

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

3
4 1000 FRIENDS OF OREGON, NEIGHBORS FOR CLEAN AIR,
5 and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
6 *Petitioners,*

7
8 vs.

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10 CITY OF PORTLAND,
11 *Respondent,*

12
13 and

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15 FASTER PERMITS and PROLOGIS,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2023-088

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from City of Portland.

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25 Eric Wriston and Mary Stites filed the petition for review and reply brief
26 and argued on behalf of petitioners. Also on the brief was Crag Law Center.

27
28 Linly Rees filed the respondent's brief and argued on behalf of respondent.
29 Also on the brief was Rob Yamachika.

30
31 Christen C. White filed the intervenor-respondent's brief and argued on
32 behalf of intervenors-respondents. Also on the brief was Radler White Parks &
33 Alexander LLP.

34
35 RYAN, Board Member; ZAMUDIO, Board Chair; participated in the
36 decision.

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38 RUDD, Board Member, did not participate in the decision.

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TRANSFERRED 09/24/2024

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

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NATURE OF THE DECISION

Petitioners appeal a commercial building permit for a freight warehouse.

BACKGROUND

In March 2023, intervenors-respondents (intervenors) applied for a building permit for a “New tilt-up concrete tilt-up semi-heated warehouse building with one office tenant space; including associated site work” (Warehouse) on property zoned General Employment 2 (EG2), located at the intersection of Sandy Boulevard and N.E. 122nd Avenue. Record 1, 3. The record of the city’s review of intervenors’ building permit application includes a “Zoning Code Standards Review Summary – Employment [and] Industrial Zones.” Record 1226. That review summary refers to Portland City Code (PCC) 33.140.130 and PCC 33.262, which we set out and discuss below. Record 362, 1226-1227. During that review, city staff noted that the submitted building plans needed to be modified to comply with the glare standard at PCC 33.262.080(A).¹ Record 362. Intervenors subsequently submitted revised plans. Record 514.

¹ PCC 33.262.080 provides:

“33.262.080 Glare

“A. Glare standard. Glare is illumination caused by all types of lighting and from high temperature processes such as welding or metallurgical refining. Glare may not directly, or indirectly from reflection, cause illumination on other properties in excess of a measurement of 0.5 foot candles of light.

1 On November 28, 2023, the city’s Bureau of Development Services (BDS)
2 approved the building permit for the Warehouse. Petitioners then appealed the
3 building permit to LUBA.

4 **JURISDICTION**

5 Intervenors previously moved to dismiss the appeal on the basis that the
6 appeal of the building permit is excluded from LUBA’s jurisdiction under ORS
7 197.015(10)(b)(B), which excludes from LUBA’s jurisdiction a local
8 government decision to approve or deny a building permit made under “clear and
9 objective land use standards[.]” We refer to that provision as “the building permit
10 exclusion.” On April 8, 2024, we issued an order denying intervenors’ motion to
11 dismiss. We explained intervenors’ argument:

12 “It is undisputed that the city reviewed intervenors’ building permit
13 application for compliance with several provisions of the city’s
14 zoning code, including [PCC] 33.140.130 and PCC 33.262. Record
15 362, 1226-1227. The purpose of PCC 33.262 is ‘to protect all uses
16 in the R, C, CI, IR, and OS zones from certain objectionable off-site
17 impacts associated with nonresidential uses.’ PCC 33.262.10. PCC
18 33.262 includes standards for regulating and limiting off-site
19 impacts from noise, vibration, odor, and glare. According to
20 intervenors, all of the PCC standards that the city applied are ‘clear
21 and objective land use standards.’” *1000 Friends of Oregon v. City*
22 *of Portland* (Order, LUBA No 2023-088, Apr 8, 2024) (slip op at
23 3).

“B. Strobe lights. Strobe lights visible from another property are
not allowed.” (Boldface omitted.)

1 We denied the motion to dismiss because we concluded that intervenors had not
2 established that the building permit exclusion applied, because the off-site impact
3 standard for odor in PCC 33.262.070 is not a “clear and objective land use
4 standard[.]” ORS 197.015(10)(b)(B).

5 Briefing then commenced. After petitioners filed their petition for review,
6 the city filed a motion to dismiss the appeal because, the city argued, the building
7 permit exclusion applies. The city’s motion to dismiss explained that it did not
8 join in intervenors’ previous motion to dismiss and that the city’s motion was
9 “based on the record and other city code not previously addressed by the parties
10 or this Board.” Respondent’s Motion to Dismiss 2.

11 Petitioners filed a response and a motion to transfer pursuant to OAR 661-
12 010-0075(9). We now resolve the city’s motion to dismiss and conclude that the
13 building permit exclusion to LUBA’s jurisdiction applies to the challenged
14 building permit.

15 **A. ORS 197.015(10)(a)**

16 LUBA has exclusive jurisdiction to review land use decisions. ORS
17 197.825(1).² ORS 197.015(10)(a)(A)(iii) defines “[l]and use decision” to include

² ORS 197.825(1) provides in part:

“[LUBA] 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.”

