarding PCC 17.88.020(A) and (B).

B. PCC 17.88.050(A) and (B)

PCC 17.88.050 specifies that a traffic impact study may be required, where the applicable approval criteria require a traffic impact study or where the city engineer has identified traffic safety or operational concerns.[7] Although petitioners suggest a traffic impact study should have been required under PCC 17.88.050, petitioners identify no approval criteria that require one and do not argue that the city engineer identified traffic safety or operational concerns. Petitioners' arguments under PCC 17.88.050(A) and (B) provide no basis for reversal or remand.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

PCC 33.460.310 sets out "Additional Standards" that apply in the Main Street Corridor overlay zone. In their first assignment of error, petitioners contend the city erroneously applied two of those additional standards, one that governs maximum building

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[7] PCC 17.88.050 provides:

> "The traffic impacts of dividing or developing land may warrant a transportation impact study. * * *. A transportation impact study may be required under the following situations:
>
> **"A.** Where approval criteria for a land use review include a requirement of adequacy of transportation services * * *[.]
>
> **"B.** Safety or operational impacts. Where the City Engineer has identified potential safety or operational concerns that may be impacted by the layout of a site or the location or size of driveways for a proposed development."

height and one that governs main entrances. We consider those additional standards separately below.

A. Height Limits For Sites Abutting R5 Zones

With exceptions that do not apply here, PCC 33.460.310(B)(1) limits building height on sites that have frontage on SE Division Street to 35 feet, "on the portion of a site within 25 feet of a site zoned R5 * * *."[8] Referring to the drawing included earlier in this opinion, the city determined that this building height limitation applies only to Tax Lot 17200 (the only portion of the site that is subject to the Main Street overlay zone). Under that interpretation, the 35-foot height limitation only requires that the height of the 45-foot tall building be reduced to 35 feet in an area covered by an arc with a 25 foot radius on Tax Lot 17200 measured from the point where Tax Lot 17200, Tax Lot 17300 and the R5 zoned parcel next to Tax Lot 17300 come together.

Petitioners contend the city should have required that the 35-foot height limit be applied to the entire *site* (Tax Lots 17200 and 17300), not just the portion of the site subject to the Main Street overlay zone. Under petitioners' interpretation and application of PCC 33.460.310(B)(1), the portion of the proposed building to be located on Tax Lot 17300 east of the dotted line shown on the drawing would also need to be reduced to a height of no more than 35 feet.

Petitioners' interpretation and application of PCC 33.460.310(B)(1) is certainly plausible if PCC 33.460.310(B)(1) is read in isolation. The 35-foot height limitation applies to a "site" and more specifically to the "portion of a site within 25 feet of a site zoned R5[.]" *See* n 8. As defined by PCC 33.910, with exceptions that do not apply here, a "site' is an

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[8] The text of PCC 33.460.310(B)(1) is set out below:

> "Generally. If a *site* has frontage on Division Street, on the *portion of a site within 25 feet of a site zoned R5* through R2.5, the maximum building height is 35 feet." (Emphases added.)

ownership * * *." As defined by PCC 33.910, "[a]n ownership is one or more contiguous lots that are owned by the same person, partnership, association or corporation. * * *" As far as we can tell, it is undisputed that tax lots 17200 and 17300 are owned by the same person and therefore qualify as both an "ownership" and a "site." Because PCC 33.460.310(B)(1) read in isolation applies to the "portion of a *site* within 25 feet of a site zoned R5," petitioners' reading is consistent with the text of PCC 33.460.310(B)(1).

However, respondents point out that PCC 33.460.310(B)(1) should not be interpreted and applied in isolation, because the PCC anticipates and specifically addresses cases where a site is subject to more than one zone. Specifically, PCC 33.700.070(F) provides that where sites are subject to more than one zone, "the development standards of each zone apply to the portion of the site in that zone."[9] As limited by PCC 33.700.070(F), only the portion of the site that is subject to the Main Street Overlay Zone (Tax Lot 17200) and within 25 feet of the R5 zoned property (the 25-foot arc on the drawing) is subject to the 35-foot height limit imposed by PCC 33.460.310(B)(1). We agree with respondents that PCC 33.700.070(F) limits application of the PCC 33.460.310(B)(1) height limit to Tax Lot 17200.

