BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KERNS NEIGHBORS FOR RATIONAL GROWTH, JOHN URBANOWSKI, TOM BUGAS, CARL FERRARIS, SAUMYA COMER and ERIC FOSGARD,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

UDG BURNSIDE LLC,
Intervenor-Respondent.

LUBA No. 2012-085
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.

Robert Yamachika, Deputy City Attorney, Portland, filed a joint response brief. Kathryn Beaumont, Senior Deputy City Attorney, argued on behalf of respondent.

Michael C. Robinson, Portland, filed a joint response brief and argued on behalf of intervener-respondent. With him on the brief was Perkins Coie LLP.

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

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

AFFIRMED 02/26/2013

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 that approves a 50-unit, four-story apartment building.

FACTS

The subject property is made up of two lots, both of which are zoned Storefront Commercial (CS). The CS zone permits residential development outright, subject to development standards. The challenged building permit approves a four-story apartment building, adjacent to E Burnside Street and NE 30th Avenue in the City of Portland.

THE RECORD

The record and supplemental record that was filed by the city in this matter is made up entirely of 8 ½" by 11" pages. Some of those pages are reductions of much larger plans and diagrams. Following oral argument in this matter, intervenor-respondent transmitted to LUBA and the other parties copies of full size plans that are included in reduced form in the record. Because the full size plans are simply larger scale copies of drawings that already are included in the record, the post-oral argument transmittal of these drawings is appropriate and we have considered them in issuing this decision. *See Lyon v. Linn County*, 28 Or LUBA 402, 404 (1992) (original aerial photograph accepted at oral argument, where less legible copy of the original aerial photograph was already included in the record). No party objected to our consideration of the larger scale drawings.

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. In a decision issued on February 20, 2013, we rejected a nearly identical argument in a different appeal that has many similarities with this appeal. *Richmond Neighbors v. City of Portland*,

___ Or LUBA ___ (LUBA No. 2012-061, February 20, 2013). We repeat much of the reasoning in that decision in rejecting petitioners' second assignment of error in this appeal.

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.

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*." (Emphasis added.) 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[.]"[1] As we have

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

"A development ordinance may provide for:

already noted, under the CS zoning applied to the subject property, the proposed apartment building (a household living use) is allowed as of right, provided the applicable development standards are met. Portland City Code (PCC) Table 33.130-1. Under the Portland Zoning Code, a discretionary permit is not required. Under the Portland Zoning Code, a building permit for an apartment building in the CS zone is not treated as a statutory permit.

Petitioners contend that although the Portland Zoning Code authorizes the city to approve building permits for applications for household living uses in the CS zone ministerially, without the prior 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 petitioners' arguments that building permits and other permits that a local government approved ministerially under its acknowledged comprehensive plan and land use regulations, *i.e.*, without a 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.*

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

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 provided in conjunction with farm use qualifies as a statutory permit).

It is one thing to say that 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), which is not excluded from LUBA's jurisdiction under the ORS 197.015(10)(b) exclusions for certain nondiscretionary decisions.[2] *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000). However, 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 *Tiramali v. City of Portland*, 41 Or LUBA 231, 240, *aff'd* 180 Or App 613, 45 P3d 519 (2002):

---

[2] 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:
>
> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards[.]"

> "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 approval' that results in a 'permit' under ORS 227.160(2)."[3] (Footnote omitted.)

Petitioners appear to understand our decision in *Tirumali* to turn on the level of *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 more complex than in *Tirumali* * * *."). Petition for Review 11. 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

[3] 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.

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 apartment building use is allowed outright in the CS zone. All of the Portland Zoning Code ambiguities that petitioners have identified in this case concern regulation of the development of the apartment building use that no party disputes is permitted outright in the CS 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 use regulations, is therefore a "land use decision" that is subject LUBA review. *See* n 2 and related text. However, because there is no question that the proposed apartment building is permitted outright under the city's 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

Under their third assignment of error, petitioners argue "[i]t is impossible for Respondent to lawfully approve a 50-unit apartment at this Property through a process that results in no written findings." Petition for Review 13. Petitioner cites no authority for that sweeping statement that findings are invariably a necessity in reviewing a land use decision in an appeal at LUBA and we are aware of none.

