

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

3  
4                   ROBERT BUYS, SUSAN BUYS,  
5                   JEFFREY BOWMAN and PATRICIA BOWMAN,  
6                   *Petitioners,*

7  
8                   vs.

9  
10                  CITY OF PORTLAND,  
11                  *Respondent,*

12  
13                  and

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15                  EVERETT CUSTOM HOMES, INC.  
16                  and EMERIO DESIGN, LLC,  
17                  *Intervenors-Respondents.*

18  
19                  LUBA No. 2014-007

20  
21                  ORDER

22                  Petitioners appeal a decision by the city’s Public Works Administrative  
23                  Appeal Panel (PWAAP) waiving sidewalk corridor improvement and right-of-  
24                  way dedication provisions.

25                  **FACTS**

26                  In July, 2013, intervenors-respondents (intervenors) attended a pre-  
27                  application conference related to their proposal for (1) a zoning map  
28                  amendment from R-7 to R-5 and (2) a land division to create two “through  
29                  lots,” for property located adjacent to S.E. Woodstock Boulevard and S.E.  
30                  Moreland Lane.<sup>1</sup> Intervenors’ eventual intent is to construct two new

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<sup>1</sup> S.E. Moreland Lane is a Local Service Street.

1 dwellings on the two new lots, with driveways and/or garages that are accessed  
2 from S.E. Moreland Lane.<sup>2</sup> Petitioners are adjacent property owners.

3 The pre-application conference facilitator provided a written response to  
4 the pre-application conference that contains the following:

5 **“B. STREET CLASSIFICATION AND CONFIGURATION**

6 “ \* \* \* \* \*

7 “For a site along a classified Local Service street (SE Moreland  
8 Ln) and zoned R5 (presumably), *the City’s Pedestrian Design*  
9 *Guide recommends* an 11-ft wide sidewalk corridor comprised of a  
10 0.5-ft curb/4-ft wide furnishing zone/6-ft wide sidewalk/.05-ft  
11 frontage zone. The site’s existing frontage conditions along SE  
12 Moreland do not satisfy *this standard*.

13 “1. In relation to the Building Permits for the new homes on the  
14 eventual lots that will be created in association with the  
15 expected land division request, *the applicant is advised that*  
16 *the aforementioned 11-ft wide sidewalk corridor will need*  
17 *to be constructed*.

18 “2. To accommodate *the required frontage improvements*, a 9-ft  
19 dedication of property for right-of-way purposes *will be*  
20 *required*. Said dedication amount will need to be confirmed  
21 by a survey.” Record 16 (Emphases added.)

22 The pre-application conference response also includes the following:

23 “The applicant has the opportunity to challenge PBOT’s frontage  
24 improvement requirements if he objects to them or to propose an  
25 alternative frontage improvement solution. The applicant may  
26 elect to appeal the aforementioned r.o.w. improvements via the  
27 Public Works Administrative Appeal process. \* \* \*” Record 19.

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<sup>2</sup> Intervenors subsequently applied for a zone change and land division and a staff report was issued on January 3, 2014, prior to a January 15, 2014 hearing on the applications for a zone change and land division.

1 Pursuant to Portland City Code (PCC) 17.06.050, intervenors  
2 subsequently filed a Public Works Administrative Appeal Request Form that  
3 requested a waiver of the 9-foot right of way dedication and the 11-foot wide  
4 sidewalk corridor provisions referred to in the pre-application conference  
5 response. Record 9-14.

6 On November 20, 2013, the PWAAP issued its decision approving the  
7 request. The decision provides:

8 “Reasons/Comments/Conditions: The appellant has requested  
9 relief from the requirement to construct sidewalk and dedicate on  
10 SE Moreland Lane. The public works administrative committee  
11 supports this appeal. SE Moreland is a local service street at this  
12 location and is a dead end street with only a few residences taking  
13 access. This street can be considered a shared roadway.” Record  
14 2.

