

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

SCOTT DAHLEN,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

JOHN ROEDER,
Intervenor-Respondent.

LUBA No. 2021-013

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Scott Dahlen filed the petition for review and argued on their own behalf.

No appearance by City of Bend.

Christopher P. Koback filed the response brief and argued on behalf of
intervenor-respondent.

RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
Member, participated in the decision.

AFFIRMED

06/14/2021

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

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision approving a six-phase, 141-lot subdivision.

FACTS

The 20.4-acre subject property is located in the northeast quadrant of the city, an area of the city that is

“developed with a mix of standard density and low-density residential uses. All of the properties in the surrounding area are zoned [Standard Density Residential (RS)] and are part of the Lava Ridge Refinement Plan Area. To the north of the property lies Morningstar Drive and Boyd Acres Road (designated as local connector streets on the Lava Ridge Refinement Area Transportation Map) and beyond that, the Northridge Subdivision. To the east lies the Wishing Well Phase 1 Subdivision and the stubbed Town Drive (a local street). To the south lies the Yardley Estates Phase 3 Subdivision and the stubbed Peale Street (a local street), and to the west lies the Madison Phase 5 Subdivision and the stubbed Silas Drive (a local street).” Record 33.

Although vegetated with juniper trees, rabbit brush, and sagebrush, and developed with a single-family residence and associated structures, the subject property is mostly vacant. Intervenor applied to remove the existing structures and develop a subdivision on the subject property. Intervenor’s tentative plan application explained that the proposed subdivision is phased:

“Phase I (Lots 1-22) is located in the northeastern corner of the subject property adjacent to Morningstar Drive; Phase II (Lots 23-50) is located immediately to the south of Phase I. Phases III (Lots 51-67) and IV (Lots 68-97) are located to the west of Phases I and II and are situated with Phase III to the north and Phase IV to the

1 south. Phases V (Lots 98-111) and VI (Lots 112-141) are located to
2 the west of Phases III and [IV] and are situated with Phase V to the
3 north and Phase VI to the south.” *Id.*

4 On November 16, 2020, the hearings officer held a public hearing and
5 considered intervenor’s application. On December 10, 2020, the hearings officer
6 issued a decision approving the application with conditions. On December 21,
7 2020, petitioner appealed the hearings officer’s decision to the city council. On
8 December 29, 2020, the city council declined to hear the appeal. This appeal
9 followed.

10 **ASSIGNMENT OF ERROR**

11 Bend Development Code (BDC) 3.4.400(A) contains the city’s “to and
12 through” standard, providing that “[s]*anitary sewers and water mains must be*
13 *installed to serve each new development and to connect developments to existing*
14 *mains* in accordance with the City’s construction specifications as described in
15 the City of Bend Standards and Specifications document and the applicable Bend
16 Comprehensive Plan policies.” (Emphases added.) Petitioner notes that the “to
17 and through” standard in BDC 3.4.400(A) is repeated in City of Bend Design
18 Standard 4.1.17, which provides:

19 “If a sewer extension is required as part of Section 4.1.16 for
20 compliance with OAR 340-071-0160, the property owner shall be
21 required to extend the City sewer main a distance sufficient to
22 establish a standard perpendicular service connection into the
23 property or 20 feet, whichever is greater.

24 *For all other developments, sewer mains shall be required to be*
25 *extended to and through the length of the property frontage.”*
26 (Emphasis added.)

1 The city's definition of "development" includes subdivisions,¹ and the
2 parties agree that BDC 3.4.400(A) requires intervenor *eventually* to provide a
3 sewer connection to two lots (Lots 5 and 6 of the Madison Phase 5 Subdivision)
4 that are owned by petitioner and located adjacent to Phase V of intervenor's
5 proposed subdivision. However, the parties dispute *when* intervenor must provide
6 that sewer connection.

7 The hearings officer explained in their decision that

8 "[t]he abutting Madison Phase 5 subdivision was reviewed under
9 PZ-03-0256 and was recorded in 2006. Lots 5 and 6 of that
10 subdivision are at a lower elevation than the remainder of that
11 subdivision, so it was not possible for those lots to gravity flow to
12 the west like the other lots in that development. The City wanted to
13 minimize the number of pump stations and because the subject
14 property was in the process of obtaining subdivision approval under
15 PZ-06-0313 it was believed that within months a sewer mainline
16 would be constructed which would gravity flow to the east. It was
17 decided that a 'dry' section of sewer main would be installed in
18 Madison Phase 5 and then would be extended to the east on the
19 subject property in short order. Unfortunately, the real estate market
20 crashed and the development of the subject property was abandoned.
21 This left the 46-foot section of 'dry' sewer an orphan in the City

¹ "Development" is defined, in relevant part, as

"all improvements on a site, including buildings, placement or replacement of manufactured or other structures, parking and loading areas, landscaping, paved or graveled areas, grading, and areas devoted to exterior display, storage, or activities. Development includes improved open areas such as plazas and walkways, but does not include natural geologic forms or landscapes. Development includes a partition and subdivision." BDC 1.2.