One of the effects of our denial of petitioners' second assignment of error is that ORS 227.173(3), which applies to statutory permits, does not apply here. That statute requires that

decisions concerning statutory permits be accompanied by findings.[4] But even if there is no statutory or other legal requirement that a building permit such as the one at issue in this appeal must always be supported by findings, the record must be sufficient for LUBA to conduct its review and for the Court of Appeals to conduct its review in appeals of LUBA decisions. As the Court of Appeals explained in the context of a review of a legislative decision "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002); *see also Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12, 16 (2008) (LUBA and the appellate courts must be able to perform their review function). But in conducting our review in this appeal, the initial burden is on petitioners to demonstrate that there is at least an arguable legal error in the decision on appeal. Upon such a demonstration, if the record is not sufficient to show that the city correctly applied the applicable law, remand may be required for the city to adopt findings to demonstrate that it correctly applied the law, even though supporting findings for the building permit might not be required in other circumstances. We therefore consider whether petitioners have made such a showing under their third assignment of error.

Petitioners question whether the development authorized by the appealed building permit is consistent with PCC 17.88.020, which requires that proposed development have

[4] The text of ORS 227.173(3) is set out below:

> "Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

access to a street, and PCC 17.88.050, which requires a traffic impact study in certain circumstances. We consider those requirements separately below.[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]

The development authorized by the building permit that is the subject of this appeal has direct frontage on East Burnside Street and NE 30th Avenue. Record 96. Petitioners do not allege that the proposal lacks the "direct street access * * * to a street used for vehicular traffic" that is required by PCC 17.88.020(A), and the record clearly supports a conclusion that it has such direct access. ORS 197.835(11)(b). Neither do petitioners contend that East

---

[5] As was the case with the second assignment of error, petitioners' arguments under the third assignment of error are nearly identical to arguments that were presented and rejected in a decision issued on February 20, 2013. *Richmond Neighbors v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2012-061, February 20, 2013). We repeat some of the reasoning in that decision here, in rejecting petitioners' third assignment of error in this appeal.

[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."

Burnside or NE 30th Avenue lack the "standard full width improvement" required by PCC 17.88.020(B) and there is nothing in the record that suggests that they are substandard streets. 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] Petitioners argue:

> "This is a highly discretionary criterion. Did the City Engineer consider safety and operational impacts resulting from the Project? It appears that he or she was required to do so. If so, what did he or she conclude and on what basis?" Petition for Review 15.

Petitioners make no attempt to confront the actual language of PCC 17.88.050(A) and (B). PCC 17.88.050 provides that a traffic impact study "may" be warranted in two "situations." First, "[w]here approval criteria for a land use review include a requirement of adequacy of transportation services," and second where the "City Engineer has identified potential safety or operational concerns[.]" Petitioners identify no approval criteria that would potentially implicate PCC 17.88.050(A), and there do not appear to be any. PCC 17.88.050(B) only requires a traffic impact study "[w]here the City Engineer has identified potential safety or operational concerns[.]" Respondents note that the application was

---

[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." (Emphasis added.)

"Approved" for "Street Systems Review." Record 1. While the record does not disclose what was involved in approval of Street Systems Review, that review is at least some evidence that street safety or operational concerns were not identified. In any event, petitioners point to no "City Engineer * * * identified potential safety or operational concerns," which might permit the city exercise its discretion under PCC 17.88.050 to require a traffic impact study under PCC 17.88.050(B).

Petitioners' arguments under PCC 17.88.050(A) and (B) provide no basis for remanding the challenged decision for additional findings.

The third assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Under their first assignment of error, petitioners contend the city erroneously applied the applicable Portland Zoning Code building height limit and requirement for street-facing windows.

