BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS ZIRKER and VIVIANN ZIRKER,
Petitioners,

and

PATRICIA NIPPERT,
Intervenor-Petitioner,

vs.

CITY OF BEND,
Respondent,

and

STEIDL ROAD, LLC,
Intervenor-Respondent.

LUBA No. 2007-114

DEBRA J. TALLMAN,
Petitioner,

and

PATRICIA NIPPERT,
Intervenor-Petitioner,

vs.

CITY OF BEND,
Respondent,

and

STEIDL ROAD, LLC,
Intervenor-Respondent.

LUBA No. 2007-119

FINAL OPINION
AND ORDER

Appeal from City of Bend.

William Hugh Sherlock, Eugene, filed a joint petition for review and argued on behalf of petitioners. With him on the brief were Pamela Hardy and Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

Pamela Hardy, Bend, filed a joint petition for review and argued on behalf of intervenor-petitioner. With her on the brief were William Hugh Sherlock and Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

No appearance by City of Bend.

Sharon R. Smith, Bend, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Bryant Lovlien & Jarvis, PC. Helen L. Eastwood, Bend, argued on behalf of inervenor-respondent.

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

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

DISMISSED (LUBA No. 2007-114) 10/10/2007
REMANDED (LUBA No. 2007-119)

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 two decisions. The first decision segregates one tax lot into two tax lots. The second decision approves a triplex on one of the newly created tax lots.

FACTS

Intervenor-respondent owns a 16,608-square-foot property that is zoned Urban Medium Density Residential (RM). The properly lies on the west side of Steidl Road. Petitioners allege that Steidl Road is currently not developed to city road standards. Intervenor-respondent previously sought approval for a six lot subdivision of the property and approval for three duplexes. That application was denied, in part, due to the substandard condition of Steidl Road.

Following that denial, intervenor-respondent sought approval to segregate tax lot 1800 into two tax lots. Tax lot 1800 is made up of two legal lots. The tax lot segregation made each of those existing legal lots a separate tax lot (tax lots 1800 and 1801). Intervenor-respondent then sought approval for a triplex on tax lot 1800.[1] The city approved the request as a "Type I" action on January 2, 2007.[2] Several months later, when construction began, petitioners discovered the tax lot segregation and triplex approval decisions. We understand petitioners to allege that they filed their appeals with LUBA within 21 days after they learned of those decisions.

MOTION TO DISMSS

In LUBA No. 2007-114 petitioners challenge the tax lot segregation decision. In LUBA No. 2007-119, petitioners challenge the triplex approval decision. We previously

[1] Petitioners speculate that intervenor-respondent plans to construct a duplex on tax lot 1801 at some future time.

[2] Under the Bend Development Code, a Type I action requires no notice to adjoining property owners and requires no public hearing.

consolidated LUBA Nos. 2007-114 and 2007-119 for review. Intervenor-respondent moves to dismiss both appeals. In response to that motion to dismiss, petitioners stipulate that LUBA No. 2007-114 (the tax lot segregation decision) may be dismissed.

In accordance with petitioners' stipulation, LUBA No. 2007-114 is dismissed. We consider the parties' jurisdictional arguments regarding the city's approval of a triplex below.

MOTION TO CONSIDER EXTRA-RECORD EVIDENCE

Except in certain limited circumstances, LUBA's review is limited to the local government record. ORS 197.835(2).[3] Petitioners request that we consider a June 13, 2007 electronic mail message (message) from a city planner to one of petitioners' attorneys. In that message the planner states that the planning staff person who approved the triplex was unaware of the hearings officer's denial of the subdivision application. The planner goes on to state that the controversy that has surrounded development of the property might warrant elevation to a Type II review that would require notice and a hearing. However, the planner states that such elevation of process is at the discretion of the planning director and that the city's failure to elevate the triplex approval to a Type II review was not error. The planner also states his disagreement with petitioners' attorney concerning the applicability of a road adequacy standard. The planner closes with a promise to require a Type II review if a duplex is proposed on tax lot 1801 in the future.

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[3] ORS 197.835(2) provides:

> "(a) [LUBA r]eview of a decision under ORS 197.830 to 197.845 shall be confined to the record.
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> "(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record."

Petitioners do not cite or discuss ORS 197.835(2)(b) in their motion to consider extra-record evidence. The closest petitioners come to alleging a basis that might allow us to consider the message is their argument that the message shows that the city has discretion to elevate a Type I review to a Type II review and that it shows that it was an "abuse of discretion" to fail to do so "given the facts of this case and applicable code standards." Motion to Take Evidence Not in the Record 2.

