

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 RICHMOND NEIGHBORS FOR RESPONSIBLE
5 GROWTH, SUSAN LEVINE, JUDAH GOLD-MARKEL,
6 RICHARD MELO, CIARAN LITTLE, AMY LITTLE,
7 LINDA MLYNSKI, JULIE FITZWATER,
8 ELIZABETH VARGAS and KATHY LAMBERT,
9 *Petitioners,*

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11 vs.

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13 CITY OF PORTLAND,
14 *Respondent,*

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16 and

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18 37th STREET APARTMENTS, LLC
19 and SK HOFF CONSTRUCTION,
20 *Intervenors-Respondents.*

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22 LUBA No. 2012-061

23 ORDER ON MOTION TO DISMISS

24 Petitioners appeal a building permit that approves development of “a 52,307 sq. ft.
25 four-story apartment building with 3,000 sq. ft. of commercial tenant space on the ground
26 floor.” Notice of Intent to Appeal 1. Intervenors-Respondents move to dismiss this appeal,
27 arguing that the challenged building permit is not a land use decision and is not subject to
28 LUBA review.

29 **A. The Relevant Statutes**

30 It is petitioner’s burden to establish that LUBA has jurisdiction to review the appealed
31 building permit. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985). As
32 relevant here, LUBA’s jurisdiction is limited to *land use decisions*. ORS 197.825(1). As
33 defined by ORS 197.015(10)(a), a decision is a land use decision if it is a final city decision
34 that “concerns the * * * application of * * * [a] land use regulation.” There does not appear
35 to be any dispute that the challenged decision is a “final” city decision that applies Portland

1 City Code (PCC) Chapter 33, the Portland Zoning Code, which is a “land use regulation.”
2 But even if a decision falls within the ORS 197.015(10)(a) definition of land use decision,
3 some decisions that would otherwise be land use decisions are exempted from the statutory
4 definition of land use decision if they are governed by (1) standards that do not require the
5 exercise of legal or policy judgment or (2) clear and objective standards. ORS
6 197.015(10)(b)(A) and (B).¹ The Court of Appeals has described the inquiry that is required
7 to determine if a decision that would otherwise qualify as a “land use decision” is exempted
8 from the statutory definition of that term by ORS 197.015(10)(b)(A) and (B) as follows:

9 “We emphasize that our inquiry here is * * *only to determine whether [the
10 applicable land use regulations] can plausibly be interpreted in more than one
11 way. If so, they are ambiguous, and it would follow that the relevant city
12 provisions are not ‘clear and objective,’ ORS 197.015(10)(b)(B), and that they
13 cannot be applied without interpretation, ORS 197.015(10)(b)(A); *see St. John*
14 *v. Yachats Planning Commission*, 138 Or App 43, 47, 906 P2d 304 (1995).
15 Consequently, if the terms are ambiguous, the city’s application of the
16 provisions would constitute ‘land use decisions’ that fall within LUBA’s
17 jurisdiction, and a remand for LUBA to decide the merits of the appeal would
18 be necessary.” *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761
19 (2000), *rev den* 331 Or 674, 21 P3d 96 (2001).

20 Under the inquiry required by *Tirumali*, the building permit that is the subject of this
21 appeal does not qualify for either of the exceptions set out in ORS 197.015(10)(b)(A) and (B)
22 if the Portland Zoning Code standards that the city applied in this matter are ambiguous.
23 The applicable Portland Zoning Codes standards are ambiguous, if they “can plausibly be
24 interpreted in more than one way.” 169 Or App at 246.

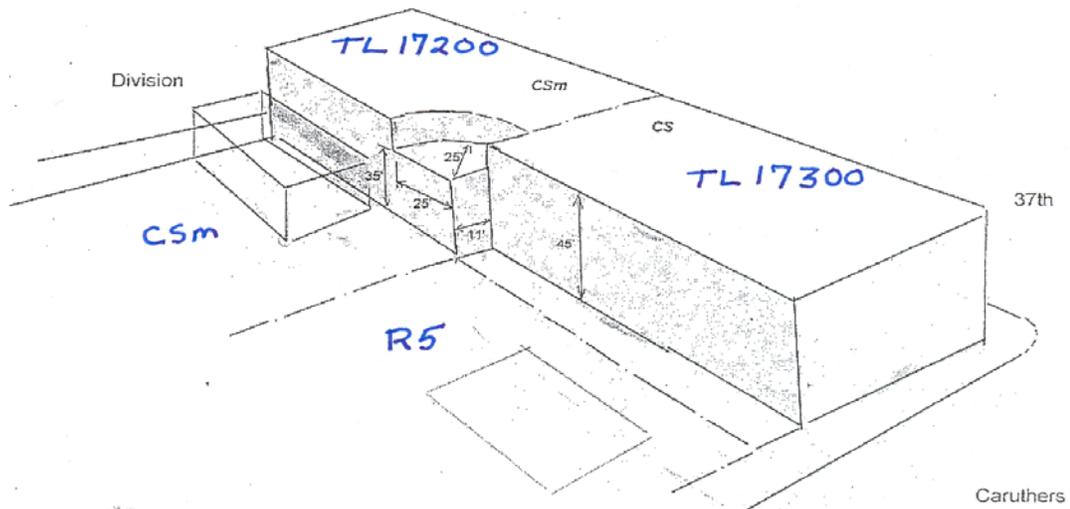
¹ ORS 197.015(10)(b) provides that the ORS 197.015(10)(a) definition of land use decision does not include a local government decision:

- “(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[.]”