15 On January 21, 2014, petitioners filed their appeal of the PWAAP decision.

## 16 **JURISDICTION**

17 At the outset, we note that the posture in which this appeal comes to  
18 LUBA is somewhat unique, because the challenged decision resulted from a  
19 written response the city sent to intervenors after a pre-application conference  
20 on intervenors’ proposed project was held. That post pre-application  
21 conference response took the position that if and when the applicant applied for  
22 future building permits for the intended single family dwellings to be  
23 constructed, the applicant would be required to construct sidewalk corridor  
24 improvements and dedicate right of way. The challenged PWAAP decision  
25 waives the requirement for improvements and dedications, when and if the  
26 applicant applies for building permits. The city apparently allows persons who  
27 plan to seek building permits in the future to first seek a waiver of future  
28 building permit conditions, such as conditions requiring the applicant to

1 construct sidewalk improvements and dedicate right of way. That waiver  
2 procedure resulted in the challenged PWAAP decision.

3 **A. Statutory “Land Use Decision”**

4 ORS 197.015(10)(a) defines “land use decision” in relevant part as a  
5 final decision of a local government that concerns the application of a  
6 statewide planning goal, comprehensive plan provision or land use regulation.  
7 The city and intervenors (respondents) first contend that the challenged  
8 decision is not a “land use decision” because in granting a waiver of city  
9 sidewalk corridor and right of way dedication provisions, the city did not apply  
10 and was not required to apply any statewide planning goal, comprehensive plan  
11 provision or land use regulation.<sup>3</sup> Petitioners provide several theories for why  
12 the challenged decision is a “land use decision” that we address below.

13 **1. Portland Zoning Code**

14 “Land use regulation” is defined in ORS 197.015(11) as “any local  
15 government zoning ordinance, land division ordinance \* \* \* or similar general  
16 ordinance establishing standards for implementing a comprehensive plan.” In  
17 arguing that the challenged decision is a “land use decision” we understand  
18 petitioners to first argue that the city was required to but failed to apply two  
19 provisions of PCC Title 33, the city’s zoning code, that are land use  
20 regulations. That is so, we understand petitioners to argue, because the cited

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<sup>3</sup> A decision “concerns” the application of a goal, plan provision or land use regulation if the local government applied, or should have applied, the goal, provision or regulation in making the decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

1 provisions are identified in the pre-application conference response to the  
2 applicant.<sup>4</sup> Petition for Review 3; Record 17.

3 We disagree that the PWAAP was required to apply the PCC Title 33  
4 provisions cited in the pre-application conference response to its decision  
5 waiving the sidewalk and right of way dedication recommendations. Although  
6 PCC 33.641.020 and PCC 33.855.050.B are “land use regulations” as defined  
7 in ORS 197.015(11), petitioners have not established that they are applicable  
8 criteria for PWAAP’s decision to waive sidewalk improvement and right of  
9 way dedication provisions. The pre-application conference response identifies  
10 PCC 33.641.020 and PCC 33.855.050.B as criteria that would apply in the  
11 future, to the land division application or the one map amendment application,  
12 neither of which are the subject of this appeal. Record 17.

## 13 **2. Administrative Rule TRN 1.09**

14 Petitioners next argue that a city administrative rule, TRN 1.09, that is  
15 cited on the city’s Public Works Administrative Appeal Request Form “sets  
16 forth a legal standard materially relevant to the Decision.” Petition for Review  
17 3. We are not sure what the quoted phrase “sets forth a legal standard  
18 materially relevant to the Decision” is supposed to mean, but in taking that  
19 position we understand petitioners to argue that TRN 1.09 is a “land use  
20 regulation” as defined in ORS 197.015(11). As noted above, a land use

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<sup>4</sup> Those provisions are PCC 33.641.020 and PCC 33.855.050.B. PCC 33.641.020 requires that for a land division an applicant must demonstrate that the transportation system is capable for safely supporting the proposed development and existing uses in the area. PCC 33.855.050.B requires that for a zone map amendment, an applicant must demonstrate that adequate public services for water, transportation (facilities and capacity) and police and fire protection are capable of supporting the uses allowed by the zone.

1 regulation is a local government ordinance “establishing standards for  
2 implementing a comprehensive plan.” TRN 1.09 is an administrative rule  
3 adopted by the city’s Bureau of Transportation, Engineering and Development  
4 that adopts design standards for public streets. Petitioners do not provide any  
5 support for their argument that TRN 1.09 is a “land use regulation,” or  
6 otherwise establish that TRN 1.09 implements the city’s comprehensive plan.  
7 We conclude that it is not a land use regulation.