It may be that the city erred by failing to review the triplex application under a Type II Review. But if that is the case, it is because the city failed to correctly interpret and apply its code provisions that govern applicable review procedures. The parties disagree about how the applicable code provisions should be interpreted. That is a dispute of law; it is not a factual dispute. The planner's message has no bearing on how that issue of law should be resolved. Petitioners have not established that there is any basis for LUBA to consider the planner's message, in resolving this appeal, under ORS 197.835(2)(b).

Petitioners' motion to consider extra-record evidence is denied.

STANDING

A person generally has standing to appeal to LUBA if that person filed a timely notice of intent to appeal and appeared before the local government that rendered the appealed decision. ORS 197.830(2). Petitioners do not allege that they appeared below. Under ORS 197.830(3), where a local government makes a decision "without providing a hearing," a person who is adversely affected or aggrieved may appeal within 21 days after actual notice, if written notice of the decision is required or within 21 days of constructive notice, if written notice of the decision is not required.

Petitioners allege that they filed timely notice. We do not understand intervenor-respondent to dispute that allegation, and it appears that petitioners were never provided written notice of the decision and appealed to LUBA within 21 days of the date they received constructive notice of the decisions.

Petitioners also allege that they will be adversely affected by the additional traffic and congestion that will be caused by construction and use of the disputed triplex. In an affidavit petitioners submitted earlier in support of their motion to stay the triplex approval decision, petitioners alleged that the earlier six-lot subdivision was denied because the road is substandard and that construction and future use of the triplex would similarly create unsafe traffic conditions. Intervenor-respondent contends that petitioners lack standing because they have not demonstrated that they will be adversely affected by the disputed decision. Intervenor-respondent argues "[i]n *Grahn [v. City of Newberg*], 49 Or LUBA 762 (2005), LUBA held that an allegation of 'substantial new traffic' was insufficient to prove an injury." Response Brief 1-2.

In *Grahn*, we rejected an allegation that a relocated intersection would "add substantial new traffic." 49 Or LUBA at 771. But that allegation was not supported by an affidavit or any evidence. More importantly, the allegation that we found inadequate in *Grahn* was presented in support of a motion to stay a land use decision while an appeal of the decision was pending at LUBA; the allegation was not offered in support of standing under the adversely affected standard in ORS 197.830(3). A party moving for a stay must demonstrate, among other things, that without the stay he or she will suffer "irreparable harm." This Board has interpreted "irreparable harm" to require that the moving party show the expected injury is both "probable," and "substantial and unreasonable." *Grahn*, 49 Or LUBA at 770 (quoting from *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032 (1988)). Intervenor-respondent makes no attempt to argue that the demonstration of irreparable injury that must be made to justify a stay is the same demonstration that must be made to demonstrate adverse affect under ORS 197.830(3). They are not the same. The irreparable injury standard is a much more exacting standard. *See City of Oregon City v. Clackamas County*, 17 Or LUBA at 1041-46 (setting out the five step inquiry that is required under the irreparable harm standard).

Without a more focused challenge by intervenor-respondent, we conclude that petitioners' allegations that they are adversely affected by the additional traffic that will be caused by construction and occupation of the disputed triplex are adequate and supported by the affidavits that were submitted in support of their motion for stay.[4]

JURISDICTION

A. Land Use Decision or Limited Land Use Decision

LUBA's jurisdiction is limited to land use decisions and limited land use decisions. ORS 197.825(1). Intervenor-respondent contends that the city triplex approval decision that is before us in this appeal only required the city to apply clear and objective standards that did not require the exercise of any interpretation or discretion. Intervenor-respondent contends the challenged decision falls within the ORS 197.015(11)(b)(A) exception to the statutory definition of "land use decision."[5]

Petitioners' petition for review includes an unexplained allegation that the appealed decision is either a land use decision or a limited land use decision.[6] But other jurisdictional arguments are scattered through the petition for review and petitioners' motion for stay and

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[4] As in *Grahn*, we concluded in an earlier order in this appeal that petitioners' allegations of increased traffic were insufficient to demonstrate the kind of irreparable harm that would justify a stay. *Zirker v. Bend*, ___ Or LUBA ___ (LUBA No. 2007-114 and 2007-119, Order, August 1, 2007). However, the affidavits that were submitted in support of petitioners' motion for stay are adequate to demonstrate that they will be adversely affected by triplex-related traffic, such that they have standing to bring this appeal under ORS 197.830(3).

