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

On remand from the Court of Appeals.

Aaron J. Noteboom, Eugene, represented petitioner.

Mary Winters, City Attorney, Bend, and Gary Firestone, Assistant City Attorney, Bend, represented respondent.

Sharon R. Smith, Bend, represented intervenor-respondent.

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

REMANDED 02/08/2011

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

Opinion by Holstun.

DECISION

This appeal concerns petitioner's application for city approval for a driveway connection from an athletic club parking lot on petitioner's property to Century Drive, along with related improvements in the Century Drive right of way. Petitioner's parking lot currently has access from an internal road, and petitioner's parking lot does not have access directly onto Century Drive. Century Drive was an Oregon Department of Transportation (ODOT) facility until September 2000, when it was transferred to the city. It is now a city transportation facility.

In reviewing petitioner's application, the city hearings officer applied the current Bend Development Code (new BDC), which regulates driveway access onto minor arterials like Century Drive, and on the basis of the new BDC denied the application. Petitioner appealed that decision to LUBA and argued to LUBA, as it had to the city hearings officer, that under ORS 92.040(2) the city should have applied the version of the BDC that was in effect when the subdivision application was filed in 1999 (the old BDC). Petitioner contends that the old BDC did not regulate driveway connections onto minor arterials like Century Drive. ORS 92.040(2) provides:

> "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 *on the property* unless the applicant elects otherwise." (Emphasis added.)

In his decision, the hearings officer determined that ORS 92.040(2) did not apply to petitioner's application because petitioner's proposed driveway included improvements in the Century Drive right of way, which is city-owned property and was not part of the property that was subdivided in 1999. Those improvements included a raised median improvement between the north-bound and south-bound lanes of Century Drive to provide a

refuge lane for turning movements. The hearings officer reasoned that ORS 92.040(2) did not preclude application of the new BDC to the part of petitioner's proposal that was not located on petitioner's property. Petitioner appealed to LUBA.

In its first assignment of error to LUBA, petitioner challenged the hearings officer's determination that ORS 92.040(2) does not bar application of the new BDC to petitioner's proposal. LUBA denied petitioner's first assignment of error, concluding that the hearings officer correctly interpreted ORS 92.040(2). *The Athletic Club of Bend v. Bend*, ___ Or LUBA ___ (LUBA No. 2010-018, June 16, 2010), slip op 3-8. On appeal, the Court of Appeals disagreed with the hearings officer's and LUBA's interpretation of ORS 92.040(2):

> "* * * In light of the legislative history and our understanding of how the development of access to subdivision lots occurs, we conclude that the protection that ORS 92.040(2) provides to 'subsequent construction on the property' is most plausibly understood to apply whenever the approval of on-property development depends on the approval of off-property construction on rights-of-way and roadways adjacent to subdivision lots that occurs as a consequence of on-property development. Accordingly, we conclude that LUBA erred in affirming the hearings officer's decision to apply the new BDC access standards to petitioner's site review plan application. *Athletic Club of Bend, Inc. v. City of Bend*, 239 Or App 89, 99-100, 243 P3d 824 (2010)

Based on the above, LUBA should have sustained petitioner's first assignment of error. Based on petitioner's first assignment of error, the hearings officer's decision must be remanded. Petitioner's third and fourth assignments of error to LUBA challenged city findings that the proposal does not comply with the new BDC. Because the new BDC does not apply to petitioner's application, it is unnecessary for us to revisit those assignments of error.

Finally, we turn to our discussion of petitioner's second assignment of error in our initial decision. Our discussion was relatively brief, and is set out below:

> "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 [its] 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." *The Athletic Club of Bend v. Bend*, slip op at 8.

City planning staff and ODOT did take the position below that if the new BDC does not apply to petitioner's proposal under ORS 92.040(2), then 1999 ODOT access standards governed the off-site portion of petitioner's proposal and preclude approval. Record 40. However, contrary to our discussion quoted above, the hearings officer did not conclude "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,'" within the meaning of ORS 92.040(2). Although the hearings officer acknowledged that planning staff and ODOT took that position, the hearings officer did not adopt planning staff's and ODOT's position. The closest the hearings officer came to agreeing with planning staff and ODOT is the following:

> "[I]f the access [to Century Drive] had been requested with subdivision approval [in 1999], the applicant would have had to address the ODOT standards controlling Century Drive access, jurisdiction over which has now been transferred to the City of Bend." Record 42.

The hearings officer simply recognized that while Century Drive is no longer an ODOT facility, had the petitioner sought driveway access onto Century Drive at the time it applied for subdivision approval in 1999—when Century Drive was an ODOT facility—petitioner would have had to comply with whatever standards ODOT had in place at that time for access onto ODOT facilities. The hearings officer is no doubt correct that ODOT access

1 standards would have applied in 1999 had petitioner sought access onto Century Drive at that
2 time. But that is a very different question from whether the city may now apply 1999 ODOT
3 access standards to petitioner's current application for approval of driveway access onto
4 Century Drive, which is no longer an ODOT facility. The hearings officer did not decide the
5 latter question, and we were wrong to say that he did. The hearings officer is free to take up
6 that question on remand if he wishes.

7 The hearings officer's decision is remanded for further consideration consistent with
8 the Court of Appeals' decision and our decision on remand.