BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MADRONA PARK, LLC,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

OPSIS ARCHITECTURE, LLP and
OREGON HARBOR OF HOPE,
Intervenors-Respondents.

LUBA No. 2019-032

FINAL OPINION
AND ORDER

Seth J. King, Portland, filed the petition for review on behalf of petitioner. With him on the brief were Steven L. Pfeiffer and Perkins Coie LLP.

Michael J. Jeter, Assistant Deputy City Attorney, Portland, filed the response brief on behalf of respondent.

Renee M. France, Portland, represented intervenors-respondents.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

TRANSFERRED 07/17/2019

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision that approves a building permit for a temporary mass shelter under the city's Housing Emergency Ordinance.

BACKGROUND

In 2015, the city adopted a Housing Emergency Ordinance (Ordinance 187371) pursuant to PCC 15.04.040.F, following its determination that a state of emergency exists within the city due to the number of persons experiencing homelessness and the lack of habitable shelters for those persons.[1] PCC 15.04.040.F is part of the city's Emergency Code, and provides in relevant part:

> "When circumstances create an immediate need to provide adequate, safe, and habitable shelter to persons experiencing homelessness, the Council may declare a housing emergency exists. A housing emergency is a health and safety emergency under Portland City Code Subsection 33.296.030.G. and mass shelters are

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[1] Ordinance 187371, adopted October 7, 2015, declared that a housing emergency exists "because there are urgent and unmet needs to provide safe, warm, and habitable shelters for persons experiencing homelessness." Record 558. The Ordinance states, in part, that "[u]nder state law, the Portland City Charter and Portland City Code, the Council has authority to declare a housing emergency for the purpose of addressing the shelter needs of the homeless on a short-term basis, and protecting the public health, safety and welfare." Record 556.

The Housing Emergency Ordinance has since been extended until April 4, 2021. Pursuant to ORS 40.090(7), the city asks LUBA to take official notice of Ordinance 189387, adopted on February 21, 2019, which extends the housing emergency until April 4, 2021. City of Portland Response Brief 6, n 2. Petitioner has not objected to the request, and the request is granted.

> allowed as temporary activities for the duration of the emergency subject to the standards in Section 33.296.040."

PCC 33.296.030 (Title 33 Planning and Zoning Code, Section 296 Temporary Activities), referenced in PCC 15.04.040.F, lists the categories of temporary activities that are allowed. PCC 33.296.030.G in turn allows:

> "Temporary activities and structures needed as the result of a natural disaster or other health and safety emergencies are allowed for the duration of the emergency. Temporary activities include food, water, and equipment distribution centers, warming or cooling shelters, and triage stations."

PCC 33.296.040, also referenced in PCC 15.04.040.F, provides general regulations for temporary activities authorized under PCC 33.296.030. PCC 33.296.040.A provides:

> "New development or alterations to existing development are prohibited, unless consistent with the development standards for uses allowed by right in the underlying zone or required by applicable building, fire, health, or safety codes."

In July 2018, intervenor-respondent Opsis Architecture, LLP (intervenor) applied for a building permit to construct the Oregon Harbor of Hope Navigation Center (the Center). The Center is proposed to be located on a 1.17-acre portion of a 1.97-acre parcel on NW Naito Parkway, under the Broadway Bridge, within the city's Central Employment (EX) zone. As described in the building permit application, the Center would consist of a 60-foot by 150-foot tensioned, membrane structure, which would be used for a sleeping dormitory, common area and program service space for approximately 100 short-term residents. The application states that the purpose of the proposed Center is "to provide short-

term shelter and navigation toward social service programs such as mental and medical health, housing placement and job training to assist currently homeless individuals." Record 238.

On February 6, 2019, the city's Bureau of Development Services (BDS) approved the building permit for the Center. The BDS decision included findings explaining why it concluded that the building permit was authorized in accordance with the city's Housing Emergency Ordinance and satisfied the development standards in the EX zone.