### 8 **3. Pedestrian Design Guide**

9 We also understand petitioners also argue that the city’s Pedestrian  
10 Design Guide (PDG), which sets forth the dedication and right of way  
11 improvement provisions that were waived by the challenged decision, is a land  
12 use regulation that the city either applied or was required to apply in granting  
13 the requested waivers of the sidewalk corridor and right of way dedication  
14 provisions. Respondents respond that the PDG is not a land use regulation  
15 because it is not included in PCC Title 33 and because it “is a separate  
16 document issued by the City Engineer. \* \* \* As such, it is an engineering  
17 design document applicable to all public sidewalk improvements, whether  
18 related to a land use review or not.” Joint Motion to Dismiss 5.

19 Respondents also argue:

20 “[T]here is no evidence that the sidewalk corridor provisions of  
21 the [PDG] implement any of the Goals or any land use regulation  
22 or Comprehensive Plan provision. For example, they do not  
23 reference such provisions in substance or by citation. As such,  
24 there is no “clear connection’ between the [PDG] and the  
25 [Portland Comprehensive Plan (PCP)] or land use regulations. *See*  
26 *Homebuilders Assoc. of Lane County v. City of Eugene*, 41 Or  
27 LUBA [453], 457 (2002).” Joint Motion to Dismiss 5-6.

1 The city is correct that the PDG does not appear to reference the Portland  
2 Comprehensive Plan (PCP) or any city land use regulations. However, the  
3 reverse is not true.

4 Petitioners point to PCP Goal 11 (Public Facilities Element) Section  
5 11.10. Section 11.10 provides that one of the policies to implement the city’s  
6 goal of “[i]mprov[ing] the quality of Portland’s transportation system by  
7 carrying out projects to implement the 2040 Growth Concept, preserving public  
8 rights-of-way, implementing street plans, continuing high-quality maintenance  
9 and improvement programs, and allocating limited resources to identified needs  
10 of neighborhoods, commerce, and industry[.]” is to “[d]esign improvements to  
11 existing and new transportation facilities to implement transportation and land  
12 use goals and objectives.”

13 One objective, Objective E, to further that policy is to:

14 “Use a variety of transportation resources in developing and  
15 designing projects for all City streets, such as the City of  
16 Portland’s Pedestrian Design Guide \* \* \* and Design Guide for  
17 Public Street Improvements.”

18 Another objective, Objective G, is to:

19 “[i]nclude sidewalks on both sides of all new street improvement  
20 projects, except where there are severe topographic or natural  
21 resource constraints *or when consistent with the Pedestrian*  
22 *Design Guide.*” (Emphasis added.)

23 Accordingly, petitioners argue, the PDG implements PCP Section 11.10 and is  
24 a “land use regulation” as defined in ORS 197.015(11).

25 The PDG is a land use regulation if it establishes “standards” for  
26 implementing a comprehensive plan. *Rest-Haven Memorial Park v. City of*  
27 *Eugene*, 39 Or LUBA 282, 288, *aff’d* 175 Or App 419, 28 P3d 1229 (2001);  
28 *Homebuilders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 453, 457

1 (2002). Where a provision establishes standards and the connection between  
2 the disputed standards and the comprehensive plan is “direct and clear,” the  
3 standards will be found to implement the comprehensive plan. *Rest Haven*, 39  
4 Or LUBA at 288.

5 The language from the PCP quoted above appears to be sufficient to  
6 establish a direct and clear connection between the PCP and the PDG. The  
7 only remaining question presented here is whether the PDG includes  
8 “standards” within the meaning of ORS 197.015(11). The PDG explains that it  
9 is an element of the city’s Pedestrian Master Plan, that it is issued by the city  
10 engineer, and that “[e]very project that is designed and built in the City \* \* \*  
11 should conform to these guidelines.” As noted above, the pre-application  
12 conference response at Record 16 identifies the PDG as the source of what the  
13 city alternatively characterizes as “recommendations” and “requirements” to  
14 construct sidewalk corridor improvements and dedicate right of way in  
15 connection with a building permit application. If the PDG *requires* the  
16 sidewalk corridor improvements and right of way dedication, then those  
17 requirements are likely “standards” within the meaning of ORS 197.015(11).<sup>5</sup>  
18 *See Davenport v. City of Tigard*, 121 Or App 135, 140-141, 854 P2d 483  
19 (1993) (construing the term “standards and criteria” in ORS 227.178(3) and  
20 ORS 215.428(3) as including “the substantive factors that are actually applied  
21 and that have a meaningful impact on the decision permitting or denying an

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<sup>5</sup> The term “standards” is not further defined in ORS 197.015(11) or any other statute. *Webster’s Third New International Dictionary* 2223 (unabridged ed. 2002) defines “standard” in relevant part to mean “**3 a**: something that is established by authority, custom, or general consent as a model or example to be followed : CRITERION, TEST[.]”