1 **B. Facts**

2 The subject property is bordered by SE 37th Avenue, SE Caruthers Street and SE
3 Division Street. The subject property is made up of two tax lots, both of which are zoned
4 Storefront Commercial (CS). Tax lot 17200, like the lots to the west and east along SE
5 Division Street, is subject to a Main Street Corridor overlay zone.² Tax lot 17300 lies
6 between tax lot 17200 and SE Caruthers Street. Tax lot 17200 is not subject to the Main
7 Street Corridor overlay zone. A drawing from the record is included below with some added
8 notations to show the orientation of tax lots 17200 and 17300 and an outline of the proposed
9 building.³

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² 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.

³ The drawing is not oriented with north to the top of the drawing. SE 37th runs north and south along its frontage with Tax lots 17200 and 17300. SE Division Street is south of SE Caruthers Street. Therefore the top of the drawing is approximately south and the bottom of the map is approximately north. Tax lot 17200 is designated CSm, to reflect its Commercial Storefront (CS) base zone and the Main Street Corridor (m) overlay zone. Tax lot 17300 is designated CS to reflect its Commercial Storefront (CS) base zone. The property adjoining the side of the site away from SE 37th is zoned CSm along Tax lot 17200 and zoned R5 along Tax lot 17300.

1 **C. The Main Street Corridor Overlay Zone**

2 Petitioners contend that at least two Main Street Corridor overlay zone standards are
3 capable of more than one plausible interpretation. We limit our discussion to the height limit
4 imposed by Portland City Code (PCC) 33.460.310(B).

5 The Main Street Corridor overlay zone applies along three different city streets. The
6 regulations that apply specifically in the Main Street Corridor overlay zone along SE Division
7 Street appear at PCC 33.460.310. PCC 33.460.310(B)(1) provides as follows:

8 “B. Height limits for sites abutting R5 – R2.5 zones.

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

12 The ambiguity in PCC 33.460.310(B)(1) arises from its use of the defined term “site,”
13 and its failure to expressly anticipate and address how to measure the 35-foot maximum
14 building height for a site that is partially within the Main Street Corridor overlay zone and
15 partially outside the Main Street Corridor overlay zone.

16 Tax lots 17200 and 17300 are a single “ownership.”⁴ Under the circumstances
17 presented here, a “site is an ownership.”⁵ Therefore, tax lots 17200 and 17300 are a single
18 “site,” even though only the tax lot 17200 portion of the site is subject to the Main Street
19 Corridor overlay zone. Referring to the drawing included earlier in this order, Petitioners
20 contend that because tax lots 17200 and 17300 are a single *site*, and because the PCC
21 33.460.310(B)(1) applies to “the portion of a *site* within 25 feet of a site zoned R5,”
22 petitioners contend the 35-foot height limit applies to the portions of both tax lot 17200 and
23 17300 “within 25 feet” of the R5 zoned lot that adjoins the CSm and CS zoned site.

⁴ 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.

⁵ As defined by PCC 33.910, with exceptions that do not apply here, a “site is an ownership * * *.”

1 Referring to the drawing included earlier in this order, the 35-foot height limit would apply to
2 the semi-circular portion of tax lot 17200 within 25 feet of tax lot 17200's common corner
3 with the R5 zoned site, as shown on the diagram. All parties agree the 35-foot height limit
4 applies to that semi-circular portion of tax lot 17200. But under petitioners' interpretation of
5 PCC 33.460.310(B)(1), the 35 foot height limit would also apply to the portion of tax lot
6 17300 that is within 25 feet of the adjoining R5-zoned lot. Although the drawing shows the
7 proposed building set back 11 feet on tax lot 17300 from the R5 zoned site, the building is 45
8 feet tall. According to petitioners, the 35-foot height limit applies to the "site" and tax lot
9 7300 is part of the site even though tax lot 17300 does not lie within the Main Street Corridor
10 overlay zone. We understand petitioners to contend that the portion of the building on tax lot
11 17300 within 25 feet of the R5 zoned adjoining site must comply with the 35-foot height
12 limit, and as shown on the drawing and approved by the city it does not comply.