Petitioner owns property adjacent to the site of the proposed Center. On February 27, 2019, petitioner appealed the city's issuance of the building permit to LUBA. The city transmitted the record, and the appeal proceeded to briefing. In its response brief, the city moved to dismiss the appeal on the basis that the challenged decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(B), which we discuss below. LUBA suspended the appeal and allowed petitioner to respond to the city's motion to dismiss. Petitioner filed a response that includes a motion to transfer pursuant to OAR 661-010-0075(11). We now resolve the city's motion to dismiss.

JURISDICTION

LUBA has exclusive jurisdiction to review land use decisions. ORS 197.825(1).[2] ORS 197.015(10)(a)(iii) defines "[l]and use decision" to include

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[2] ORS 197.825(1) provides in part:

"[a] final decision or determination made by a local government or special district that concerns the adoption, amendment or application of * * * [a] land use regulation[.]" ORS 197.015(10)(b)(D)-(H), (c),(d) and (e) also list nearly a dozen types of decisions that over the years the legislature has provided are *not* "land use decisions" as described in ORS 197.015(10)(a), and thus are excluded from LUBA's jurisdiction, even if those decisions might otherwise qualify as "land use decisions."[3]

As relevant here, ORS 197.015(10)(b)(B) excludes from LUBA's jurisdiction a local government decision to approve or deny a building permit made under "clear and objective land use standards." We sometimes refer to that provision as "the building permit exclusion." ORS 197.015(10)(b)(A) excludes from LUBA's jurisdiction a local government decision "made under land use standards that do not require interpretation or the exercise of policy or legal

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> "[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

[3] These include certain decisions approving a transportation facility (ORS 197.015(10)(b)(D); an expedited land division decision as described in ORS 197.360 (ORS 197.015(10)(b)(E)); a decision that approves the siting, installation, maintenance or removal of a liquefied natural gas container or receptacle (ORS 197.015(10)(b)(F)); a decision approving a final subdivision or partition plat (ORS 197.015(10)(b)(G)); certain land use compatibility statement decisions (ORS 197.015(10)(b)(H)); a decision by a school district to close a school (ORS 197.015(10)(c)); and certain decisions to authorize an outdoor mass gathering (ORS 197.015(10)(d)).

judgment." We sometimes refer to that exclusion as "the ministerial decision exclusion."

The city moves to dismiss the appeal on the basis that petitioner has not established LUBA's jurisdiction over the appealed decision.[4] According to the city, the decision to issue a building permit for the Center is excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(B) because it was a decision to approve a building permit made under clear and objective land use standards. For the reasons explained below, we agree with the city that the building permit falls within the building permit exclusion to LUBA's jurisdiction in ORS 197.015(10)(b)(B).

A. ORS 197.015(10)(b)(A) and (B)

As a preliminary matter, we note that although the city's motion to dismiss cites both ORS 197.015(10)(b)(A) and (B), the bulk of the city's arguments focus on the exclusion in ORS 197.015(10)(b)(B). As petitioner notes, we have, to some extent, collapsed the jurisdictional analysis under ORS 197.015(10)(b)(A) and (B). *See McCollough v. City of Eugene*, 74 Or LUBA 620, 623 (2016) (a "building permit standard that was subjective or discretionary would likely require the exercise of legal or policy judgment"). Accordingly, petitioner relies on both ORS 197.015(10)(b)(A) and (B) in arguing that we have jurisdiction to

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[4] As the party seeking LUBA review, petitioner has the burden of establishing that LUBA has jurisdiction. *Biggerstaff v. Yamhill County*, 58 Or LUBA 476, 480 (2009).

review the challenged building permit. However, as we explain in more detail below, the ministerial decision exclusion in ORS 197.015(10)(b)(A) is separate and distinct from the building permit exclusion in ORS 197.015(10)(b)(B). We first briefly describe the history of the two jurisdictional exclusions in ORS 197.015(10)(b) before turning to the jurisdictional analysis.

