BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THE ATHLETIC CLUB OF BEND, INC.,
Petitioner,
vs.

CITY OF BEND,
Respondent,

and

MOUNT BACHELOR CENTER, LLC,
Intervenor-Respondent.

LUBA No. 2010-018

FINAL OPINION
AND ORDER

Appeal from Bend.

Aaron J. Noteboom, Eugene, filed the petition for review on behalf of petitioner. With him on the brief was Arnold Gallagher Percell Roberts & Potter, P.C. Micheal M. Reeder, Eugene, argued on behalf of petitioner.

Mary Winters, City Attorney, Bend, and Gary Firestone, Assistant City Attorney, Bend, filed a response brief. Gary Firestone argued on behalf of respondent.

Sharon R. Smith, Bend, filed a response brief on behalf of intervenor-respondent. With her on the brief was Bryant, Lovelien & Jarvis, PC.

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

AFFIRMED 06/16/2010

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

Petitioner appeals a city hearings officer decision that denies petitioner's application for site plan approval for a new driveway onto Century Drive, a city arterial street.

MOTION TO INTERVENE

Mount Bachelor Center, LLC, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The Mount Bachelor Village Resort has three access points onto Century Drive, an arterial roadway. Those three access points on Century Drive lead to a series of internal roadways that provide access to the individual lots in the Mount Bachelor Village Resort.

Mount Bachelor Village Subdivision (MBV Subdivision) is a 22-lot subdivision within the larger Mount Bachelor Village Resort. The subject property, owned by petitioner, is one of the lots in the MBV Subdivision. The subject property is currently developed as a parking lot, as is petitioner's adjoining lot to the east. Those parking lots serve petitioner's athletic club building, which is located on another lot that adjoins the parking lots. Although Century Drive adjoins the subject property on its western side, the parking lot does not have direct access to Century Drive. The subject property has what appears to be between 50 and 80 feet of frontage on an internal private roadway, Athletic Club Drive, which provides the only access to the parking lot on the subject property and the parking lot on the adjoining property to the east. Athletic Club Drive also provides access to other commercial development in the Mount Bachelor Village Resort commercial core. Athletic Club Drive is a horseshoe shaped road that connects with Reed Market Road to the north and Mount Bachelor Drive to the East. Both of those roads are part of the Mount Bachelor Village Resort internal roadway system. Reed Market Road connects with Century drive a short

distance north of the subject property, at a traffic circle. Maps showing the relationship of the subject property to the surrounding properties and street system appear at Record 686-87.

The decision that is at issue in this appeal denies petitioner's request to construct a direct driveway connection with Century Drive from the subject property. As proposed, that driveway would provide a right-in access to the parking lot from the northbound lane of Century Drive and right-out access to the northbound lane of Century Drive from the parking lot. In addition, petitioner proposes a raised median improvement between the northbound and southbound lanes of Century Drive that would provide a refuge lane to allow access to the parking lot from the southbound lane of Century Drive. For purposes of this appeal, it is particularly significant that the proposed driveway would require improvements on the subject property and within the Century Drive right of way, which is owned by the City of Bend.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The application for approval of the MBV Subdivision was submitted in 1999 and approved in December 2000. At the time MBV Subdivision was approved, Century Drive was owned by the Oregon Department of Transportation (ODOT) and any access limitations that would have applied at that time would have been ODOT's limitations. The version of the Bend Development Code (BDC) that was in effect in 1999 and 2000 (the Old BDC) apparently did not regulate driveway access onto streets. Sometime after MBV Subdivision was approved, ODOT transferred the portion of Century Drive next to the Mount Bachelor Village Resort to the city, and in 2006 the city amended the BDC (the New BDC) to regulate driveway access onto city streets. The hearings officer applied the New BDC to petitioner's proposal, and found that the proposal does not comply with the city's current regulations limiting driveway access to city streets. Petitioner argues under its first assignment of error that the city erred by refusing to apply the Old BDC, which would have permitted to city to approve the proposal.

Petitioner's first assignment of error is based on ORS 92.040. The first subsection of ORS 92.040 requires a two-step process for approval of subdivisions—tentative subdivision plan approval followed by final subdivision plat approval and recording. A tentative plan "showing the general design of the proposed subdivision" must be submitted and approved. Under ORS 92.040(1), the tentative plan approval decision limits the changes a local government may require before the final plat is approved and recorded. According to the legislative history for 1995 amendments to ORS 92.040, some local governments were adopting and applying additional restrictions on construction within subdivisions after the final plat was recorded, taking the position that the shield from subsequent local laws provided by ORS 92.040(1) did not apply to *construction* after the final plat was approved. The legislative history indicates that ORS 92.040(2) was enacted to stop that local government practice. The text of ORS 92.040(2) is set out below:

> "(2) After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, *only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction* <u>*on the property*</u> *unless the applicant elects otherwise*." (Italics and underlining added.)

