

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

CAROLINE HOUSE,
Petitioner,

vs.

CITY OF BEND,
Respondent.

LUBA No. 2022-044

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Caroline House represented themselves.

Michael N. Selkirk represented respondent.

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

TRANSFERRED 11/09/2022

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

Opinion by Ryan.

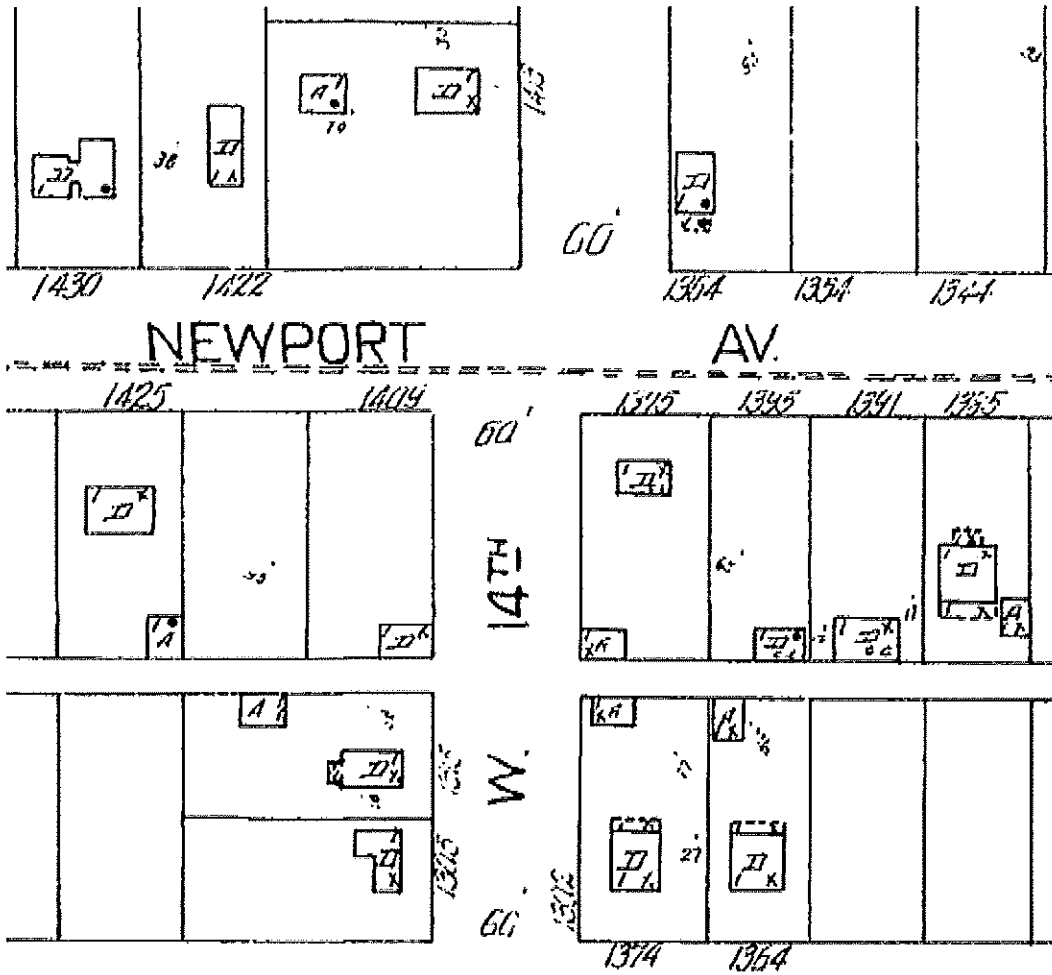
1

2 **NATURE OF THE DECISION**

3 Petitioner challenges a city engineer decision denying a right-of-way
4 permit for driveway access from petitioner's property onto an abutting arterial.

5 **FACTS**

6 Petitioner owns property abutting Newport Avenue to the south, near the
7 intersection of Newport Avenue and 14th Street. Petitioner's property also abuts
8 an alley to the north. Petitioner's property is developed with a dwelling, which is
9 near the south property line and the alley. Petitioner's property is marked "1391"
10 on the map below.