In 1983, the legislature first enacted a single exception to LUBA's jurisdiction for a "ministerial decision." As enacted in 1983, ORS 197.015(10)(b) provided that a "[l]and use decision":

> "Does not include a ministerial decision of a local government made under *clear and objective standards* contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government under ORS 215.402 to 215.422 or 227.160 to 227.180." (Emphasis added.)

In 1989, the legislature amended ORS 197.015(10)(b) to delete the previous version of ORS 197.015(10)(b), quoted above, and replace it with language that provided that a "[l]and use decision":

> "Does not include a decision of a local government:
>
> "(A) Which is made under *land use standards which do not require interpretation or the exercise of factual, policy or legal judgment*;
>
> "(B) Which approves, approves with conditions or denies a subdivision or partition * * * located within an urban growth boundary where the decision is consistent with land use standards; or
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> "(C) Which approves or denies a building permit made under *land use standards which do not require*

> *interpretation or the exercise of factual, policy or legal judgment.*" (Emphases added.)

In 1989, then, the exclusions in ORS 197.015(10)(b)(A) and (C) contained identical language regarding the types of land use standards that would trigger an exclusion from LUBA's jurisdiction.

Then in 1991, the legislature again amended ORS 197.015(10)(b) to its current form, which provides that a "[l]and use decision":

> "Does not include a decision of a local government:
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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;
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards; [or]
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> "(C) That is a limited land use decision[.]"[5]

By way of this 1991 amendment, the legislature enacted a different test for the types of standards that would trigger the exclusion from LUBA's jurisdiction for a building permit—one "issued under clear and objective land use standards." Notably, the legislature retained the exception for local government decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment," with only a slight modification to that exclusion to remove the word "factual" from the provision. ORS 197.015(10)(b)(A). To us, this signifies, at a minimum, that the legislature intended local government

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[5] The 1991 legislature created for the first time the "[l]imited land use decision" in ORS 197.015(12).

decisions that approve or deny a building permit be analyzed under a different test than the test for determining whether the ministerial decision exclusion applies. The legislature excluded a specific type of local government decision, a building permit decision, from LUBA's jurisdiction if the building permit was approved or denied "under *clear and objective* land use standards." ORS 197.015(10)(b)(B) (Emphasis added.) Conversely, the legislature largely retained the existing exclusion for the more general and nonspecific category of local government decisions "made under land use standards that do not require interpretation or the exercise of policy or legal judgment." ORS 197.015(10)(b)(A). That the legislature enacted two differently worded provisions suggests that the legislature intended the analysis of "land use standards" that are applied in the context of a generic local government decision to be distinct from the analysis of the "land use standards" that are applied in the context of a decision "approv[ing] or deny[ing] a building permit." ORS 197.015(10)(b)(B); *see, e.g.*, *State v. Newell*, 238 Or App 385, 392, 242 P3d 709 (2010) ("If the legislature uses different terms in statutes, we generally will assume 'that the legislature intends different meanings' for those terms." (quoting *Dept. of Transportation v. Stallcup*, 341 Or 93, 101, 138 P3d 9 (2006)).

To the extent some of our prior decisions have conflated or collapsed the two analyses into a single analysis, we now question whether those decisions accurately interpreted ORS 197.015(10)(b)(A) and (B) as separate and distinct provisions. While we have been imprecise about this distinction, the legislature's

decision in 1991 to create a new express exemption from LUBA's jurisdiction for building permits "issued under clear and objective land use standards" indicates that the legislature did not consider building permits to be a category of land use decisions that were to be evaluated to determine whether the land use standards that apply to them require "interpretation or the exercise of policy or legal judgment."[6]

We conclude that statutory distinction reflects a recognition that building permits are substantively different from more generic land use decisions, and that the legislature intended that LUBA's jurisdiction over building permit decisions would be (1) limited and (2) evaluated under a different standard. Land use decisions typically *are* subject to LUBA's jurisdiction except in limited instances where the land use standards that apply to the decision do "not require interpretation or the exercise of policy or legal judgment." However, local governments issue a great number of building permits on a daily and weekly basis, and the vast majority of those building permits are not subject to our jurisdiction, except in those limited situations where the land use standards under which a building permit is issued are not "clear and objective."