In addressing the effect of ORS 92.040(2) in this case, the hearings officer identified two possible ambiguities in ORS 92.040(2)—the meaning of "construction on the property" and the meaning of "local government laws." Petitioner challenges the hearings officer's conclusions regarding the meaning of "construction on the property" in its first assignment of error and his conclusion regarding the meaning of "local government laws" in its second assignment of error.

A. The Meaning of "Subsequent Construction on the Property"

We set out portions of the hearings officer's findings below:

> "The first issue is what constitutes 'subsequent construction on the property' within the meaning of [ORS 92.040(2)]. The difficulty here lies in the fact that the applicant is proposing a driveway both on the subject property and off the subject property, within Century Drive right-of-way. A portion of at least

> some of the improvements would be located on the property while some would be off the property, such as the proposed raised median. According to the applicant, the entire driveway in the application, even construction not on the property at all and well into the right-of-way, must be reviewed under the [old BDC]. * * *
>
> "* * * * *
>
> "[Mount Bachelor Center, LLC (MBC)] reads [ORS 92.040(2)] very differently, giving it a more literal interpretation.[1] MBC describes the statute as 'very specific' and written in 'plain language', arguing that the statute pertains only to 'subsequent construction on the property, unless the applicant elects otherwise.' * * * It emphasizes that the phrase subsequent construction on the property is plain, understandable and clear, and that subsequent construction off the property is unaffected by the statute and that for all such construction the applicant must meet present standards.
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> "* * * * *
>
> "While there is merit in both the applicant's and opponent's positions, I find the plain language of the statute to be most compelling. The statute refers to subsequent construction *on the property*. While I cannot say that the legislative history provided by the applicant is determinative of the issue, this reading is at least not inconsistent with [the legislative history] and is in fact, to some extent, supported by it. The small amount of testimony contained therein refers to building on lots and changes to regulations and standards on individual lots, which the Century Drive arterial street is not. * * *" Record 39-42 (underlining and italics in original).

Petitioner argues the hearings officer's decision frustrates the legislature's intent in adopting ORS 92.040(2):

> "As demonstrated by the legislative history provided by Petitioner at the local level * * *, the intent of ORS 92.040(2) was to allow subsequent development to occur under the law in effect when a subdivision application was filed. The Hearings Officer's interpretation of ORS 92.040(2) is inconsistent with that intent. Under the Hearings Officer's approach, * * * local governments could circumvent the protections of ORS 92.040(2) by merely imposing burdensome access requirements. This is true because subdivisions necessarily rely on or create roads and road rights-of-way adjacent to lots and on-site development necessarily requires the development of the right-of-way between the road and lot line. A private driveway must always enter the right-of-way to connect with an adjacent public roadway. Under the Hearings Officer's view, that fact

[1] MBC owns a commercially developed lot next to petitioner and opposed petitioner's application.

> voids the protection granted by ORS 92.040(2). This view clearly conflicts with the intent of the Legislature to allow subsequent development to occur under the local law in effect at the time of the subdivision application. The Hearings Officer's erroneous interpretation would allow new local laws to circumvent the protections afforded by the state legislature under ORS 92.040(2) and deny access to previously-created lots and, therefore, make impossible subsequent on-site development that was allowed under local laws in effect at the time the original subdivision was approved and that is protected by ORS 92.040(2)." Petition for Review 10.

Petitioner argues the hearings officer's interpretation effectively prevents the very construction that ORS 92.040(2) was designed to protect and produces an absurd result.

As we have already explained, Mount Bachelor Village Resort is largely developed. The subject property and the lot next to the subject property are developed with parking lots that serve petitioner's athletic club. Access to those parking lots is now provided by Athletic Club Drive. As far as we can tell, petitioner's lots have been provided access in exactly the way that was anticipated in the Mount Bachelor Village Resort master plan, via internal roads rather than by direct access to Century Drive. Record 268, 400. Although we cannot be sure, because there is no copy of the MBV Subdivision final plat in the record, it also seems likely that the existing access via Athletic Club Drive is what was anticipated by that final plat. Petitioner does not argue otherwise and offers nothing that would suggest that the MBV Subdivision final plat was approved with any expectation that access to the subject property would be provided via a driveway directly onto Century Drive.[2]

Petitioner's arguments complain about impacts on a hypothetical subdivision that differs significantly from the MBV Subdivision and are directed at a decision that the county has not adopted. If the MBV Subdivision that was approved in 2000 had proposed lots that could only be provided access directly from Century Drive, petitioner's criticism of the hearings officer's decision might have some merit. As we have already explained, petitioner