1 “[a] final decision or determination made by a local government or special district
2 that concerns the adoption, amendment or application of * * * [a] land use
3 regulation[.]” A local government decision “concerns” the application of a land
4 use regulation if the decision maker in fact applied land use regulations. *Bradbury*
5 *v. City of Independence*, 18 Or LUBA 552, 559 (1989).

6 PCC 33.140.200 to .320 provide the “Development Standards” for the EG2
7 zone. There is no dispute that the city applied the PCC 33.140.200 to .320
8 development standards to the application for a building permit.

9 PCC 33.140.100 to .140 provide the “Use Regulations” for the EG2 zone.
10 As relevant here, PCC 33.140.130 provides that “[a]ll nonresidential uses [in the
11 EG2 zone] including their accessory uses must comply with the standards of PCC
12 Chapter 33.262, Off-Site Impacts.” PCC 33.262.050, .060, .070, and .080 include
13 standards for regulating and limiting off-site impacts from noise, vibration, odor,
14 and glare from uses in the EG2 zone.

15 There is no dispute that PCC 33.140.130 is a land use regulation and that
16 the city in fact applied PCC 33.140.130 to the building permit application. As we
17 discuss below, the parties dispute whether the city either applied, or was required
18 to apply, the off-site impact standards at PCC 33.262.050, .060, .070, and .080 to
19 the building permit application.

20 **B. ORS 197.015(10)(b)(B)**

21 ORS 197.015(10)(b) lists nearly a dozen types of decisions that over the
22 years the legislature has provided are *not* “land use decisions” as described in

1 ORS 197.015(10)(a), and thus are excluded from LUBA’s jurisdiction, even if
2 those decisions might otherwise qualify as “land use decisions” because the local
3 government decision concerns the application of a land use regulation or
4 comprehensive plan provision. As relevant here, the city argues that ORS
5 197.015(10)(b)(B), which excludes from LUBA’s jurisdiction a building permit
6 issued under “clear and objective land use standards[,]” applies here.

7 The city first argues that our decision in *Wilson Park Neighborhood v. City*
8 *of Portland*, 24 Or LUBA 98 (1992), *aff’d*, 117 Or App 620, 845 P2d 1315, *rev*
9 *den*, 316 Or 142 (1993), has already answered the question presented in this
10 appeal and is binding here. *Wilson Park* was a challenge to a conditional use
11 permit approval for transitional housing and supportive services uses in the
12 Residential 7000 (R7) zone. One of the petitioners’ assignments of error argued
13 that the city erred in failing to apply the off-site impact standards in PCC 33.262
14 to its review of the conditional use permit application. We concluded that the off-
15 site impact standards were not required to be applied as conditional use review
16 criteria, but applied as performance standards, and denied the assignment of error.
17 *Wilson Park* does not answer the question presented here, where the challenged
18 decision approved a building permit application and not a conditional use permit
19 application and the issue is whether the building permit exclusion applies.

20 The city next argues that the building permit was issued under “clear and
21 objective land use standards” at PCC 33.140.200 *et seq*, and that PCC 33.262.100
22 makes the standards at PCC 33.262 inapplicable to the city’s review of the

1 building permit application for a Warehouse in the EG2 zone. According to the
2 city, PCC 33.262 off-site impact standards apply after a building permit for the
3 Warehouse is issued, as ongoing performance standards. Respondent’s Motion
4 to Dismiss 2-3; Respondent’s Brief 3-5.

5 PCC 33.262.100 provides in part:

6 “In situations where the Director of BDS is empowered to require
7 documentation in advance that a proposed use will conform with
8 these standards, all of the following additional information is
9 required of the applicant prior to approving a building permit[.]”

10 The city argues that the proposed Warehouse use in the EG2 zone is not a
11 “situation” where the BDS Director is so empowered to require documentation
12 in advance that the future use of the Warehouse will conform with the offsite
13 impact standards. Respondent’s Brief 6 n 4. The city first notes PCC 33.710.020,
14 which provides in part that “officers established in [PCC 33.710] are empowered
15 to perform all duties assigned to them by State law or [PCC title 33] on behalf of
16 the [c]ity [c]ouncil.” PCC 33.710.090 provides that the Director of BDS “is in
17 charge of implementing” PCC title 33.

18 The city argues that the Director of BDS is empowered to require advance
19 documentation of off-site impacts only in two situations: (1) where the PCC
20 specifically requires “Documentation in Advance” where the proposed use being
21 reviewed is a convenience store (PCC 33.219.060.F), a drive-through abutting
22 residentially zoned land (PCC 33.224.060), a nonconforming use changing to a
23 different use (PCC 33.258.050(B)), or for development in buffer zones (PCC

1 33.410.080); and (2) where off-site impacts are specifically listed as review
2 criteria, such as for conditional use review of energy production facilities in
3 commercial zones (PCC 33.815.315(B), and for mining and waste related uses
4 (PCC 33.815.220(G)). Respondent’s Brief 5. Here, according to the city, the PCC
5 does not specifically require documentation in advance of approving a building
6 permit for the Warehouse use in the EG2 zone. Accordingly, the city argues, all
7 of the land use standards under which the building permit was issued are “clear
8 and objective.”

