

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

3
4 DEBORAH TALLMAN, DOUGLAS ZIRKER,
5 VIVIANN ZIRKER and PATRICIA NIPPERT,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF BEND,
11 *Respondent,*

12
13 and

14
15 STEIDL ROAD, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2007-229

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Bend.

24
25 William Hugh Sherlock, Eugene, and Pamela Hardy, Bend, filed the petition for
26 review and argued on behalf of petitioners. With them on the brief was Hutchinson, Cox,
27 Coons, DuPriest, Orr & Sherlock, P.C.

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29 Peter M. Schannauer, Bend, filed a joint response brief and represented respondent.
30 With him on the brief were Sharon R. Smith and Bryant Lovlien & Jarvis, PC.

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32 Sharon R. Smith, Bend, filed a joint response brief on behalf of intervenor-
33 respondent. With her on the brief were Peter M. Schannauer, and Bryant Lovlien & Jarvis,
34 PC. Helen Eastwood, Bend, argued on behalf of intervenor-respondent.

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

38
39 REMANDED

03/31/2008

40
41 You are entitled to judicial review of this Order. Judicial review is governed by the
42 provisions of ORS 197.850.

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2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision that adopts additional findings to support a prior
4 city decision that granted approval for construction of a tri-plex on an individual lot.

5 **INTRODUCTION**

6 The city and intervenor argue that LUBA does not have jurisdiction over the
7 challenged decision. With exceptions that do not apply here, LUBA has exclusive
8 jurisdiction to review “land use decisions” and “limited land use decisions.” ORS
9 197.825(1).¹ As defined by ORS 197.015(10)(a), final city decisions that apply land use
10 regulations are “land use decisions.”² Under ORS 197.015(10)(b) certain ministerial, or
11 decisions that “do not require interpretation or the exercise of policy or legal judgment” or
12 are governed by “clear and objective land use standards” are excluded from the ORS
13 197.015(10)(a) definition of “land use decision.”³ As defined by ORS 197.015(12), “limited

¹ ORS 197.825(1) provides:

“[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.

² As relevant here, ORS 197.015(10) provides:

“‘Land use decision’:

“(a) Includes:

“(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

³ ORS 197.015(10)(b) provides that the ORS 197.015(10)(a) definition of “land use decision:”

1 land use decisions,” are final city decisions concerning land within an urban growth
2 boundary that apply discretionary standards, which “regulate the physical characteristics of a
3 use permitted outright.”⁴ Under these statutes, decisions that qualify for one of the ORS
4 197.015(10)(b) exemptions to the ORS 197.015(10)(a) definition of “land use decision” are
5 neither “land use decisions” nor “limited land use decisions,” and therefore are not subject to
6 LUBA’s jurisdiction. Whether the decision that is before us in this appeal qualifies for the
7 ORS 197.015(10)(b)(A) exemption is the central question in this appeal.

8 The decision that is before us in this appeal is the city’s decision following our
9 remand in *Zirker v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2007-119, October 10,
10 2007). In *Zirker* we determined that two discretionary approval standards that petitioners
11 identified applied to a city tri-plex approval decision. In reaching that conclusion, we
12 rejected intervenor’s argument that Bend Development Code (BDC) 4.2.200(A) rendered all
13 discretionary approval standards inapplicable to intervenor’s application for approval of the

“Does not include a decision of a local government:

“(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[.]”

⁴ ORS 197.015(12) provides in part:

“‘Limited land use decision’:

“(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

“* * * * *

“(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.

1 disputed tri-plex.⁵ Our decision in *Zirker* includes the following explanation for our
2 conclusion regarding the scope and meaning of the words the city used in BDC 4.2.200(A):

3 “* * * Intervenor-respondent argues those words have the following legal
4 effects: (1) only the BDC 3.6.200(H) standards apply to duplexes and
5 triplexes, (2) site development and design review under BDC Chapter 4.2 is
6 not required, and (3) the development standards in BDC 3.4.200(A)(1) and
7 BDC 4.2.200(D)(5) do not apply.

8 [U]nlike the first sentence of BDC 4.2.200(A), which makes it clear that ‘a
9 single family dwelling on one lot’ is not ‘subject to the provisions of this
10 section,’ the last sentence of the second paragraph is worded quite differently.
11 That sentence of BDC 4.2.200(A) says that certain duplexes and triplexes
12 qualify for a Type I review process. That sentence does not expressly say
13 development, site design or other *substantive* BDC standards that would
14 otherwise apply do not apply if the standards in BDC 3.6.200(H) are met.
15 That may well be what the drafters of BDC 4.2.200(A) intended to say, but
16 the words the drafters actually used in BDC 4.2.200(A) do not expressly say
17 that only the BDC 3.6.200(H) standards apply to duplexes and triplexes. The
18 way BDC 4.2.200(A) is worded, compliance with the standards in BDC
19 3.6.200(H) is a condition that must be met to qualify for Type I review. BDC
20 4.2.200(A) does not say that the BDC 3.6.200(H) approval standards are the
21 *only* approval standards that apply to duplexes and triplexes. Other sections
22 of BDC 3.6, where BDC 3.6.200(H) appears, suggest that the standards in that
23 section are supplemental rather than exclusive. As previously noted,
24 petitioners correctly point out that the term ‘development’ is broadly defined,
25 and BDC 3.0.100 seems to expressly envision that development standards in
26 the BDC will apply to development proposals, even if they do not require
27 discretionary land use permits. * * *