A. Building Height

PCC 33.130.210(B) and Table 130-3 impose a maximum building height of 45 feet in the CS zone. That seemingly simple limitation is far more complicated than it would appear, because of the way the city measures building height. The Portland Zoning Code incudes detailed instructions on how to go about measuring the height of buildings. PCC 33.930.050(A).[8] Luckily the "base point," which is the starting point in measuring the height

[8] The text of PCC 33.930.050(A) is set out below:

> "**A. Measuring building height.** Height of buildings is generally measured as provided in the Oregon Structural Specialty Code (the Uniform Building Code as amended by the State.) The height of buildings is the vertical distance above the base point described in Paragraphs 1. or 2., below. * * * Methods to measure specific roof types are shown below and in Figure 930-5:
>
> > "• Flat roof: Measure to the top of the parapet, or if there is no parapet, to the highest point of the roof.

of buildings under PCC 33.930.050(A), is not an issue in this appeal.[9] But whether the height of a building is measured to the highest point of a roof or to some point short of that highest point depends on roof type. Of particular relevance in this appeal, the height of a building with a "[p]itched, hipped, or gambrel roof where roof pitch is 12 in 12 or less" is measured "to the average height of the highest gable."[10] The issue presented in petitioners' first assignment of error is whether the roof on the proposed apartment building is accurately characterized as a "hipped roof' or whether it is more accurately characterized as among "[o]ther roof shapes." *See* n 8, third and sixth bullets. As we explain below, if the roof is accurately described as a hip or hipped roof, the height of the building is measured from the

---

> "• Mansard roof: Measure to the deck line.
>
> "• Pitched, hipped, or gambrel roof where roof pitch is 12 in 12 or less: Measure to the average height of the highest gable.
>
> "• Pitched or hipped roofs with a pitch steeper than 12 in 12: Measure to the highest point.
>
> "• Gambrel roofs where both pitches are steeper than 12 in 12: Measure to the highest point.
>
> "• Other roof shapes such as domed, vaulted, or pyramidal shapes: Measure to the highest point.
>
> "• Stepped or terraced building: Measure to the highest point of any segment of the building.
>
> "1. Base point 1. Base point 1 is the elevation of the highest adjoining sidewalk or ground surface within a 5 foot horizontal distance of the exterior wall of the building when such sidewalk or ground surface is not more than 10 feet above lowest grade. See Figure 930-6.
>
> "2. Base point 2. Base point 2 is the elevation that is 10 feet higher than the lowest grade when the sidewalk or ground surface described in Paragraph 1., above, is more than 10 feet above lowest grade. See Figure 930-7."

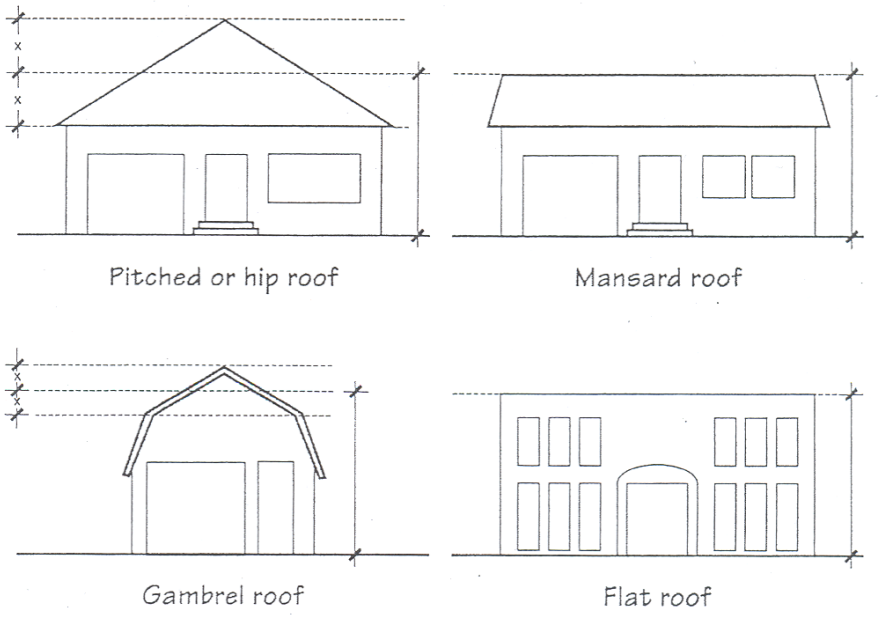
[9] The "base point," or more precisely ambiguities in determining the base point, was at the heart of our decision in *Tirumali v. City of Portland*, 37 Or LUBA 859, *rev'd and remanded* 169 Or App 241, 7 P3d 761 (2000).