1 application” for permit approval). If they are standards, any decision by the  
2 city to waive those requirements, it seems to us, would require the city to either  
3 apply the PDG standards for sidewalk corridors or explain why the PDG or  
4 some other authority allows those standards to be waived.<sup>6</sup>

5 In the pleadings thus far, we do not understand respondents to take the  
6 position that the PDG provisions are not “standards.” Respondents also have  
7 not cited to anything in PCC Title 33 (the city’s zoning code) or in another  
8 section of the city’s code that contains a requirement that an applicant for  
9 development of a single family dwelling construct a sidewalk corridor and  
10 dedicate right of way. As it now stands, there is no city ordinance that has been  
11 cited to us that implements PCP Section 11.10. Given the fact that the city  
12 took the position with intervenors in connection with their future application  
13 for a single family dwelling building permit that in order to avoid constructing  
14 the sidewalk corridor and right of way improvements set out in the PDG and  
15 identified during the pre-application conference, they must file an appeal and  
16 obtain a waiver, it seems to us that the city considers those provisions as  
17 standards that are required to be met in at least some circumstances.  
18 Accordingly, at this point, based on the record and the pleadings thus far, we  
19 agree with petitioners that the PDG is a “land use regulation” because the PDG

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<sup>6</sup> The source of authority for the city’s decision to waive the sidewalk corridor and right of way provisions is not clear from the decision. In its motion to dismiss, the city argues that the source of authority for waiving the provisions is a 2012 city ordinance that adopted the city’s “Up Out of the Mud” program, which allows for the option of shared roadways when it is safe, and in connection with infill development. Joint Response to Motion to Dismiss 3 and Exhibit 2. No one argues that that ordinance is a land use regulation.

1 appears to contain “standards,” within the meaning of ORS 197.015(11), that  
2 implement PCP Goal 11, Section 11.10.

3 **B. Timeliness of Appeal**

4 ORS 197.830(3) provides:

5 “If a local government makes a land use decision without  
6 providing a hearing, \* \* \* a person adversely affected by the  
7 decision may appeal the decision to the board under this section:

8 “(a) Within 21 days of actual notice where notice is required; or

9 “(b) Within 21 days of the date a person knew or should have  
10 known of the decision where no notice is required.”

11 Intervenors argue that petitioners’ appeal should be dismissed because  
12 petitioners have not established that they are “adversely affected by the  
13 decision” and have not established that the appeal was filed within 21 days  
14 after “petitioners knew or should have known of the decision[.]”

15 Petitioners respond that they each own property within 100 feet of  
16 intervenors’ property. Petitioners have established that they are adversely  
17 affected by the decision. *Frymark v. Tillamook County*, 45 Or LUBA 685, 690  
18 (2003).

19 Petitioners also respond that the earliest they knew of the decision was  
20 January 3, 2014, upon publication of the staff report for the zone map  
21 amendment and land division applications. *See* n 2. Petitioners filed their  
22 appeal on January 21, 2014, within 21 days of January 3, 2014.

23 Petitioners’ appeal is timely under ORS 197.830(3)(b).

24 Respondents’ motion to dismiss is denied.

1 **BRIEFING SCHEDULE**

2 After respondents filed their motion to dismiss, petitioners filed their  
3 petition for review. Petitioners subsequently confirmed by letter to all parties  
4 that their petition for review contains their response to the motion to dismiss.  
5 We suspended the appeal to resolve the motion to dismiss.

6 The next event in this appeal is the filing of the response briefs. The  
7 response briefs shall be due not later than 21 days after the date of this order.  
8 The Board’s final opinion and order shall be due not later than 56 days after the  
9 date of this order.

10 Dated this 10<sup>th</sup> day of April, 2014.

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Melissa M. Ryan  
Board Member