13 The city apparently agreed with intervenors-respondents that the PCC
14 33.460.310(B)(1) 35-foot height limit applies only to the part of the site that is subject to the
15 Main Street Corridor overlay zone, which is tax lot 17200. Under the city's and intervenors-
16 respondent's interpretation of PCC 33.460.310(B)(1), the 35-foot height limit only applies to
17 the semi-circular portion of tax lot 17200 shown on the diagram. Intervenors-respondents
18 find authority for limiting application of the 35-foot height reduction to the portion of the site
19 that is subject to the Main Street Corridor overlay zone in an introductory section of the
20 Portland Zoning Code that is entitled "How to Use this Document," under a heading entitled
21 "Determining the Zoning Regulations for a Specific Site," which provides;

22 "To determine the zoning regulations applicable to a site, you must first find
23 the site on the Official Zoning Maps. The appropriate map will show the base
24 zone that is applied to the site. It will also show if the site is subject to any
25 overlay zones or plan districts, and if the site contains a historical landmark or
26 recreational trail. You then look up all the corresponding regulations. * * *"

27 The above quoted language does not expressly resolve the ambiguity that is present in
28 PCC 33.460.310(B)(1). Following the instructions in the above-quoted text, one would

1 discover that the PCC 33.460.310(B)(1) 35-foot height limit applies to the site in this case.
2 This is because a portion of the site is subject to the Main Street Corridor overlay zone, the
3 site is adjacent to an R5 zoned site and therefore the site is subject to the PCC
4 33.460.310(B)(1) 35-foot height limit. But the above-quoted text, like PCC
5 33.460.310(B)(1), does not expressly state how to apply the PCC 33.460.310(B)(1) 35-foot
6 height limit to a site that is partially within the Main Street Corridor overlay zone and
7 partially outside the Main Street Corridor overlay zone. While it may be plausible to infer
8 from the above-quoted text that the PCC 33.460.310(B)(1) 35 foot height limit should only
9 apply to the portion of a site that lies within the Main Street Corridor overlay zone, there is
10 nothing in the above-quoted language that would render petitioners' interpretation of PCC
11 33.460.310(B)(1) to apply the 35 foot height limit to the entire site implausible.⁶

12 The ambiguity that the Court of Appeals found in *Tirumali* turned on the meaning of
13 the word “finished” in “finished grade.” PCC 33.460.310(B)(1) is at least as ambiguous as
14 the meaning of “finished grade,” because PCC 33.460.310(B)(1) applies to “sites” and
15 neither PCC 33.460.310(B)(1) nor any other provision in the PCC that is cited to us specifies
16 how to apply PCC 33.460.310(B)(1) to a site that is partially within the Main Street Corridor
17 overlay zone and partially outside the Main Street Corridor overlay zone. Therefore, under
18 *Tirumali*, PCC 33.460.310(B)(1) is ambiguous, and the statutory exclusions from the
19 definition of “land use decision” at ORS 197.015(10)(b)(A) and (B) do not apply.

20 **D. Needed Housing Statutes**

21 Finally, intervenors-respondents contend “the proposed development qualifies as
22 ‘needed housing’ under ORS 197.307 and is subject only to clear and objective standards,

⁶ We emphasize here that we need not and do not determine which of those interpretations, or other plausible interpretations of PCC 33.460.310(B)(1) if they exist, is correct.

1 conditions and procedures regulating the development of needed housing on buildable lands.
2 ORS 197.307(4).” Intervenor[s]-Respondents’ Motion to Dismiss 9.⁷

3 Because intervenors-respondents follow the above comment only with arguments that
4 the standards the city applied in this case are clear and objective, it is not clear to us what if
5 anything their citation to ORS 197.307(4) was intended to add to their arguments that all the
6 standards the city applied in issuing the building permit, including PCC 33.460.310(B)(1),
7 require no interpretation and are clear and objective. Under ORS 197.825(1) and
8 197.015(10)(b)(A) and (B), *see* n 1, the jurisdictional issue is whether the decision was
9 “made under land use standards that do not require interpretation or the exercise of policy or
10 legal judgment” or was “approve[d] or denie[d] * * * under clear and objective land use
11 standards.” It is undisputed that the challenged decision was “approved under” and was
12 “made under” PCC 33.460.310(B)(1). As we have already explained, because we disagree
13 with intervenors-respondents and conclude that PCC 33.460.310(B)(1) is ambiguous, it
14 required “interpretation;” it is not “clear and objective;” and it follows that the ORS
15 197.015(10)(b)(A) and (B) exemptions for decisions that (1) do not require interpretation and
16 (2) are approved under clear and objective standards do not apply here.

17 Intervenor[s]-respondents’ motion to dismiss is denied.

18 The deadline for filing the petition for review in this appeal is 21 days from the date
19 of this order. The deadline for filing the response briefs is 42 days from the date of this
20 order. The deadline for LUBA to issue its final opinion and order is 77 days from the date of
21 this order.

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⁷ ORS 197.307(4) provides, in part, “a local government may adopt and apply only clear and objective standard, conditions, and procedures regulating the development of needed housing on buildable land * * *.” A definition of “needed housing” is set out at ORS 197.303. Intervenor[s]-respondents make no attempt to show that the proposal falls within that definition.

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Dated this 28th day of November, 2012.

Michael A. Holstun
Board Member