[10] There is no question that the roof pitch is less than 12 in 12.

"base point" to the "average height of the highest gable" and, according to a drawing in the record, the roof is exactly 45 feet tall if height is measured in that way. Record 39. On the other hand, if the roof is not accurately characterized as a hip or hipped roof, and instead falls within "[o]ther roof shapes," the height of the building is measured to the highest point, and the building height exceeds the 45-foot height limit.

PCC 33.930.050(A) cites to PCC Figure 930-5 for assistance in determining and measuring building height for various roof types. That figure is set out below:

Figure 930-5
Measuring Height – Roof Types

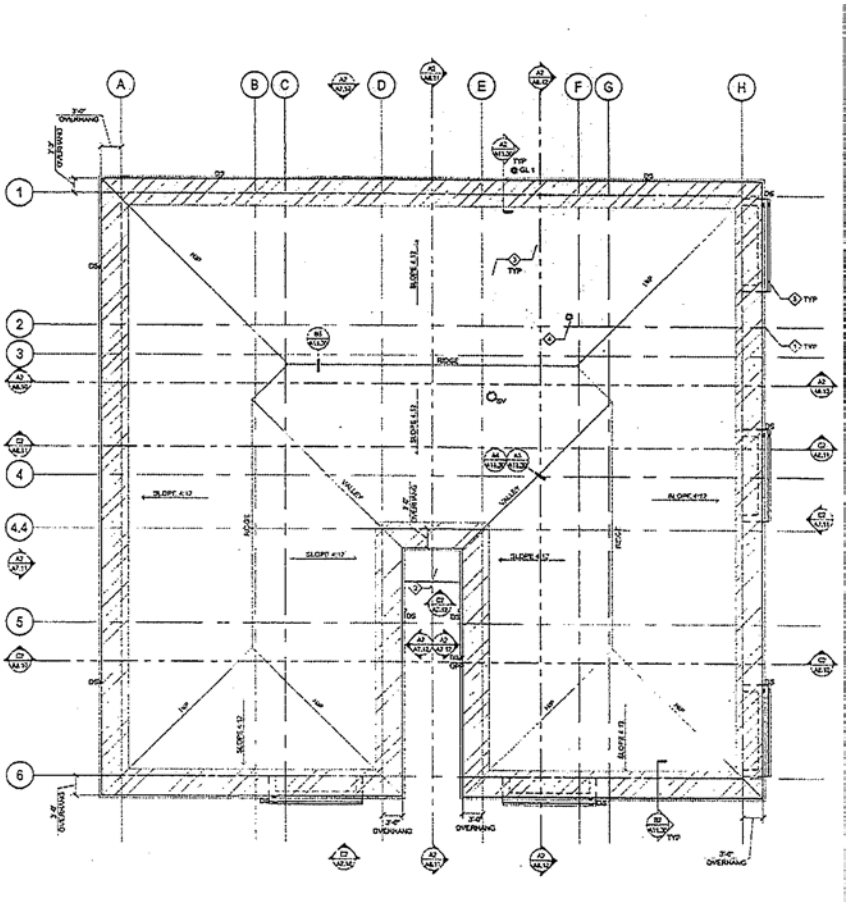


The figures shown above display the front façade of what is presumably a simple four sided building. In other words, Figure 930-5 displays a very simple example of a "Pitched or hip roof," a "Mansard roof," a "Gambrel roof" and a "Flat roof." The hip roof shows the height of the building being measured to the average height of the gable. [11] Other roof types