28 “The city has not appeared in this appeal and the challenged decision does not
29 address the interpretive issue presented in the first assignment of error. We

⁵ 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.)

1 therefore do not mean to foreclose the possibility that the city might identify
2 other provisions in the BDC that would provide adequate contextual support
3 for the interpretation the intervenor-respondent presents in response to the
4 first assignment of error. However, we emphasize that the question is one of
5 interpretation, and the city’s answer to that question should be guided by the
6 principles set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-
7 12, 859 P2d 1143 (1993). The fact that the city may have historically
8 interpreted and applied BDC 4.2.200(A) in the way intervenor-respondent
9 argues is not relevant in determining whether BDC 4.2.200(A) can be
10 interpreted in the way intervenor-respondent argues it should be interpreted.”
11 *Zirker*, slip op at 12-13 (italics in original, underlining added, footnote
12 omitted).

13 While we left open the possibility that the city might identify other contextual
14 provisions in the BDC that might support intervenor’s interpretation, our conclusion that
15 BDC 4.2.200(A) does not have the legal effect of making BDC 3.6.200(H) the *only* or the
16 *exclusive* BDC criteria that apply to applications for tri-plex approval led us to sustain
17 petitioners’ first assignment of error, in which petitioners alleged that the city erred by failing
18 to apply the discretionary approval criteria that appear at BDC 3.4.200(A)(1) and BDC
19 4.2.200(D)(5).⁶ It also led us to deny intervenor’s motion to dismiss the appeal in *Zirker*.
20 Finally, we also agreed with petitioners that because the BDC 3.4.200(A)(1) and BDC
21 4.2.200(D)(5) discretionary approval criteria apply, the decision that was before us in *Zirker*
22 fell within the ORS 197.015(12) definition of “limited land use decision.” We sustained
23 petitioners’ second assignment of error in which they alleged the city erred by failing to
24 follow statutory limited land use decision making procedures in rendering its decision in
25 *Zirker*:

26 “If the challenged decision falls within the ORS 197.015[(12)] definition of
27 ‘limited land use decision,’ the city was obligated, at a minimum, to follow
28 the procedures set out at ORS 197.195, notwithstanding that fewer or less
29 stringent procedures would be permissible under the BDC. The challenged
30 decision does not address this issue. Intervenor-respondent does not respond

⁶ Petitioners’ primary complaint appears to be that those criteria mandate that adequate streets that meet city standards are required for approval of the tri-plex and that such streets are not present.

1 to this issue, except to argue that the city was not obligated to apply any
2 discretionary standards.

3 The definition of limited land use decision is restricted to properties that lie
4 within an urban growth boundary. The subject property satisfies that
5 requirement. The decision seems to constitute ‘approval * * * of an
6 application based on discretionary standards designed to regulate the physical
7 characteristics of a use permitted outright * * *.’ Absent an argument to the
8 contrary, we conclude that the challenged decision is a limited land use
9 decision. The city erred by not providing, at a minimum, the procedural
10 protections required by ORS 197.195(3).” *Zirker*, slip op at 16-17 (citation
11 and footnotes omitted).

12 Following our remand in *Zirker*, the city did not follow limited land use decision
13 making procedures and render a new decision on the disputed duplex. Instead, the city
14 adopted supplemental findings in an attempt to establish that BDC 4.2.200(A) renders all
15 discretionary BDC criteria inapplicable to the disputed tri-plex decision, with the result that
16 the disputed tri-plex decision is neither a land use decision nor a limited land use decision.
17 Petitioners appeal and assign error to the city’s supplemental findings. We turn to
18 petitioners’ assignments of error.

19 **FIRST ASSIGNMENT OF ERROR**

20 Petitioners first argue that the question of whether the subject decision is a limited
21 land use decision was decided by LUBA in its decision in *Zirker*. Petitioners argue it was
22 error to fail to follow limited land use decision making procedures on remand.