[5] ORS 197.015(11)(b)(A) provides that a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment" is not a land use decision. Although intervenor-respondent does not cite the ORS 197.015(13) definition of "limited land use decision," limited land use decisions include "approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright * * *." Presumably, intervenor-respondent contends that the lack of discretion that renders the challenged decision something other than a land use decision also makes it something other than a limited land use decision.

[6] Petitioners' entire statement of jurisdiction is set out below:

> "LUBA has jurisdiction to review the City's decision under ORS 197.825(1) because it is a land use or limited land use decision as defined by ORS 197.015(11)(a)(A)(i)-(iii) and (13)." Petition for Review 4.

response to the motion to dismiss. OAR 661-010-0030(4)(c) requires that a petition for review must "[s]tate why the challenged decision is a land use decision or limited land use decision subject to [LUBA's] jurisdiction." The better practice is to set out a complete and adequate jurisdictional statement in the petition for review, as required by OAR 661-010-0030(4)(c). That jurisdictional statement of course could incorporate arguments made elsewhere and such incorporated arguments could be attached as an appendix to the petition for review. It is risky to assume that LUBA will search for those jurisdictional arguments when jurisdiction is challenged.

However, in this case, the parties' dispute about whether the challenged decision is a land use decision is the central dispute. Petitioners' first assignment of error alleges that the city should have applied discretionary standards in the Bend Development Code (BDC) and erred by failing to do so. Intervenor-respondent argues those standards are inapplicable. The first assignment of error, which we resolve in petitioners' favor below, is a *de facto* dispute over whether LUBA has jurisdiction to review the city's decision to approve the triplex. For the reasons explained in our resolution of the first assignment of error, we reject intervenor-respondent's argument that the city was not required to consider the applicability of the discretionary BDC land use standards that petitioners identify in their first assignment of error. The challenged decision is either a land use decision or a limited land use decision.

B. Failure to Exhaust Administrative Remedies

Intervenor-respondent argues that petitioners failed to exhaust administrative remedies. However, intervenor-respondent does not identify the BDC section that they believe provides a right of local appeal to challenge a Type I decision or why they believe

petitioners could have availed themselves of that local right of appeal.[7] Given that failure, we do not consider the argument further.

FIRST ASSIGNMENT OF ERROR

Petitioners argue the city should have, but failed to, apply discretionary approval standards in the BDC. Petitioners identify two such standards.

A. BDC 3.4.200(A) (Public Improvement Standards)

BDC 3.4 sets out improvement standards for, among other things, sanitary sewer, storm sewer, water, and streets. Petitioners argue that BDC 3.4.200(A) requires that "development" not be allowed to "occur," unless certain standards are met.[8] Among those standards is a standard that requires that streets "adjacent to a development shall be improved in accordance with the Bend Urban Area Transportation System Plan (TSP), provisions of this Chapter and other pertinent sections of this Code." BDC 3.4.200(A)(1).

Petitioners argue the city erred by failing to adopt any findings addressing BDC 3.4.200(A). Petitioners contend the BDC defines the term "development" broadly.[9] We

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[7] Petitioners apparently received no notice of the challenged decisions and did not discover that those decisions had been rendered until construction began on the property several months after the decisions had been issued.

[8] BDC 3.4.200(A) provides:

> "**Development Requirements**. No development shall occur unless the development has frontage or approved access to a public or private street, in conformance with the provisions of Chapter 3.1, Access, Circulation and Lot Design, and the following standards are met:
>
> "1. Streets within or adjacent to a development shall be improved in accordance with the Bend Urban Area Transportation System Plan (TSP), provisions of this Chapter and other pertinent sections of this Code.
>
> "2. Development of new streets, and additional street width or improvements planned as a portion of an existing street, shall be improved in accordance with this Section, and public streets shall be dedicated to the applicable City, county or state jurisdiction.
>
> "3. All new and/or existing streets and alleys shall be paved per the City of Bend Standards and Specifications document."

[9] BDC 1.2 provides the following definition of "development:"

understand petitioners to argue the BDC definition of "development" is broad enough to include the disputed triplex development. Petitioners contend that no BDC provision exempts triplex development from the BDC 1.2 definition of development.[10] To the contrary, petitioners argue, BDC 3.0.100 makes it clear that all development must comply with the BDC Chapter 3 development standards.[11]

B. BDC 4.2.200 (Site Development Review)

BDC 4.2.200 identifies when site development review is required and the required procedure for such review.[12] The first sentence of BDC 4.2.200 exempts "a single family

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> **"Development** means all improvements on a site, including buildings, placement or replacement of manufactured or other structures, parking and loading areas, landscaping, paved or graveled areas, grading, and areas devoted to exterior display, storage, or activities. Development includes improved open areas such as plazas and walkways, but does not include natural geologic forms or landscapes. For the purpose of flood standards, development shall also mean any man-made change to improved or unimproved real estate, including but not limited to mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials located within the area of special flood hazard."