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[6] We have reviewed the available legislative history regarding the enactment of ORS 197.015(10)(b)(B), and it does not reveal any particular stated reason for creating or revising the building permit exclusion.

B. The Standards That the City Applied

In determining whether a building permit is excluded from our jurisdiction under ORS 197.015(10)(b)(B), the question we must answer is whether *the land use standards* under which it was issued are "clear and objective." We have held in the context of construing that phrase in ORS 197.015(10)(b)(B) that in order to make that determination, we must determine whether the standards under which the permit was issued are "ambiguous." *See Richmond Neighbors v. City of Portland,* 66 Or LUBA 464, 466 (2012) (citing *Tirumali v. City of Portland,* 169 Or App 241, 246, 7 P3d 671 (2000), *rev den*, 331 Or 674, 21 P3d 06 (2001)). The applicable land use regulations are ambiguous if they "can plausibly be interpreted in more than one way." *Id.*

In addition, in construing the phrase "clear and objective" as it is used in another land use statute—the needed housing statute that is currently at ORS 197.307(4), which requires local governments to apply only standards that are "clear and objective" to an application for needed housing—we have held that in general, approval standards are "clear and objective" if they do not impose "subjective, value-laden analyses that are designed to balance or mitigate impacts[.]"[7] *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P 2d 685, *rev den*, 328 Or 549 (1999).

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[7] At the time that the legislature enacted ORS 197.015(10)(b)(B) (1991), ORS 197.307(6) (1989) provided that for needed housing "[a]ny approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and shall not have the effect, either in themselves or

PCC 33.296.040.A, quoted above, required BDS to apply the "development standards for uses allowed by right in the underlying [EX] zone."[8] BDS determined that the building permit application satisfied each of the development standards in the EX zone. Petitioner does not challenge the BDS determination that the building permit application satisfied the EX zone development standards; neither does petitioner argue that the EX zone standards are not clear and objective. Rather, petitioner argues that there is ambiguity in other standards that the city was required but failed to apply to the decision to issue the building permit.

C. Other Land Use Standards

In relevant part, ORS 197.015(10) defines "[l]and use decision" as a final local government decision that "concerns the adoption, amendment or application of" a comprehensive plan provision or land use regulation. A local government decision "concerns" the application of a plan provision or land use regulation if (1) the decision maker was required by law to apply its plan or land use regulations as approval standards, but did not, or (2) the decision maker in

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cumulatively, of discouraging needed housing through unreasonable cost or delay."

[8] PCC 33.296.040.A provides:

> "New development or alterations to existing development are prohibited, unless consistent with the development standards for uses allowed by right in the underlying zone or required by applicable building, fire, health, or safety codes."

fact applied plan provisions or land use regulations. *Bradbury v. City of Independence*, 18 Or LUBA 552, 559 (1989). Here, the city in fact applied some land use regulations to the building permit application, and petitioner and the city do not dispute that the challenged decision "concerns" the application of those land use regulations. ORS 197.015(10)(a). However, petitioner argues that the city was required to apply additional land use regulations that petitioner argues require "the exercise of * * * legal judgment."[9] Petitioner's Response to Motion to Dismiss 4–6.

A similar circumstance was presented in *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004). In *Jaqua*, in order to resolve the jurisdictional question presented by petitioners—whether the city should have applied comprehensive plan provisions in making its decision to issue a land and drainage alteration permit, and therefore whether the decision was a "land use decision"—we were required to resolve the merits of the petitioners' argument that the city was required but did not apply several provisions of the city's comprehensive plan.[10]

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[9] As we explain above, while we question whether the ministerial decision exclusion applies in the context of a challenge to a building permit, we assume for purposes of this opinion that petitioner may argue that the land use standards that the city was required but failed to apply require "interpretation or the exercise of policy or legal judgment" and thus the decision is not subject to the ministerial decision exclusion. ORS 197.015(10)(b)(A).