We note that the Main Street overlay zone refers to the standards in PCC 33.460.310 as "Additional Standards," while the limitation imposed by PCC 33.700.070(F) uses the term "development standards." We nevertheless conclude PCC 33.700.070(F) applies in this case to limit application of the PCC 33.460.310(B)(1) height limit to Tax Lot 17200 because the PCC 33.460.310(B)(1) height limit qualifies as a "development standard." The term "development standard" is not defined in the PCC. But it is clear that in base zones, height limits are treated as "development standards." *See* PCC 33.110.215 (Single-Dwelling

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[9] PCC 33.700.070(F) provides:

> **"Sites in more than one zone.** When a site is in more than one zone, the development standards of each zone apply to the portion of the site in that zone."

Zones); 33.120.215 (Multi-Dwelling Residential Zones); 33.130.220 (Commercial Zones), 33.140.210 (Employment and Industrial Zones). We conclude the height limit imposed by PCC 33.460.310(B)(1) in the Main Street overlay zone is correctly viewed as an additional development standard. PCC 33.700.070(F) applies, and the city did not err by limiting application of the PCC 33.460.310(B)(1) 35-foot height limit to Tax Lot 17200.

This subassignment of error is denied.

B. Main Entrance Requirement

A second "Additional Standard" that applies within the Main Street overlay zone governs main entrances. PCC 33.460.310(A). We set out the relevant text of PCC 33.460.310(A) below.

> "**Reinforce the corner.** This standard applies to all sites where any of the floor area on the site is in nonresidential uses. Where a site abuts both Division Street and an intersecting street:
>
> "* * * * *;
>
> "2. Main entrance. For portions of a building within the maximum building setback, at least one main entrance for each tenant space must:
>
> "a. Be within 5 feet of the façade facing Division Street; and
>
> "b. Either:
>
> "(1) Face Division Street; or
>
> "(2) Be at an angle of up to 45 degrees from Division Street, measured from the street property line.
>
> "* * * * *."

PCC 33.460.310(A) uses several defined terms and is a bit of a challenge to follow. However, simply stated, PCC 33.460.310(A) applies in this case, because the proposal includes 3,000 square feet of commercial floor area, which qualifies as floor area in nonresidential use. Subsection (2) of PCC 33.460.310(A) applies because the subject

property abuts both Division Street and SE 37th Avenue (an intersecting street). PCC 33.460.310(A)(2) requires that "[f]or portions of a building within the maximum building setback, at least one main entrance for each tenant space must * * * [b]e within 5 feet of the facade facing Division Street[.]"

The "maximum building setback" in the CS zone is 10 feet from the street. PCC 33.130.215(C)(b); Table 130-3. We were informed at oral argument that the portion of the proposed building that adjoins SE Division Street abuts the SE Division Street right of way, so that the ten feet of the building closest to SE Division Street is "within the maximum building setback." *See* drawing. The 3,000 square feet of commercial space is on the ground floor and is all oriented toward SE Division Street. A portion of that 3,000 square feet of commercial space is "within the maximum building setback." Above that commercial space (also partially "within the maximum building setback") are the residential units on the upper floors that adjoin SE Division Street.

Under PCC 33.460.310(A)(2), "at least one main entrance *for each tenant space* [within the maximum building setback] must * * * [b]e within 5 feet of the facade facing Division Street[.]"[10] (Emphasis added.) There is no dispute that the main entrances for each of the commercial tenants along SE Division Street, which are "within the maximum building setback," are within "5 feet of the facade facing Division Street," and "[f]ace Division Street." Therefore, with regard to the commercial floor space and tenants, the proposal complies with PCC 33.460.310(A)(2).

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[10] PCC 33.910 defines "main entrance" as follows:

> "A main entrance is the entrance to a building that most pedestrians are expected to use. Generally, each building has one main entrance. Main entrances are the widest entrance of those provided for use by pedestrians. In multi-tenant buildings, main entrances open directly into the building's lobby or principal interior ground level circulation space. When a multi-tenant building does not have a lobby or common interior circulation space, each tenant's outside entrance is a main entrance. In single-tenant buildings, main entrances open directly into lobby, reception, or sales areas."

There is also no dispute that the main entrance for all of the residential units, including the twelve residential units that abut SE Division Street and are located partially "within the maximum building setback" from SE Division Street is located on SE 37th Avenue, far removed from SE Division Street. That residential unit main entrance is not "within 5 feet of the facade facing Division Street," and does not "[f]ace Division Street."