[2] The record does include several plats showing a replat of the commercial core. Record 366-73. Those plats show access to and from the subject property from Athletic Club Drive and do not show direct driveway access from the subject property onto Century Drive.

has not established that to be the case. Similarly, if the 2000 MBV Subdivision proposed new roads, to be constructed partially on the subject property and partially on adjoining property, and the hearings officer had applied ORS 92.040(2) to apply the New BDC to preclude such construction, petitioner's criticism might have some merit. In that case the statute's reference to "the property" might well be understood include both the on-site and the adjacent off-site property that the proposed new roadway would occupy. But again, as far as we can tell, the MBV Subdivision that was approved in 2000 did not propose to provide access to the subject property via a driveway onto Century Drive with a raised median between the northbound and southbound lanes. Assuming the MBV Subdivision plat is consistent with the Mount Bachelor Village Resort master plan, and petitioner has provided no reason to suspect that it is not, access to the subject property was to be provided in exactly the way it has been provided, via Athletic Club Drive. The hearings officer's decision does not deny the subject property the access that apparently was envisioned by the Mount Bachelor Village Resort master plan and MBV Subdivision plat; it denies the subject property a second access directly onto Century Drive that does not appear to have been envisioned by either of those documents in any express or implied way.

In construing and applying ORS 92.040(2) to petitioner's application, the hearings officer was required to examine the text and context of the statute and any legislative history that the parties supplied. *State v. Gaines*, 346 Or 160, 165-73, 206 P3d 1042 (2009); *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610-11, 859 P2d 1143 (1993). The hearings officer did so, and we agree with the hearings officer's understanding of the text and legislative history. We also reject petitioner's suggestion that a contrary interpretation is required to avoid absurd results. Where statutory text is clear, it cannot be subverted to avoid absurd results. *Folkers v. Lincoln County School Dist.*, 205 Or App 619, 627, 135 P3d 373 (2006). The statutory text is clear, and as explained above, the absurd result that petitioner seeks to avoid is purely hypothetical and is not present in this case. The

hearings officer did not err by applying the New BDC access standards to petitioner's application.

Petitioner's first assignment of error is denied.

B. The Meaning of "Local Government Laws"

With regard to the meaning of "local government laws," as used in ORS 92.040(2), the hearings officer ultimately concluded that whatever regulations ODOT would have imposed on a request to approve direct access from the subject property to Century Drive in 1999 qualified as "local government laws." Because petitioner did not demonstrate that his proposed access would satisfy those 1999 ODOT standards, the hearings officer concluded the application could not be approved. Petitioner challenges that conclusion in its second assignment of error.

Petitioner is almost certainly correct that ODOT's 1999 access standards do not qualify as "local government laws," within the meaning of ORS 92.040(2). However, we do not reach petitioner's second assignment of error, because we have already concluded in denying petitioner's first assignment of error that the hearings officer correctly concluded that petitioner's application must comply with the New BDC access standards.

We do not reach petitioner's second assignment of error.

THIRD ASSIGNMENT OF ERROR

Assuming the New BDC applies, petitioner next argues the hearing officer erroneously interpreted BDC 3.1.400(E) to preclude the city engineer from approving a second access to the subject property from Century Drive under BDC 3.1.400(I).

BDC 3.1.400 is entitled "Vehicular Access Management." BDC 3.1.400(E) is entitled "Access Requirements," and generally requires that where there is more than one option for access to a lot that the access be provided by the "lower functionally classified roadway." The relevant text of BDC 3.1.400(E) is set out below:

"Access Options. When vehicle access is required for development (*i.e.*, for off-street parking, delivery, service, drive-through facilities, etc.), access shall be provided by one of the following methods as determined by the City Engineer, unless one method is specifically required by this ordinance.

"a. Option 1. *Access shall be taken from an alley (either an existing, proposed or potential alley), mid-block lane, or lowest functionally classified street possible. If a property has the ability to take access to a lower functionally classified roadway, direct access to a higher functionally classified roadway is not permitted unless required by the City Fire Chief for fire and life safety reasons.* This requirement applies to all properties, all zones and all uses (i.e. alleys are considered a lower classification than local streets).

"b. Option 2. Access is from a shared private street or driveway straddling a shared property line with direct access to a public street (i.e., 'shared driveway'). If approved, a cross access easement covering the private street or driveway shall be recorded in this case to assure access to the closest street for all users of the private street/drive.

"c. Option 3. Access is through an adjoining property to achieve access to a street (i.e. cross access easement). The cross access easement shall be recorded in this case to assure access to the street system.

"d. Option 4. If neither Option 1, nor Option 2, nor Option 3 is available to the site, access may be allowed from an arterial or collector street adjacent to the development parcel. * * *" (Emphasis added.)