[10] We explained:

Here, in order to resolve the jurisdictional question of whether the building permit exclusion applies, we must resolve the merits of petitioner's argument that the city should have applied other land use standards that petitioner argues, and the city does not dispute, require "the exercise of * * * legal judgment."

We emphasize that the jurisdictional analysis under ORS 197.015(10)(b)(B) focuses on the applicable land use standards, and not on the arguments presented by a party that the city either does or does not address in issuing a decision. An opponent to development cannot, through comments during the process that leads to the challenged decision, convert a decision that is subject to the building permit exclusion into a land use decision that is subject to LUBA's jurisdiction. Stated differently, a local government's express or implicit decision that standards that are not clear and objective do not apply to

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> "It is awkward at least that, in order to resolve that question and the jurisdictional issue in the present case, we must also effectively determine the merits of petitioners' assignment of error, which argues that GRP policies 13.0 and 13.3 apply to prohibit the city from approving 'development' prior to master plan approval. However, given the statutory definition of 'land use decision' and the nature of petitioners' assignment of error, that awkwardness is inescapable. *See Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 806 P2d 162 (1991) (LUBA must decide the merits of whether a challenged subdivision is consistent with applicable land use standards in order to rule on a motion to dismiss, under *former* ORS 197.015(10)(a)(B), which excluded from LUBA's jurisdiction approval or denial of a subdivision that is consistent with land use standards)." 46 Or LUBA at 574–75 n 5.

the building permit decision does not mean that the local government has engaged in an interpretational exercise that converts the building permit decision into a land use decision subject to LUBA's review. The focus of the building permit exclusion is on the applicable land use standards, and not the local government's response to arguments made during the proceedings that led to the issuance (or denial) of the building permit. Otherwise, every building permit decision could be a land use decision.

1. PCC 33.296.010 - Purpose Statement for PCC Title 33 Chapter 296

PCC 33.296.010 is entitled "Purpose" and states:

> "This chapter allows short-term and minor deviations from the requirements of the zoning code for uses that are truly temporary in nature, will not adversely impact the surrounding area and land uses, and which can be terminated and removed immediately. Temporary uses have no inherent rights within the zone in which they locate."

Petitioner first argues that the city was required to make a threshold determination as to whether the purpose statement includes mandatory approval criteria, andin so doing, was required to exercise "legal judgment." Petition for Review 2. Petitioner also argues that the purpose statement is an applicable approval criterion that requires "interpretation or the exercise of policy or legal judgment," and accordingly, the city was required to determine whether the proposed Center is "truly temporary in nature," whether it will "adversely impact the surrounding area," and whether it "can be terminated and removed immediately." Record 4.

The findings adopted in support of the decision conclude that PCC 33.296.010 is not an applicable approval criterion and, in the alternative, that even if it is an applicable approval criterion, the proposed Center satisfies it. Record 4. The city responds that by its terms, and pursuant to PCC 15.04.040.F, the purpose statement is not an applicable approval criterion, and accordingly, any findings that BDS adopted in support of the building permit are "not essential to the building permit Decision." Response Brief 11, 13–14. We agree.

First, while the particular wording can lead to different results, purpose statements are generally not applied as approval criteria. *Jones v. City of Grants Pass*, 64 Or LUBA 103, 110 (2011); *SEIU v. City of Happy Valley*, 58 Or LUBA 261, 271–72, *aff'd*, 228 Or App 367, 208 P3d 1057, *rev den*, 347 Or 42 (2009); *Tylka v. Clackamas County*, 22 Or LUBA 166, 172 (1991). Petitioner has not pointed to anything in the language of PCC 33.296.010 that suggests that it is an applicable approval criterion. Under PCC 15.04.040.F "[a] housing emergency is a health and safety emergency under [PCC] Subsection 33.296.030.G. and *mass shelters are allowed as temporary activities for the duration of the emergency subject to the standards in Section 33.296.040.*" (Emphasis added.) PCC 15.04.040.F does not require the city to evaluate the proposed Center for compliance with the purpose statement in PCC 33.296.010 as a prerequisite to issuing the building permit. It is perhaps unfortunate that BDS adopted alternative findings that the building permit was consistent with the purpose statement, but those findings do not convert an otherwise clearly inapplicable purpose statement

into an ambiguous purpose statement. Petitioner's argument that the purpose statement in PCC 33.296.010 is an applicable approval criterion is inconsistent with the express language in PCC 15.04.040.F.