The city and intervenors-respondents contend the main entrance standard set out in PCC 33.460.310(A)(2) applies only to *nonresidential* tenant space. Respondents note that the main entrance requirement applies only to development where any of the floor area is in non-residential use, suggesting that the main entrance requirement is directed at non-residential uses. The main entrance requirement would not apply at all, respondents argue, if the entire development were residential. Second, respondents cite to PCC 33.460.300, which indicates that the purpose of the Division Street regulations, including the main entrance requirement, is to activate Division Street corners and enhance "the pedestrian environment." We understand respondents to argue that "pedestrian" in this context refers to retail-oriented pedestrians, citing to language in PCC 33.460.300 stating that the purpose of the Division Street regulations is to ensure that development "[c]onsists of retail that * * * promotes pedestrian activity[.]" Finally, respondents cite to legislative history, code commentary discussing the PCC 33.460.310(A)(2) requirements. That commentary states that "[o]ne unique urban design element along SE Division is the orientation of numerous storefront buildings to the corner with a main entrance." Joint Response Brief 7. Respondents argue that this legislative history supports their view that the main entrance requirement is directed at "storefronts," *i.e.* commercial uses, and is not intended to apply to any residential uses located above storefronts.

The context and commentary that respondents cite can be read to suggest that the authors of PCC 33.460.310(A)(2) may have contemplated that the main entrance requirement would apply only to nonresidential tenant space. However, the text of PCC 33.460.310(A)

itself includes no language that purports to limit the main entrance requirement to nonresidential tenant space. Again, PCC 33.460.310(A) states in pertinent part that the "standard applies to all sites where any of the floor area on the site is in nonresidential uses," and PCC 33.460.310(A)(2) provides "[f]or portions of a building within the maximum building setback, at least one main entrance for each tenant space must * * * [b]e within 5 feet of the façade facing Division Street."

The city and intervenors-respondents read PCC 33.460.310(A) as though it included the underlined text "[t]his standard applies to the nonresidential uses on all sites where any of the floor area on the site is in nonresidential uses," and "[f]or portions of a building within the maximum building setback, at least one main entrance for each nonresidential tenant space must * * * [b]e within 5 feet of the façade facing Division Street." The underlined language or similar limiting language must be inserted for PCC 33.460.310(A) to have the more limited application to only "nonresidential uses" and "nonresidential tenant space" that the city and intervenors-respondents contend it has. However, under ORS 174.010, in interpreting the meaning of PCC 33.460.310(A), LUBA is not permitted to "insert what has been omitted."[11]

This subassignment of error is sustained.

The first assignment of error is sustained in part.

CONCLUSION

Although we reject petitioners' second and third assignments of error and the first part of their first assignment of error, we sustain the second part of their first assignment of error regarding the PCC 33.460.310(A) main entrance requirement in the Main Street overlay

[11] The Purpose Statement at PCC 33.460.300 and code commentary that the city and intervenor-respondent cite both call for enhancing the pedestrian environment. However, neither the purpose statement nor the code commentary state that the pedestrian environment to be enhanced is a *nonresidential* pedestrian environment. Neither the purpose statement nor the code commentary support the city's and intervenors-respondents' limited application of PCC 33.460.310(A).

zone. Petitioners request that if any part of the first assignment of error is sustained, LUBA reverse rather than remand the challenged decision. Respondents do not address this point.

OAR 661-010-0071 provides that LUBA shall reverse a decision when "[t]he decision violates a provision of applicable law and is prohibited as a matter of law," while LUBA shall remand a decision when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law." According to petitioners, whether reversal or remand is appropriate depends on whether it is the decision or the proposed development that must be corrected. If the identified errors can be corrected by adopting new findings or accepting new evidence, petitioners argue, then remand is appropriate. If the identified errors require a new or amended development application, then reversal is appropriate. *Angius v. Washington County*, 35 Or LUBA 462, 465-66 (1999); *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992).

As noted, respondents do not address whether remand or reversal is the appropriate remedy, if the first assignment of error is sustained. It might be possible that compliance with the PCC 33.460.310(A) main entrance requirement could be demonstrated on remand, without significant changes to the proposed development. However, as far as we can tell, it is more likely that compliance with the PCC 33.460.310(A) main entrance requirement will require, at a minimum, more than insignificant changes to the existing application, if not a new application. Absent some assistance from respondents on this point, we agree with petitioners that reversal is the appropriate disposition.

The city's decision is reversed.