[11] The Portland Zoning Code provides no definitions for the roof types. *Webster's Third New International Dictionary* (Unabridged 1981) defines "hip roof" as a "roof having sloping ends and sloping sides." *Id* at 1072. *Webster's* defines "gable" as "the vertical triangular portion of the end of a building from the level of the cornice or eves to the ridge of the roof." *Id*. at 927. Apparently Figure 930-5, set out below, treats the sloping end of a hipped roof as a gable, although it technically is not a gable.

would require measuring the height of the building to the highest point of the structure. The building at issue in this appeal is not simple four-sided building. It is most accurately described as an inverted U-shaped building with one wing oriented east-west along the north side of the property and two north-south wings that extend south from that east-west wing to East Burnside Street. A map from page 31 of the record displaying an overhead view of the inverted U-shaped building around a small courtyard at the bottom is set out below.

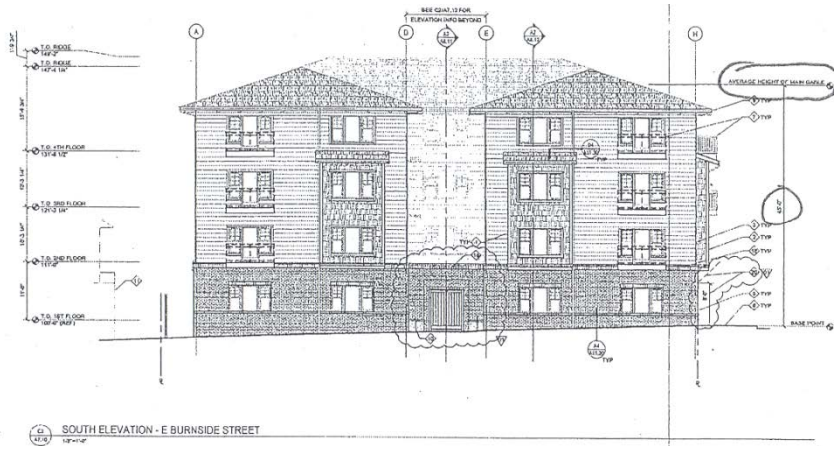
Record 31



We also set out below, the south, north, east and west elevations of the proposed apartment building that appear at Record 39-40.

1

2 1. South Elevation



3

4

5 2. North Elevation

6

7 3. East Elevation

8

4. West Elevation

The oversized drawing that is replicated in reduced form at Record 31, and set out earlier, specifically calls out the "hips" in the roof of the proposed building. The south elevation displays the hipped roofs over the two wings that face East Burnside and shows the outline of the east-west oriented hipped roof structure along the north property line. While the roof of the subject building is admittedly a compound hipped roof, rather than a simple four-sided hipped roof like the example shown on Figure 930-5, we conclude it is nevertheless accurately characterized as a hip or hipped roof.

The city did not err by measuring the height of the building to the average height of the main gable. Record 39.[12] We reject petitioners' contention that the roof falls within the category of "[o]ther roof shapes," and we reject their contention that the height of the building must be measured to the highest point of the building.

It is less clear to us whether, assuming the roof is accurately characterized as a hip or hipped roof, that the city correctly measured the height of the building to the average height of the highest gable. The applicant and city appear to have treated the two gables that face East Burnside as the main gable and measured the height of the building to the average

[12] The oversize drawing supplied by the city more clearly show the height measurement that is displayed on the reduced drawing on Record 39.

height of those two gables. The east-west wing of the building appears to be slightly taller and presumably its average gable height would be slightly higher than the average gable height of the two wings that face East Burnside. But petitioners do not assign error to the accuracy of the measured building height, assuming the roof is accurately characterized as a hip or hipped roof. Petitioners' sole argument is that the roof falls within "[o]ther roof shapes" so that the height of the building must be measured to the highest point of the building. We reject that argument, and because petitioners do not contend that the "highest gable" is the one that appears in the east and west elevations, we do not consider that question.

The first subassignment of error is denied.