9 Petitioners maintain that all of the PCC 33.262 off-site impact standards
10 apply prior to the issuance of the building permit, and that there is no dispute that
11 the city failed to apply any of the off-site impact standards except the glare
12 standard at PCC 33.262.080.³ Petitioners argue that the city’s explanation of how
13 PCC 33.262.100 functions in context with other PCC provisions demonstrates
14 that PCC 33.262.100 is ambiguous.⁴ Response to Motion to Dismiss 8.

15 In *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26, *aff’d*, 300 Or
16 App 403, 450 P3d 1050 (2019), we explained that the building permit exclusion
17 from LUBA’s jurisdiction is separate and distinct from the exclusion at ORS
18 197.015(10)(b)(A) for a local government decision “made under land use

³ Petitioners do not argue that the glare standard is not clear and objective.

⁴ We understand petitioners to argue that such an ambiguity requires “interpretation or the exercise of policy or legal judgment” within the meaning of ORS 197.015(10)(b)(A).

1 standards that do not require interpretation or the exercise of policy or legal
2 judgment[,]” which we sometimes refer to as “the ministerial decision
3 exclusion.” 80 Or LUBA at 30 (“That the legislature enacted two differently
4 worded provisions suggests that the legislature intended the analysis of ‘land use
5 standards’ that are applied in the context of a generic local government decision
6 to be distinct from the analysis of the ‘land use standards’ that are applied in the
7 context of a decision ‘approv[ing] or deny[ing] a building permit.’” *Id.* at 32
8 (quoting ORS 197.015(10)(b)(B) (brackets in original))). We explained that
9 “[i]n determining whether a building permit is excluded from our jurisdiction
10 under ORS 197.015(10)(b)(B), the question we must answer is whether the *land*
11 *use standards* under which it was issued are ‘clear and objective[,]’” and that the
12 petitioners’ arguments that other land use standards, that the city was required
13 but failed to apply, are ambiguous was not determinative. *Id.* at 33 (emphasis in
14 original).

15 As we have noted, sometimes in order to resolve the jurisdictional question
16 of whether a statutory exclusion to our jurisdiction applies, we must resolve the
17 merits of the parties’ arguments regarding the standards that apply to the city’s
18 review of the application. In *Madrona Park*, we were required to resolve the
19 merits of the petitioners’ arguments that other land use standards that required
20 interpretation applied to the city’s review of the building permit application in
21 order to then determine whether the building permit exclusion applied. We
22 concluded that the other land use standards that the petitioners argued applied did

1 not in fact apply, and that the building permit was issued under clear and
2 objective land use standards. *See also Jaqua v. City of Springfield*, 46 Or LUBA
3 566, 574 n 5 (2004) (in reviewing a city decision to issue a land and drainage
4 alteration permit, we were required to resolve the merits of the petitioners'
5 argument that the city was required but did not apply several provisions of the
6 city's comprehensive plan in order to determine whether we had jurisdiction).

7 Here, for the reasons explained by the city in the motion to dismiss and
8 respondent's brief, we agree with the city that PCC 33.262.100, read in context
9 with the other PCC provisions cited above, is properly interpreted to mean that
10 the land use standards that applied to the city's review of the building permit
11 application did not include the off-site impact standards at PCC 33.262.050, .060
12 and .070. As we explained in *Madrona Park*, and as we explain above, that PCC
13 33.262.100 requires interpretation might mean that the challenged decision is not
14 subject to the ministerial decision exclusion, but it does not answer the question
15 of whether the challenged decision falls within the building permit exclusion.
16 *Madrona Park, LLC*, 80 Or LUBA at 34 n 9.

17 Finally, notwithstanding the city's and intervenors' attempt to characterize
18 the city staff's comments regarding the glare standard at PCC 33.262.080 as
19 merely "advice" and "efficient and good customer service," we conclude that the
20 city's decision approving the building permit did make a decision that concerns
21 the application of the PCC 33.262.080 glare standard. Respondent's Brief 10;
22 Intervenors-Respondents' Brief 15. However, although the city applied the glare

1 standard at PCC 33.262.080, petitioners do not argue that the glare standard is
2 not clear and objective. Petitioners also do not argue that any other land use
3 standards that the city applied to review the building permit application are not
4 clear and objective. Accordingly, we agree with the city that the city’s decision
5 is subject to the building permit exclusion from LUBA’s jurisdiction.

6 **MOTION TO TRANSFER**

7 Petitioners request that if LUBA determines that the challenged building
8 permit is not a land use decision, the decision be transferred to circuit court
9 pursuant to OAR 660-010-0075(9).⁵ Petitioners’ motion to transfer is granted.

10 The appeal is transferred to Multnomah County Circuit Court.

⁵ OAR 661-010-0075(9)(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.”