23 In *Zirker* we specifically left open the possibility that the city might be able to
24 identify other contextual provisions in the BDC that would be sufficient to establish that
25 BDC 4.2.200(A) has the legal effect of rendering BDC 3.4.200(A)(1) and BDC
26 4.2.200(D)(5), which are the only discretionary decision making standards that petitioners
27 identified, inapplicable to the disputed tri-plex decision. If the city were able to do that, the
28 challenged decision would not be a limited land use decision, and it would not be error for
29 the city to approve the tri-plex without following limited land use decision making
30 procedures. Under the second assignment of error below, we consider petitioners’ challenge

1 that the city has again failed to establish that BDC 4.2.200(A) renders BDC 3.4.200(A)(1)
2 and BDC 4.2.200(D)(5) inapplicable to the challenged tri-plex decision. While we agree
3 with petitioners that the city has not demonstrated that BDC 4.2.200(A) renders BDC
4 3.4.200(A)(1) and BDC 4.2.200(D)(5) inapplicable to the challenged tri-plex decision, it was
5 not error for the city to make that attempt, since our decision in *Zirker* specifically left open
6 the possibility that the city could make that attempt.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 The relevant text of BDC 4.2.200(A) was quoted earlier and is set out again below:

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

14 The city’s supplemental findings on remand add little to the arguments that intervenor
15 advanced in *Zirker*. Importantly, those supplemental findings do not identify any significant
16 contextual provisions in the BDC that we did not already consider in *Zirker*. We have no
17 doubt that the city earnestly believes that BDC 4.2.200(A) make the clear and objective
18 criteria in BDC 3.6.200(H) the only tri-plex approval criteria in this case. However, for the
19 reasons we explained in *Zirker*, BDC 4.2.200(A) simply does not say what the city believes it
20 was adopted to say.

21 A detailed discussion of the city’s supplemental findings is not warranted. We rely
22 mainly on our analysis of intervenor’s position in *Zirker*. We do however, comment briefly
23 on several points that the city makes in its supplemental findings and that the city and
24 intervenor make in their brief in this appeal.

25 **A. The Text of BDC 4.2.200(A) is Clear**

26 In its supplemental findings the city takes the position that the last sentence of BDC
27 4.2.200(A), which is quoted above, “clearly identifies the exclusive set of criteria for

1 duplexes and triplexes at BDC 3.6.200(H) * * *.” Record 5. The city also believes it is
2 significant that that sentence of BDC 4.2.200(A) makes “no mention of having to satisfy the
3 requirements of any other section of the [BDC] including the [street improvement
4 requirements of BDC]3.4.200(A).” *Id.* at 4.

5 The only thing that BDC 4.2.200(A) “clearly” does is authorize a Type I procedure if
6 the BDC 3.6.200(H) clear and objective criteria are met. It is therefore unremarkable that
7 BDC 4.2.200(A) does not specify that other BDC substantive criteria may apply to a tri-plex.
8 No matter how many times the city and intervenor say that BDC 4.2.200(A) makes the BDC
9 3.6.200(H) the “exclusive” approval criteria, BDC 4.2.200(A) simply does not say that. The
10 city can certainly amend BDC 4.2.200(A) to say that the BDC 3.6.200(H) criteria are the
11 only criteria that apply to a tri-plex, but the city cannot interpret BDC 4.2.200(A) to say what
12 it does not say.⁷

13 **B. BDC 3.4.100(C) Expressly Recognizes That Other Provisions of the BDC**
14 **May Exempt Certain Development From the BDC 3.4.200**
15 **Transportation Improvement Standards**

16 In its supplemental findings, the city cites and assigns great weight to BDC
17 3.4.100(C), which provides:

18 **“When Standards Apply.** *Unless otherwise provided,* the standard
19 specifications for construction, reconstruction or repair of transportation
20 facilities, utilities and other public improvements within the City shall
21 conform to this Chapter. No development shall occur unless the public
22 improvements related to development comply with the public facility
23 requirements established in this Chapter, *unless specifically exempt or*
24 *otherwise specified by a land use review and/or condition of approval from a*
25 *land use action.”* (Emphasis added.)

26 As the city correctly points out in its supplemental findings, the above language in
27 BDC 3.4.100(C) recognizes that the BDC Chapter 3.4 public improvement standards may not

⁷ As petitioners point out, it seems highly unlikely that the city intends that none of the BDC Chapter 3.0 criteria should apply to tri-plexes since some of those criteria expressly apply to tri-plexes. BDC 3.1.400(I)(1); BDC 3.1.400(K)(1); Table 3.3.300.

1 apply to development where the BDC provides otherwise or specifically exempts such
2 development. But the question is whether BDC 4.2.200(A) is worded in a way that creates
3 such an exemption. We see no reason why BDC 4.2.200(A) could not be amended to exempt
4 tri-plex development from the BDC 3.4 public improvement standards. But as BDC
5 4.2.200(A) is currently worded, it simply does not provide the kind of exemption that BDC
6 3.4.100(C) anticipates may apply to some development.