BDC 3.1.400(I) is entitled "Number of Access Points," and provides in relevant part:

"2. Multi-family housing and nonresidential uses: One street access point for multiple family (including multi-family housing over commercial uses in a mixed-use development), commercial, industrial, and public/institutional developments is permitted to protect the function, safety and operation of the street(s) and sidewalk(s) for all users; *except that additional access points may be permitted, as approved by the City Engineer, subject to the access requirements in this Chapter of the City of Bend Development Code*." (Emphasis added.)

During the proceedings below, planning staff took the position that the current access to the subject property via Athletic Club Drive complies with Option 1, "because the development does take access to Athletic Club Drive which is classified as lower order facilities." Record 57. However, planning staff also took the position that the clause in Option 1 that prohibits access to a higher functionally classified roadway, such as Century

Drive in this case, "unless the access is approved by the City Fire Chief for fire and life safety reasons * * * conflicts with [BDC] 3.1.400(I), which specifically allows additional access points for commercial developments." *Id*. Petitioner agreed with planning staff below. However, the hearings officer did not see any conflict between BDC 3.1.400(E) and BDC 3.1.400(I)(2), and neither do we.

It is physically possible to provide access to the subject property via Century Drive or Athletic Club Drive or both. Under BDC 3.1.400(E) Option 1, access to the subject property must be provided by Athletic Club Drive, because Athletic Club Drive is the "lower functionally classified roadway." Under BDC 3.1.400(E) Option 1, because access from Athletic Club Drive is possible, access to Century Drive is only permissible if such access is "required by the City Fire Chief for fire and life safety reasons," which is not the case here.

Under BDC 3.1.400(I)(2), a second access to the subject property is permissible "as approved by the City Engineer, subject to the access requirements in this Chapter of the City of Bend Development Code." The city engineer apparently approved the request. Under BDC 3.1.400(I)(2) the only remaining hurdle for approval of a second access is the limitation that the second access is "subject to the *access requirements* in this Chapter of the City of Bend Development Code." (Emphasis added.) As we have already noted, BDC 3.1.400(E) is entitled "Access Requirements." As we have also already noted, BDC 3.1.400(E) Option 1 prohibits access to Century Drive, because the subject property has the ability to take access from Athletic Club Drive. Because the potential city engineer authorization of a second access under BDC 3.1.400(I)(2) is expressly "subject to" the prohibition in BDC 3.1.400(E) Option 1, and the city fire chief has not found there is any fire or life safety reason for the driveway onto Century Drive, petitioner does not qualify for a second access onto Century Drive under BDC 3.1.400(I)(2). While petitioner does not qualify for a second access onto Century Drive, based on the facts of this case, there is no conflict between the access requirements in BDC 3.1.400(E) Option 1 and the limited authorization for multiple

access points in BDC 3.1.400(I)(2). There is no conflict because the contingent authorization for multiple access points in the latter is expressly subject to the limitations in the former.[3] The hearings officer's interpretation gives effect to both BDC 3.1.400(E) Option 1 and BDC 3.1.400(I)(2), as required by ORS 174.010.[4] Petitioner's interpretation gives no effect to the language in BDC 3.1.400(I)(2) that expressly limits city engineer approval of multiple accesses to the "access requirements in this Chapter of the City of Bend Development Code," and in so doing makes the access requirements of BDC 3.1.400(E) Option 1 subject to the city engineer's authority to grant multiple access points, instead of the other way around. Petitioner's interpretation of BDC 3.1.400(E) Option 1 and BDC 3.1.400(I)(2) is flatly inconsistent with the language of those sections of the BDC.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error is premised on petitioner's position that the hearings officer erroneously applied the New BDC access requirements and erroneously found that the application does not comply with the New BDC access requirements. Petitioner contends that the hearings officer should have found that the New BDC access requirements do not apply or found that the application complies with the New BDC access requirements and proceeded to consider and find that the application complies with remaining criteria that the hearings officer declined to consider after he found the application

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[3] As the hearings officer noted in his decision, if the subject property's only potential access were via Century Drive, the city engineer might be able to approve a second access onto Century Drive and the prohibition in BDC 3.1.400(E) Option 1 would not apply, because the subject property would not have "the ability to take access to a lower functionally classified roadway." Similarly, if the subject property had sufficient frontage on Athletic Club Drive, the city engineer might be able to approve a second access onto Athletic Club Drive.

[4] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and *where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all*." (Emphasis added.)

does not comply with BDC 3.1.400(E) access requirements. Because petitioner's premise is incorrect, this assignment of error provides no basis for reversal or remand.

The fourth assignment of error is denied.

The city's decision is affirmed.