[10] Intervenor-respondent disputes this position. We discuss intervenor-respondent's arguments after we set out petitioners' arguments.

[11] BDC 3.0.100 provides:

> "All developments within the City must comply with the provisions of this ordinance. Some developments, such as major projects requiring land division and/or site design review approval, may require detailed findings demonstrating compliance with each chapter of the code. For smaller, less complex projects, fewer code provisions may apply. *Though some projects will not require land use or development permit approval, they are still required to comply with the provisions of this chapter*." (Emphasis added.)

[12] BDC 4.2.200(A) provides, in part:

> "In all zones, except for a single family unit on one lot, all new uses, buildings, outdoor storage or sales areas and parking lots or alterations shall be subject to the provisions of this section.
>
> "Site Development Review approval may not be required where a proposed alteration of an existing building does not exceed 10% or 1000 square feet, whichever is greater, of the original structure unless the Planning Director finds the original structure or proposed alteration does not meet the requirements of this ordinance or other ordinances of the City of Bend. *In the residential zones where duplexes and triplexes are allowed, such development may undergo a Type I review process if they meet minimum standards as set forth in subsection 3.6.200(H), Duplex and Triplex Development*." (Emphasis added.)

unit on one lot" from site development and design review. Petitioners contend the disputed triplex is not "a single family unit on one lot." Petitioners contend the city erred by failing to require the site analysis map required by BDC 4.2.200(C)(1) and failing to apply the site plan approval criterion at BDC 4.2.200(D)(5), which requires consideration of public facility capacity.[13]

The last sentence of the second paragraph of BDC 4.2.200(A) authorizes "a Type I review process" for duplexes and triplexes in zones that allow such uses, if they meet the standards set out in 3.6.200(H). Petitioners contend that part of BDC 4.2.200(A) may authorize certain aspects of the proposed triplex to be reviewed under a Type I review process, but it does not obviate the need for the city to apply the BDC 3.4.200(A) street improvement standard or the BDC 4.2.200(D)(5) public facility capacity standard. Petitioners contend the city erred by failing to require that intervenor-respondent submit a site plan that complies with BDC 4.2.200(C)(1) and by failing to adopt findings that demonstrate that the city considered the BDC 4.2.200(D)(5) site design public improvement criterion.

C. Intervenor-Respondent's Argument

The challenged decision does not include any findings that explain why the city did not impose the street improvement standard that BDC 3.4.200(A)(1) imposes on all development. Neither does the challenged decision explain why the city did not require a site plan that complies with BDC 4.2.200(C)(1) or consider the BDC 4.2.200(D)(5) site design public improvement criterion. Intervenor-respondent argues the last sentence of the

[13] BDC 4.2.200(C)(1)(c) requires a site analysis map that shows "[t]he location and width of all public and private streets, drives, sidewalks, pathways, rights-of-way, and easements on the site and adjoining the site[.]" Before the city can approve a site development plan, BDC 4.2.200(D)(5) requires the city to consider the following criterion: "All required public facilities have adequate capacity as determined by the City, to serve the proposed use."

second paragraph of BDC 4.2.200(A) makes those requirements inapplicable. That part of BDC 4.2.200(A) was quoted earlier, *see* n 12, and provides as follows:

> "In the residential zones where duplexes and triplexes are allowed, such development may undergo a Type I review process if they meet minimum standards as set forth in subsection 3.6.200(H), Duplex and Triplex Development."

The above language authorizes a Type I review process for duplexes and triplexes if the minimum standards in BDC 3.6.200(H) are met. There is no dispute that triplexes are allowed in the RM zone. There does not appear to be any dispute that the standards set forth in Subsection 3.6.200(H) are satisfied.[14] The only dispute is the meaning of "such development may undergo a Type I review process." Intervenor-respondent argues those words have the following legal effects: (1) only the BDC 3.6.200(H) standards apply to duplexes and triplexes, (2) site development and design review under BDC Chapter 4.2 is not required, and (3) the development standards in BDC 3.4.200(A)(1) and BDC 4.2.200(D)(5) do not apply.