7 **C. The Planning Department Checklist and the BDC 4.2.200(A)**
8 **Requirement for a Type I Procedure for Tri-Plex Applications Render**
9 **any Discretionary BDC Criteria Inapplicable**

10 The city and intervenor advance two arguments that demonstrate a fundamental
11 misunderstanding regarding what the city must do to create a category of decisions under the
12 BDC that qualifies for the exception to the statutory definition of land use decision that is
13 provided by ORS 197.015(10)(b)(A).

14 BDC 3.0.200 provides that the city may create checklists to assist applicants in
15 determining what provisions of BDC Chapter 2.0 and 3.0 apply to particular kinds of
16 development.

17 “The City’s development design standards are contained in Chapter 2.0 and
18 Chapter 3.0. It is important to review both chapters, and all relevant code
19 sections within the chapters, to determine which standards apply. *The City*
20 *may prepare checklists to assist property owners and applicants in*
21 *determining which Sections apply.*” BDC 3.0.200 (emphasis added).

22 The city has prepared a checklist for tri-plex development. Amended Record 1-2. That
23 checklist does not list BDC 3.4.200(A)(1) or BDC 4.2.200(D)(5) as applicable. The city and
24 intervenor suggest that BDC 3.0.200 and the checklist that the city planning department
25 prepared pursuant to BDC 3.0.200 provide authority for their view that those discretionary
26 BDC standards do not apply to tri-plex development.

27 Both the city and intervenor also argue that the city intends its Type I decisions to
28 qualify for the ORS 197.015(10)(b)(A) exemption from the statutory definition of land use
29 decision. *See* n 3. The city and intervenor contend that under the BDC, when significant

1 discretion is required, the city follows its Type II decision making procedure, which parallels
2 the notice and comment statutory requirements for limited land use decision making. ORS
3 197.195. We understand the city and intervenor to suggest that because BDC 4.2.200(A)
4 clearly authorizes use of the city's Type I decision making procedure if the BDC 3.6.200(H)
5 clear and objective criteria are met, it follows that any discretionary BDC criteria that might
6 otherwise apply to a tri-plex are rendered inapplicable by BDC 4.2.200(A).

7 The city and intervenor have it backwards. Neither the city nor intervenor has
8 disputed that BDC 3.4.200(A)(1) and BDC 4.2.200(D)(5) impose the kind of discretionary
9 approval standards that under ORS 197.015(12)(a)(B) would make approval of a tri-plex a
10 limited land use decision, if those BDC standards apply to tri-plex development. *See* n 4.
11 We have rejected the city's and intervenor's arguments that BDC 4.2.200(A) has the legal
12 effect of making BDC 3.4.200(A)(1) and BDC 4.2.200(D)(5) inapplicable. If the city wishes
13 to allow approval of tri-plexes under its Type I procedure, it must amend the BDC to exempt
14 tri-plex development from the kind of discretionary land use standards that are described in
15 ORS 197.015(12)(a)(B). The fact that the author of the tri-plex checklist did not believe that
16 BDC 3.4.200(A)(1) and BDC 4.2.200(D)(5) apply to tri-plexes is not important. The BDC is
17 complicated and it is understandable that the city might want to prepare checklists to assist
18 applicants and the planners that must administer the BDC. But it is the BDC itself that
19 determines what BDC standards apply to various types of development, not the checklist. As
20 we have already explained, in its current form, BDC 4.2.200(A) does not exempt tri-plex
21 development from BDC 3.4.200(A)(1) and BDC 4.2.200(D)(5).

22 Similarly, the fact that BDC 4.2.200(A) authorizes the city's Type I decision making
23 procedure for certain tri-plex development does not mean that BDC 3.4.200(A)(1) and BDC
24 4.2.200(D)(5) do not apply. Rather, because neither BDC 4.2.200(A) nor any other BDC
25 provision exempts tri-plex development from BDC 3.4.200(A)(1) and BDC 4.2.200(D)(5),
26 BDC 4.2.200(A) is inconsistent with ORS 197.195, which imposes substantive and

1 procedural requirements on “limited land use decisions,” as defined by ORS 197.015(12).
2 *See* n 4. If the city does not want to comply with statutory limited land use decision making
3 requirements when approving tri-plex development, it must amend the BDC to exempt tri-
4 plex development from “discretionary standards designed to regulate the physical
5 characteristics of a use permitted outright.” *See* n 4. Unless and until the city does so, it
6 must follow the limited land use decision making procedures that are set out in ORS 197.195,
7 or its Type II decision making procedure that was adopted to comply with ORS 197.195,
8 notwithstanding BDC 4.2.200(A).

9 The city’s decision is remanded.