2. PCC 33.296.030.G

PCC 33.296.030 lists the temporary activities that are, in some cases, allowed in specified zones in the city. PCC 33.296.030.G allows:

> "Temporary activities and structures needed as the result of a natural disaster or other health and safety emergencies are allowed for the duration of the emergency. Temporary activities include food, water, and equipment distribution centers, warming or cooling shelters, and triage stations."

Petitioner next argues that, even if the Center is a "temporary activit[y]" within the meaning of PCC 33.296.030.G, the only type of "temporary activit[y] and structure[]" described in PCC 33.296.030.G that is allowed pursuant to a housing emergency declared under PCC 15.04.040.F is a "mass shelter." PCC Chapter 33.910 defines "Mass Shelter" as:

> "A structure that contains one or more open sleeping areas, or is divided only by non-permanent partitions, furnished with cots, floor mats, or bunks. Individual sleeping rooms are not provided. The shelter may or may not have food preparation of shower facilities. The shelter is managed by a public or non-profit agency to provide shelter, with or without a fee, on a daily basis."

Petitioner does not argue that the design or intended use of the Center fails to satisfy the definition of "[m]ass [s]helter" at PCC 33.910. Rather, petitioner argues that the city was required to determine whether the proposed Center qualifies as a mass shelter given that the application states that the Center would

allow stays of up to 120 days. According to petitioner, the Center does not satisfy the city's definition of "[m]ass [s]helter" at PCC 33.910 because it would allow stays of between 60 and 120 nights. Petition for Review 17–18. Petitioner argues that "[t]enancy in a mass shelter is limited to periods of less than a month." *Id.* In support of its argument, petitioner relies on the description of the "Community Service Use" category set out in PCC 33.920.420.[11] *Id.* However, petitioner has not explained why PCC 33.920.420 has any bearing on or applies to the building permit application as an applicable approval standard.

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[11] PCC 33.920.420 "Community Services" provides as relevant here:

> "A. Characteristics. Community Services are uses of a public, nonprofit, or charitable nature providing a local service to people of the community. Generally, they provide the service on the site or have employees at the site on a regular basis. The service is ongoing, not just for special events. Community centers or facilities that have membership provisions are open to the general public to join at any time, (for instance, any senior citizen could join a senior center). The use may provide mass shelter or short term housing where tenancy may be arranged for periods of less than one month when operated by a public or non-profit agency. The use may also provide special counseling, education, or training of a public, nonprofit or charitable nature."
>
> "D. Exceptions.
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> " * * * * *
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> "3. Uses where tenancy is arranged on a month-to-month basis, or for a longer period are residential, and are classified as Household or Group Living."

We reject petitioner's argument that the city was required to determine whether the Center qualifies as a "[m]ass [s]helter" allowed under PCC 15.04.040.F based on petitioner's argument that PCC 33.920.420 limits tenancy to stays of 30 days. Nothing in the definition of "[m]ass [s]helter" at PCC 33.910 limits stays to tenancies of 30 days or less. More significantly, PCC 15.04.040.F expressly allows mass shelters "as temporary activities *for the duration of the emergency* subject to the standards in Section 33.296.040." (Emphasis added.)