We do not mean to foreclose the possibility that the city on remand may be able to adopt an interpretation of BDC 4.2.200(A) that is consistent with intervenor-respondent's understanding of the legal effect of BDC 4.2.200(A). But unlike the first sentence of BDC 4.2.200(A), which makes it clear that "a single family dwelling on one lot" is not "subject to the provisions of this section," the last sentence of the second paragraph is worded quite differently. That sentence of BDC 4.2.200(A) says that certain duplexes and triplexes qualify for a Type I review process. That sentence does not expressly say development, site design or other *substantive* BDC standards that would otherwise apply do not apply if the standards in BDC 3.6.200(H) are met. That may well be what the drafters of BDC 4.2.200(A) intended to say, but the words the drafters actually used in BDC 4.2.200(A) do

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[14] BDC 3.6 sets out "Special Standards for Certain Uses." BDC 3.6.200(H) sets out a number of special standards for duplexes and triplexes. The challenged decision sets out the BDC 3.6.200(H) standards and indicates that all of those standards are satisfied. Record 10-11.

not expressly say that only the BDC 3.6.200(H) standards apply to duplexes and triplexes. The way BDC 4.2.200(A) is worded, compliance with the standards in BDC 3.6.200(H) is a condition that must be met to qualify for Type I review. BDC 4.2.200(A) does not say that the BDC 3.6.200(H) approval standards are the *only* approval standards that apply to duplexes and triplexes. Other sections of BDC 3.6, where BDC 3.6.200(H) appears, suggest that the standards in that section are supplemental rather than exclusive.[15] As previously noted, petitioners correctly point out that the term "development" is broadly defined, and BDC 3.0.100 seems to expressly envision that development standards in the BDC will apply to development proposals, even if they do not require discretionary land use permits. *See* n 11.

The city has not appeared in this appeal and the challenged decision does not address the interpretive issue presented in the first assignment of error. We therefore do not mean to foreclose the possibility that the city might identify other provisions in the BDC that would provide adequate contextual support for the interpretation the intervenor-respondent presents in response to the first assignment of error. However, we emphasize that the question is one of interpretation, and the city's answer to that question should be guided by the principles set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). The fact that the city may have historically interpreted and applied BDC 4.2.200(A) in the

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[15] BDC 3.6.100 sets out the purpose of BDC Chapter 3.6 and provides:

> "This Chapter supplements the standards contained in this ordinance. It provides standards for certain land uses in order to control the size, scale and compatibility of those uses within all the zoning Districts[.]"

BDC 3.6.200 sets out the purpose of the residential section of BDC Chapter 3.6 and provides:

> "This section supplements the standards contained in Chapter 2.0 and provides standards for the following land uses in order to control the size, scale and compatibility of those uses within all the Residential Districts[.]"

way intervenor-respondent argues is not relevant in determining whether BDC 4.2.200(A) can be interpreted in the way intervenor-respondent argues it should be interpreted.

The first assignment of error is sustained.[16]

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue the city erred by approving the disputed triplex as a Type I decision.[17] Petitioners contend the city should have approved the application as a Type II decision.[18] As defined by BDC 1.2, a Type II review and decision is required where a decision maker must apply BDC standards that require the exercise of

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[16] We agree with petitioners that application of BDC 3.4.200(A) and BDC 4.2.200(C)(1)(c) require the exercise of discretion. Similarly, determining whether those standards apply or whether BDC 4.2.200(A) obviates any need to consider those standards requires discretion. Therefore, the challenged decision does not fall within exception to the statutory definition of land use decision that is set out at ORS 197.015(11)(b)(A). *See* n 5.

[17] BDC 1.2 provides the following definition of Type I decision:

> "**Type I also known as 'Development action'** means the review of any permit, authorization or determination that the City of Bend Development Services Department is requested to issue, give or make that either:
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> "1. Involves the application of the City zoning ordinance or the City Land Division ordinance and is not a land use action as defined below; or
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> "2. Involves the application of standards other than those referred to in subsection 1, above.
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> "For illustrative purposes, the term 'development action' includes review of any condominium plat, permit extension, *duplex or triplex units under 3,600 square feet where permitted as an outright use*, road name change, sidewalk permit, setback determination, and lot coverage determination." (Bold type in original, emphasis added.)

[18] BDC 1.2 provides the following definition of Type II decision:

> "**Type II also known as 'Land use permit'** means any approval of a proposed development of land under the standards in the City zoning ordinances or Land Division ordinances involving the exercise of significant discretion in applying those standards.
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> "By way of illustration, 'land use permit' includes review of conditional use permits, partition, master plan, commercial design review, riverfront design review, site plan, site plan change of use, modification of approval, administrative determination, declaratory ruling, subdivision variance, subdivision, and variance, but does not include Type I actions." (Bold type in original)

"significant discretion." Petitioners contend that BDC 3.4.200(A) and BDC 4.2.200(D)(5), which the city should have applied in this case, require the exercise of "significant discretion," making a Type II review and decision necessary.

We have agreed with petitioners that, in the absence of a sustainable interpretation from the city to the contrary, the city was obligated to apply BDC 3.4.200(A) and BDC 4.2.200(D)(5), which require the exercise of discretion and render the exception to the statutory definition of land use decision inapplicable. However, as defined by BDC 1.2, a Type II review is required only where the decision maker must exercise "significant discretion." Petitioners make no attempt to explain why they believe BDC 3.4.200(A) and BDC 4.2.200(D)(5) require the exercise of *significant* discretion. Even more importantly, the definition of Type I decision expressly includes "duplex or triplex units under 3,600 square feet where permitted as an outright use." *See* n 17. Petitioners do not argue the disputed triplex units are larger than 3,600 square feet, and triplexes are allowed outright in the RM zone. The definition of Type I decision is also consistent with BDC 4.2.200(A), *see* n 12, which includes similar language that requires a Type I review for triplexes in the circumstances set out in BDC 4.2.200(A).

As we have previously noted, the planning director has the discretion but not the obligation to require a Type II review where a Type I review would otherwise be required. BDC 4.1.410(B).[19] Under the BDC, that discretion is left to the planning director. As far as the BDC is concerned, the city correctly processed the application as a Type I review.

Petitioners also argue that the city should have treated the application as a "limited land use decision." *See* n 5. In approving a limited land use decision, a local government must, at a minimum, observe the notice and procedural requirements set out at ORS

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[19] BDC 4.1.410(B) provides:

> "The Planning Director has the discretion to determine that for the purposes of this ordinance a Type I application should be treated as if it were a Type II application."

197.195(3).[20] Petitioners argue the city erred by not following the statutory requirement set out at ORS 197.195(3)(b), which requires notice to property owners within 100 feet of the property.

If the challenged decision falls within the ORS 197.015(13) definition of "limited land use decision," the city was obligated, at a minimum, to follow the procedures set out at ORS 197.195, notwithstanding that fewer or less stringent procedures would be permissible under the BDC.[21] The challenged decision does not address this issue. Intervenor-

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[20] ORS 197.195(3) provides, in part:

> "(b) For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. * * *.
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> "(c) The notice and procedures used by local government shall:
>
> "(A) Provide a 14-day period for submission of written comments prior to the decision;
>
> "(B) State that issues which may provide the basis for an appeal to the Land Use Board of Appeals shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue;
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> "(C) List, by commonly used citation, the applicable criteria for the decision;
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> "(D) Set forth the street address or other easily understood geographical reference to the subject property;
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> "(E) State the place, date and time that comments are due;
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> "(F) State that copies of all evidence relied upon by the applicant are available for review, and that copies can be obtained at cost;
>
> "(G) Include the name and phone number of a local government contact person;
>
> "(H) Provide notice of the decision to the applicant and any person who submits comments under subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal rights; and
>
> "(I) Briefly summarize the local decision making process for the limited land use decision being made."

[21] The city is of course free to provide more procedural protections than the minimum required by ORS 197.195(3). *See Andrews v. City of Prineville*, 28 Or LUBA 653, 657 n 3 (1995) (procedures that comply with

respondent does not respond to this issue, except to argue that the city was not obligated to apply and discretionary standards.

The definition of limited land use decision is restricted to properties that lie within an urban growth boundary. The subject property satisfies that requirement. The decision seems to constitute "approval * * * of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright * * *." *See* n 5. Absent an argument to the contrary, we conclude that the challenged decision is a limited land use decision. The city erred by not providing, at a minimum, the procedural protections required by ORS 197.195(3).[22]

The second assignment of error is sustained in part.

LUBA No. 2007-114 is dismissed. The city's decision in LUBA No. 2007-119 is remanded.

ORS 197.763 requirements for quasi-judicial land use decisions will generally satisfy the ORS 197.195(3) procedural requirements for limited land use decisions).

[22] It may be that the city's Type II review procedures equal or exceed the requirements set out at ORS 197.195(3). If so, the city could simply follow its Type II review procedure on remand.