1 sewer system.” Record 90.

2 The hearings officer conditioned their approval of intervenor’s tentative plan as
3 follows:

4 “Th[e Madison Phase 5] dry sewer main must be connected to the
5 rest of the system in [intervenor’s] construction phase where Silas
6 Drive, and underlying utilities, are improved to comply with the ‘to
7 and through policy’ and to contribute to the orderly development of
8 the City. The submitted Site Plan shows the extension of a sewer
9 main to the western boundary of the subject property in Silas Drive.”
10 *Id.* (citation omitted).

11 Petitioner’s sole assignment of error is that, because the hearings officer’s
12 decision requires intervenor to provide a sewer connection at the time that
13 intervenor improves Silas Drive—that is, during the development of Phase V of
14 their proposed subdivision—the decision does not ensure that the sewer
15 connection will ever be built. According to petitioner, the “to and through”
16 standard is not met because intervenor may avoid construction of the connection
17 by not constructing Phase V of their subdivision.

18 We will reverse or remand a decision where the local government
19 misconstrued a land use regulation or made a decision that is not in compliance
20 with an applicable land use regulation. ORS 197.835(8), (9)(a)(D). LUBA
21 reviews non-governing body interpretations of local code provisions under ORS
22 197.835(9)(a)(D) to determine whether the decision maker improperly construed
23 the applicable law. *Waverly Landing Condo. Owners’ Assoc. v. City of Portland*,
24 61 Or LUBA 448, 454 (2010). In determining whether the hearings officer
25 properly construed the law, we consider the text and context of the code and give

1 words their ordinary meaning. *PGE v. Bureau of Labor and Industries*, 317 Or
2 606, 610-11, 859 P2d 1143 (1993). We agree with intervenor that the hearings
3 officer did not misconstrue or misapply BDC 3.4.400(A)'s requirement that
4 sanitary sewers be installed to serve each new development and to connect
5 developments to existing mains.

6 A "phased tentative plan" is "a subdivision plan designed to be platted and
7 constructed in more than one phase." BDC 1.2. BDC 4.3.300(C) provides that,
8 where a phased tentative plan is proposed, the applicant must submit an overall
9 tentative plan, and it requires that

10 "[t]he Review Authority * * * review all phases of a phased
11 tentative plan at the same time. The final plat for each phase shall
12 be filed in accordance with the applicable provisions of BDC
13 4.3.400(A). The phased tentative plan shall include, but not be
14 limited to, the informational requirements of subsection (B) of this
15 section, as well as the following elements:

16 "1. Overall tentative plan, including phase or unit sequence, and
17 *the schedule for initiation of improvements and projected*
18 *completion date.*

19 "2. *Overall facility development phasing plan, including*
20 *transportation and utility facilities plans that specify the*
21 *traffic pattern plan for motor vehicles, bicycles, and*
22 *pedestrians, water system plans, sewer system plans and*
23 *utility plans.*

24 "3. Development and phasing plans for any common elements or
25 facilities.

26 "4. Plan of development pattern for streets, bikeways, and access
27 corridors for adjoining lands as required by the Review
28 Authority." (Emphases added.)

1 The above provisions make it clear that the tentative plan must include a schedule
2 for improvements and a development phasing plan, including the phasing of
3 sewer system plans. The plain language of the provisions do not require that all
4 sewer improvements associated with the subdivision be constructed as part of the
5 first subdivision phase.

6 The hearings officer approved intervenor's proposed phasing:

7 "The Hearings Officer's review is of all six phases of the proposed
8 overall Tentative Plan. Phasing details are included on the submitted
9 Tentative Plan, *which specifies the order of development of each*
10 *Phase*. The Hearings Office finds the proposal will comply with
11 these standards with the following condition of approval.

12 "CONDITION OF APPROVAL: The final plat for each phase shall
13 be filed in accordance with the applicable provisions of BDC
14 4.3.400(A) Final Plat. The final plat for each phase shall be in
15 substantial conformance with the approved Tentative Plan." Record
16 42 (underscoring in original; emphasis added).

17 Petitioner does not challenge the hearings officer's findings that the application
18 provided the required information for subdivision phasing and *specified the order*
19 *of development*. BDC 3.4.400(A) requires that sanitary sewers be installed to
20 serve each new development and to connect developments to existing mains.
21 Nothing in BDC 3.4.400(A) requires that sanitary sewer improvements that are
22 required due to a particular phase of a planned development occur before
23 development of that phase is commenced.

24 The assignment of error is denied.

25 The city's decision is affirmed.