

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

3
4 ALLAN DONALD BRUCKNER TRUST,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEND,
10 *Respondent,*

11
12 and

13
14 THE SHEPHERD'S HOUSE
15 *Intervenor-Respondent.*

16
17 LUBA No. 2008-030

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from the City of Bend.

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24 Elizabeth A. Dickson, Bend, filed the petition for review on behalf of petitioner.
25 With her on the brief was Hurley Re, P.C.

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27 No appearance by the City of Bend.

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29 Tamara E. MacLeod, Bend, represented intervenor-respondent.

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31 BASSHAM, Board Member; HOLSTUN, Board Member, participated in the
32 decision.

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34 RYAN, Board Chair, did not participate in the decision.

35
36 REMANDED

06/06/2008

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision approving a modification to an earlier decision that approved a homeless shelter. As modified, the homeless shelter may increase its number of beds from 32 to 60.

FACTS

In 2006, intervenor-respondent (intervenor) applied for a change in use approval to convert an existing building into a homeless shelter in a limited commercial (CL) zone. The city approved the change in use (the 2006 application) over petitioner’s objections, and petitioner appealed that decision to LUBA. That appeal, LUBA No. 2007-011, is currently stayed at the parties’ request for mediation.

A condition of approval of the 2006 application requires that any future increase in the number of beds at the homeless shelter be subject to a new land use application. Sometime after obtaining approval of the 2006 application, intervenor increased the homeless shelter to include approximately 60 beds. Intervenor did this without obtaining approval from the city in violation of the condition of approval in the 2006 application. Intervenor then applied for a modification of the 2006 application that would allow intervenor to operate a 60-bed homeless shelter. The city approved the modification administratively without notice to petitioner or providing petitioner an opportunity to comment. Petitioner attempted to appeal the decision locally, but the city rejected the local appeal because the city code does not provide for a local appeal of administrative decisions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioner argues that the city committed procedural error in granting the modification to expand the homeless shelter from 32 to 60 beds. For the reasons set out below, we agree with petitioner that the city followed the

1 wrong procedure and that remand is necessary for new proceedings that provide notice and
2 opportunity for petitioner to participate. Accordingly, we do not reach the second and third
3 assignments of error, which challenge the evidence and findings supporting the current
4 decision.

5 Bend Development Code (BDC) 4.1.1325 sets out the standards for a modification of
6 an approval.¹ As discussed earlier, the city processed the modification application
7 administratively, as a so-called Type I Action.² Under the city’s code, Type I (Development)

¹ BDC 4.1.1325 provides, in relevant part:

- “A. An applicant may apply to modify an approval at any time after a period of 60 days has elapsed from the time a land use action approval has become final.
- “B. Unless otherwise specified in a particular zoning ordinance provision, the grounds for filing a modification shall be that a change of circumstances since the issuance of the approval makes it desirable to make changes to the proposal, as approved. *A modification shall not be filed as a substitute for an appeal or to apply for a substantially new proposal or one that would have significant additional impacts on surrounding properties.*
- “C. An application to modify an approval shall be directed to one or more discrete aspects of the approval, *the modification of which would not amount to approval of a substantially new proposal or one that would have significant additional impacts on surrounding properties.* Any proposed modification, as defined in this section, shall be reviewed under the criteria applicable to that particular aspect of the proposal. Proposals that would modify an approval in a scope greater than allowable as a modification shall be treated as an application for a new proposal.
- “D. An application for a modification shall be processed as *a land use action.*” (Emphases added.)

² 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:

- “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
- “2. involves the application of standards other than those referred to in subsection 1, above.

“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

1 actions do not require prior notice, opportunity for comment, a hearing, or an opportunity for
2 appeal for persons who may be adversely affected. Petitioner argues that the modification
3 application should have been processed as a Type II Action.³ A Type II (Land Use Permit)
4 Action is required when the decision “involv[es] the exercise of significant discretion.”
5 Unlike a Type I (Development) Action, a Type II (Land Use Permit) Action requires that the
6 planning director provide affected parties an opportunity to appeal the initial decision to a
7 hearings body. The city’s Type II (Land Use Permit) procedures appear to implement the
8 statutory requirements for a “permit” decision that is issued without a prior hearing under
9 ORS 227.175(10).⁴

10 Petitioner argues that the city exercised significant discretion in determining that (1)
11 an 87% increase in beds from 32 to 60 would not have “significant additional impacts on
12 surrounding properties,” (2) an increased need for beds is a justifiable change in
13 circumstances; and (3) the condition of approval in the original change of use approval
14 requiring a “new land use application” to increase the number of beds is satisfied by filing an
15 application for modification of approval, among other determinations.

16 We agree with petitioner that the city exercised “significant discretion” in applying
17 BDC 4.1.1325. Neither the city nor the intervenor has not filed a brief in this appeal.

permitted as an outright use, road name change, sidewalk permit, setback determination, and
lot coverage determination.” (Bold type in original.)

³ 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.

“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, emphases added.)

⁴ Under ORS 227.175(10), a city is required to give written notice of permit decisions that are issued
without a prior hearing and provide an opportunity for a *de novo* appeal.

1 Absent some argument to the contrary, we agree with petitioner that in determining that (1)
2 there are no significant additional impacts on surrounding properties, (2) there is a justifiable
3 change in circumstances, and (3) the earlier condition of approval requiring a “new land use
4 application” is satisfied by filing an application for modification of approval the city was
5 required to exercise significant discretion.

6 To the extent there is room for doubt on this point, the definition of Type II (Land
7 Use Permit) Action specifically states that Type II (Land Use Permit) Actions include a
8 “modification of approval.” *See* n 3. For that reason alone, the city erred in processing the
9 application as a Type I (Development) Action. The city’s procedural error was clearly
10 prejudicial to petitioner’s substantial rights, as petitioner had no opportunity to request a
11 hearing or submit evidence to controvert whether the modification would cause “significant
12 additional impacts on surrounding properties,” among other issues. ORS 197.835(9)(a)(B).
13 Therefore, remand is necessary for the city to follow procedures that provide petitioner an
14 opportunity to file an appeal or request a hearing.⁵

15 Under the first assignment of error, petitioner also argues that the city erred in
16 processing the application as a modification under BDC 4.1.1325, because the proposed
17 increase in beds has a “significant additional impact on surrounding properties,” and
18 therefore the modification process is inappropriate. BDC 4.1.1325(B). However, that
19 argument is based on petitioner’s evidentiary and findings challenges under the second and
20 third assignments of error, which we do not reach. On remand, petitioner will have the
21 opportunity to argue that BDC 4.1.1325 does not apply and that the city must require a new
22 land use application. If raised, the city should address those issues in the first instance.

⁵ A further point of confusion is that BDC 4.1.1325(D) specifically states that a modification of approval is to be processed as a “land use action.” *See* n 1. The BDC defines “land use actions” to be Type III Actions, which require a prior public hearing. The BDC therefore gives conflicting directions regarding whether modification of approval applications must be processed as Type II or Type III actions. However, it is relatively clear that modifications of approval are not Type I Actions.

- 1 The first assignment of error is sustained, in part. We do not reach the second and
- 2 third assignments of error.
- 3 The city's decision is remanded.