3. Central City Plan District Standards

PCC 33.296.040.A prohibits new development "unless consistent with the development standards for uses allowed by right in the underlying zone * * *."[12] As explained above, the city determined that because the EX zone was "the underlying zone," "the development standards for uses allowed by right" in that zone were the land use standards applicable to the challenged building permit. Petitioner argues that PCC 33.296.040.A is ambiguous because it can plausibly be interpreted in more than one way. Petitioner argues that "the development standards" are the ones that apply to uses that are set forth and "allowed by right in the underlying zone." Petitioner's Response to Motion to Dismiss 6–7.

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[12] PCC 33.296.040.A provides:

> "New development or alterations to existing development are prohibited, unless consistent with the development standards for uses allowed by right in the underlying zone or required by applicable building, fire, health, or safety codes."

Petitioner reasons that the city interpreted the provision to ignore the phrase "for uses allowed by right." Petitioner argues that the "for" preceding that phrase suggests that other development standards, other than those in the underlying zone (in this case, those in the Central City Plan District (CCPD)) could also apply.

As we have recognized in the context of the needed housing statutes, "at least the illusion of a lack of clarity can be created in even the clearest of statutory language." *Home Builders Association v. City of Eugene,* 59 Or LUBA 116, 132 (2009). Likewise, in this instance, with enough grammatical maneuvering it is possible to fashion an interpretation that could potentially lead to an interpretation other than the city's. However, we disagree that petitioner's alternative interpretation renders PCC 33.296.040.A ambiguous. We also disagree that the city has "omitted" language to reach its conclusion. In fact, petitioner's reading would require the insertion of qualifying language so that it would apply to uses "that are set forth in and allowed by right in the underlying zone" *and any applicable overlay and plan district* – thereby allowing consideration of development standards that are not required by the underlying zone but are required by, in this case, the Central City Plan District.

The plain language of the code provision requires consistency with the underlying zone. Not only is the CCPD not the underlying zone, the CCPD is not itself a "zone" at all. PCC 33.500 explains the distinction between zones and plan districts. Under PCC 33.500.010:

> "Plan Districts address concerns unique to an area when other zoning mechanisms cannot achieve the desired results. * * * Plan districts provide a means to modify zoning regulations for specific areas defined in special plans or studies. Each plan district has its own nontransferable set of regulations. This contrasts with base zone and overlay zone provisions which are intended to be applicable in large areas or in more than one area."

PCC 33.296.040.A directs the city to apply the development standards in "the underlying zone." Regardless of whether other zones or overlay zones could otherwise apply in other situations, on its face, the plain language of PCC 33.296.040.A expressly requires the city to apply the development standards for uses allowed by right in the EX zone. Petitioner's interpretation would extend the scope of the requirements beyond those required under the plain language of the provision.

Finally, petitioner argues that PCC 33.500.040.A applies to the building permit application and required the city to determine whether the CCPD development standards were in conflict with those of the underlying zone and, if so, which standards controlled. PCC 33.500.040 provides that "[t]he specific regulations of the base zone, overlay zones, or other regulations of this Title apply unless than plan district provides other regulations for the same topic." According to petitioner, the city was required to evaluate the proposed Center against the CCPD development standards.

As discussed above, PCC 33.296.040.A requires that the city apply only the development standards of *the underlying zone*. The CCPD is not the

underlying zone, and is not a zoning district at all. Therefore, the development standards that apply to properties in that district do not apply.

D. Conclusion

Petitioner does not argue that the EX zone standards that the city applied in approving the building permit are not "clear and objective." We have rejected above petitioner's arguments that the city was required but failed to apply other land use regulations, other than the development standards for the EX zone that are required to be applied pursuant to PCC 33.296.040.A. Accordingly, we agree with the city that the land use standards applicable to challenged building permit are clear and objective, and that the city's decision is subject to the building permit exclusion from LUBA's jurisdiction.

MOTION TO TRANSFER

Petitioner requests that if LUBA determines that the challenged building permit is not a land use decision, the decision be transferred to circuit court pursuant to OAR 660-010-0075(11)(b).[13] Petitioner's motion to transfer is granted.

The appeal is transferred to Multnomah County Circuit Court.

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[13] OAR 661-010-0075(11)(b) provides in part:

> "A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed."