

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

3
4 CATHERINE BAILEY,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF TUALATIN,
10 *Respondent.*

11
12 LUBA No. 2008-079

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Tualatin.

18
19 Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Oregon Land Law.

21
22 Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of
23 respondent. With him on the brief was Miller Nash LLP.

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25 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

26
27 RYAN, Board Member, did not participate in the decision.

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29 AFFIRMED

10/01/2008

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

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NATURE OF THE DECISION

Petitioner appeals a building permit and a mechanical permit.

FACTS

The subject property is zoned Low Density Residential (RL) and is improved with a one-family dwelling. The existing dwelling includes approximately 1,595 square feet and has three bedrooms, two baths and a two-car garage. The disputed permits authorize conversion of the garage and a family room into five additional bedrooms. Following the conversion, the applicant plans to lease the house to Oregon Recovery Homes (ORH). ORH provides alcohol-free/drug-free housing to persons who have completed alcohol and drug treatment and are in recovery. ORH uses the Oxford House model, which the city describes as follows:

“An Oxford House is typically occupied by six to eight unrelated adults of the same gender, and can be occupied by up to three children of one or more of the adults. The adult residents are in drug or alcohol recovery, have completed or participated in a treatment program, and range in age from 19 to 58 years old. Each Oxford House is individually managed by the residents as members of the 19-chapter Oxford House organization in Oregon. The residents live together as a single housekeeping unit and provide support to one another to remain sober and become contributing members of society. There is no on-site treatment or counseling at an Oxford House. Respondent’s Brief 3 (record citations omitted).

JURISDICTION

LUBA has exclusive jurisdiction to review local government land use decisions. ORS 197.825(1). As defined by ORS 197.015(10)(a), a land use decision includes

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

“* * *

“(iii) A land use regulation[.]”

Tualatin Development Code (TDC) 31.114 provides, in part:

1 “No building permit shall be issued by the Building Official for the City of
2 Tualatin for the erection, construction, conversion or *alteration of any*
3 *building or structure* or use of land unless the Community Development
4 Director or designee has first determined that such land use, building or
5 structure, as proposed, would comply with the [TDC].” (Emphases added.)

6 The TDC is a land use regulation. The requested conversion of the existing garage
7 and family room to five bedrooms is at the very least an “alteration” of the existing one-
8 family dwelling. Therefore, the city was required to assure that the alteration will “comply
9 with the [TDC],” which required an “application of” the TDC, within the meaning of ORS
10 197.015(10)(a). The challenged building permit is therefore a land use decision, unless the
11 building permit is excluded from the statutory definition of land use decision. Under ORS
12 197.015(10)(b), a land use decision does not include a local government decision:

13 “(A) That is made under land use standards that do not require
14 interpretation or the exercise of policy or legal judgment;

15 “(B) That approves or denies a building permit issued under clear and
16 objective land use standards[.]”

17 The parking standard that the city applied in this case, which is the subject of
18 petitioner’s assignment of error, can be interpreted in more than one way and therefore is not
19 “clear and objective.” *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761
20 (2000)(where local standard can “plausibly be interpreted in more than one way” it is not
21 “clear and objective” within the meaning of ORS 197.015(10)(b)(B)). Neither is that parking
22 standard one that can be applied without “interpretation or the exercise of policy or legal
23 judgment.” It follows that the challenged building permit is a land use decision, and LUBA
24 has jurisdiction to consider petitioner’s assignment of error.¹

¹ The challenged decision is both a building permit and a mechanical permit, but the parties treat the decision as a single decision, and so do we.

1 **ASSIGNMENT OF ERROR**

2 TDC Chapter 73 is entitled Community Design Standards. That chapter is divided
3 into a number of sections. One of those sections imposes off-street parking requirements.
4 The city’s off-street parking requirements are set out in a table that follows TDC 73.370(2).
5 There is no dispute that the structure at issue is a one-family dwelling. According to the
6 table, one-family dwellings in the RL zone must provide “1.00 space per unit, in addition to
7 garage.” According to petitioner, the quoted language in the table requires that one-family
8 dwellings have a garage, and the building permit erroneously authorizes the applicant to
9 convert the existing one-family dwelling’s only garage into three bedrooms. Petitioner
10 contends the building permit decision should therefore be reversed.

11 Petitioner also argues “TDC 34.310(4) further prohibits the conversion of a garage
12 into an accessory dwelling unit.” Petition for Review 8.

13 Turning first to petitioner’s second argument concerning TDC 34.310(4), petitioner
14 does not develop the argument, and the city does not respond to the argument. TCC
15 34.310(4) states “[n]either a garage nor a former garage shall be converted to an accessory
16 dwelling unit.” As defined by the TDC, an accessory dwelling unit “functions as a separate
17 living area from the other living area in the detached single-family dwelling.” TDC 31.060.
18 Petitioner makes no attempt to explain why she thinks the converted garage will qualify as an
19 “accessory dwelling.” As we understand the proposal, the three new bedrooms that would
20 occupy the garage, either individually or collectively, will not qualify as an accessory
21 dwelling.

22 We turn next to the TDC Section 73.370(2) table requirement that the dwelling
23 provide “1.00 space per unit, *in addition to garage.*” (Emphasis added.) Petitioner cites no
24 other TDC section that requires that one-family dwellings in the RL zone must have a
25 garage. If the TDC requires that all one-family dwellings must have a garage, it is the quoted
26 TDC Section 73.370 table language that imposes that requirement. We agree with the city

1 that the more natural reading of the quoted table language is that it assumes that one family
2 dwellings *may* have a garage and requires that one additional off-street parking space must
3 be provided beyond any off-street parking that may be provided by the garage. As explained
4 below, when the quoted table language is viewed in context, that interpretation is reinforced.
5 *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (first
6 level of analysis in determining the meaning of a statute is to examine its text and context).

7 In a number of other instances in the TDC Section 73.370 table, a specified number
8 of off-street parking spaces are required “in addition to garage.” However for “[d]welling
9 units within the Central Design District,” the requirement is for “1.50 space per dwelling
10 unit, including garage.” When the different phrasing is compared, it is reasonably clear that
11 for the Central Design District dwellings any parking spaces within a garage may be counted
12 in satisfying off-street parking spaces, whereas when the required off-street parking spaces
13 are “in addition to garage” the spaces in the garage may not be counted. That context
14 supports reading the “in addition to garage” language not to *require* a garage, but rather to
15 impose an off-street parking requirement that goes beyond (*i.e.*, is in addition to) any off-
16 street parking that may be present if there is a garage.

17 Additional context that supports that interpretation is provided elsewhere in the TDC.
18 In at least two instances, other provisions of the TDC expressly require garages. In the RL
19 zone, manufactured dwellings are separately regulated. TDC 40.145. TDC 40.145(6)
20 expressly requires that a “manufactured home shall have an attached or detached two-car
21 garage constructed of materials similar to the manufactured home.” There is no such express
22 garage requirement in the TDC for one-family dwellings. Another section of TDC Chapter
23 73 sets out standards for one-family and multi-family uses. TDC 73.190. TDC 73.190(1)
24 sets out standards for one-family dwellings. TDC 73.190(2) sets out standards for multi-
25 family uses and imposes the following requirement:

26 “(b) Carports and Garages.

1 “(i) If carports and garages are provided for multi-family
2 development, except townhouses, the form, materials, color
3 and construction shall be compatible with the complex they
4 serve.

5 “(ii) At least one garage space shall be provided for townhouses.”

6 TDC 73.190(2)(b) expressly provides that townhouses must provide “[a]t least one garage
7 space * * *.” There is no such express requirement in the standards for one-family dwellings
8 that appear at TDC 73.190(1). It appears that where the city has decided to *require* that a
9 building include a garage, it expressly imposes that requirement.

10 Viewed in context, we agree with the city that the TDC 73.370(2) table entry for one-
11 family dwellings in the RL zone does not require that all one-family dwellings in that zone
12 must include a garage. It simply recognizes that buildings sometimes include garages, and in
13 most cases imposes an off-street parking requirement that is in addition to the off-street
14 parking that is provided by any garages that may be present.

15 Petitioner’s assignment of error is denied.

16 The city’s decision is affirmed.