B. Windows and Doors

PCC 33.130.250(D) "applies to the street-facing facades of buildings in commercial zones where any of the floor area is in Residential uses." PCC 33.130.250(D)(2). PCC 33.130.250(D)(3) applies here and provides as follows:

> "The standard. At least 15 percent of the area of each façade that faces a street lot line must be windows or main entrance doors. Windows used to meet this standard must allow views from the building to the street. Glass block does not meet this standard. Windows in garage doors do not count toward meeting this standard, but windows in garage walls do count toward meeting this standard. To count toward meeting this standard a door must be at the main entrance and facing the street lot line."

According to the document at Record 6, the south facing facade on East Burnside has 21 percent of the total façade in windows and doors and thus satisfies the PCC 33.130.250(D)(3) requirement.[13] That document does not include the calculations that support the 21 percent figure.

[13] A magnifying glass is required to read record page 6. The 21 percent notation is easy to read in the oversized exhibits supplied by intervenor-respondent.

The south-facing façade is set out earlier in this opinion, from a drawing in the record that is not much more readable than the duplication of that drawing that is set out in this opinion. However, as we have already noted, intervenor-respondent has provided the oversize drawings at a scale of one inch equals eight feet. Reasonably accurate calculations are possible from that larger drawing. It is not clear whether petitioners' and respondents' calculations discussed below were taken from the full size drawings or from the reduced versions in the record. Our calculations are taken from the full size drawings.

Petitioners contend the south, street-facing façade on East Burnside include 3,956 square feet. Fifteen percent of that area is 593 square feet. Petitioners argue that south-facing façade has 16 windows, ten of which they contend are 25.75 square feet in area and six of which are 27.75 square feet in area. Adding the total window area to the 39 square feet for the entrance facing East Burnside, petitioners contend that total is 463 square feet, which is less than the required 593 square feet. Even if the three recessed windows in the courtyard that face East Burnside are included, petitioners contend those windows only add 77.25 square feet, bringing the total to 540 square feet, which is less than the required 593 square feet.[14]

Respondents contend the south-facing façade on East Burnside has 3,878 square feet. Fifteen percent of that area is 581.7 square feet. Respondents contend the total area of windows and doors is 762.87 square feet, which easily exceeds the required 581.7 square feet.[15]

---

[14] Petitioners offer no focused challenge under PCC 33.130.250(D)(3) to the NE 30th Avenue street-facing façade.

[15] Respondents also contend the NE 30th Avenue façade includes 3,600 square feet and that 15 percent of that area is 540 square feet. According to respondents, the total window and door area on that façade adds up to 691 square feet, which exceeds the required 540 square feet.

Of necessity, LUBA has done its own calculations. In doing so, we have attempted to exclude the framing area around the window panes, but we have not attempted to account for or subtract interior window dividers or framing, because we conclude those parts of the window are properly considered part of the window. We also have included the recessed courtyard windows that face East Burnside Street, because they "allow views from the building to the street" and therefore fall within the description of windows set out in PCC 33.130.250(D)(3). We reject petitioners' suggestion that those three windows should not be counted.

According to our calculations, the south facing façade has 3,948 square feet and 15 percent of that area is approximately 592 square feet. Measuring conservatively, the total of 19 windows that face East Burnside Street measure ½" by 1."[16] At a scale of one inch equals 1/8 inch that results in windows with 32 square feet for a total of 608 square feet, which is more than the required 592 square feet. When the area of the door is added, approximately 32 square feet, the total area of windows and doors exceeds the required 592 square feet by 52 square feet.[17]

Based on our review of the record, the window and door area of the street-facing facades complies with PCC 33.130.250(D)(3), and we reject petitioners' arguments to the contrary.

This subassignment of error is denied.

The first assignment of error is denied.

The city's decision is affirmed.

---

[16] The one inch dimension may be slightly less than one inch, but the ½ inch dimension is actually longer than ½ inch and more than off-sets any additional area that might be attributable to the one inch approximate dimension.

[17] Our calculations show that 15 percent of the east facing façade is 540 square feet and that the actual window and door area for the east facing façade is 668 square feet.