1

2 Record 29.

3 Newport Avenue is designated as a minor arterial on the city's
 4 Transportation System Plan. In March 2021, the city began constructing the
 5 Newport Corridor Improvement Project. Among other things, the project will
 6 reconstruct the entire street along the portion of Newport Avenue that abuts
 7 petitioner's property, including reconstructing travel lanes, bike lanes, sidewalks,
 8 and existing private driveway accesses. The project will also construct a
 9 roundabout at the intersection of Newport Avenue and 14th Street.

10 In October 2021, petitioner contacted the city to request approval to

1 construct a driveway access from petitioner’s property onto Newport Avenue. On
2 October 20, 2021, a senior project engineer with the city’s community
3 development department sent petitioner an email stating:

4 “*Following up on our phone conversation, I can’t recommend that*
5 *the City approve a second access to your lot at 1391 Newport*
6 *Avenue from Newport Avenue, even though the location of the*
7 *house on private property limits access to any on-site parking.*

8 “Per Bend Development Code [(BDC)] Section 3.1.400.F.3, ‘For
9 lots or parcels abutting an alley, access may be required to be taken
10 from the alley. Outside of the Downtown Wall Street/Bond Street
11 couplet, the City Engineer may determine that an alley is not an
12 adequate roadway for primary access if both of the following criteria
13 are met:

- 14 “a. The alley does not provide adequate or sufficient access to the
15 proposed development; and
16 “b. Access to the higher classification roadway will be safe.’

17 “In my opinion, the alley provides adequate access to the site
18 because it is currently constructed approximately 15 feet wide with
19 gravel and minimal obstructions at the property frontage. I also do
20 not believe that allowing a new access to Newport Avenue would be
21 safe. This lot is in close proximity to the 14th and Newport
22 roundabout intersection and I am concerned that allowing a new
23 access has a high chance of causing conflicts with eastbound traffic
24 exiting the roundabout. When exiting a roundabout, vehicles have
25 limited site distance which leaves little time to react to a potential
26 conflict ahead. There is also the possibility of eastbound vehicles
27 having to slam on their brakes at the proposed access location which
28 could back up traffic within the roundabout and cause further
29 accidents and congestion. Additionally, Newport Avenue is an
30 Arterial roadway, which is the highest classification street in City of
31 Bend jurisdiction. Limiting accesses to Arterial streets is a high
32 priority for the City, especially when other alternative access points

1 are available.” Record 51-52 (emphasis added).

2 On December 20, 2021, petitioner sent an assistant city engineer with the
3 city’s community development department an email asking to discuss the
4 requirements to obtain a right-of-way permit for the driveway access. On
5 December 28, 2021, after additional phone and email correspondence, the
6 assistant city engineer sent petitioner an email stating:

7 “After discussing, at length, internally, we are not going to approve
8 a driveway access off of Newport.

9 “1. *Our standards* require the driveway on the alley to reduce
10 conflicts on the adjacent higher volume, multi modal street.
11 The driveway is at the end of the [roundabout] radius that
12 creates safety concerns for both the road and driveway users.
13 This is right where the cyclists get back in the lane too.

14 “2. Our parking space std width is 7 – 8 ft – that can fit in 11 ft
15 plus a retaining wall/buffer if needed (tight yes but possible).
16 The narrow parking stall may not be desirable but it is doable,
17 and it is more desirable than a driveway in a [roundabout].”
18 Record 8 (emphasis added).

19 On December 29, 2021, petitioner sent the assistant city engineer an email
20 asking them to “confirm the City of Bend Community Development Department
21 and Transportation Mobility Department are denying me an access point onto
22 Newport Avenue and there is no appeal process for this decision by the City of
23 Bend.” Record 6. That same day, the assistant city engineer responded, “As for
24 the previously stated reasons, the City requires access to be taken from alleys
25 when they front a Collector and/or Arterial street.” Record 5.

26 On March 15, 2022, petitioner submitted an application for a right-of-way

1 permit for the driveway access through the city’s online permit center. Record
2 12-50. On April 4, 2022, the assistant city engineer sent petitioner an email
3 stating, “It has come to our attention that you have submitted a [right-of-way]
4 permit for [1391 NW Newport]. Like we have previously told you, an approach
5 will not be granted to Newport. This permit will be denied today.” Record 5. That
6 same day, petitioner sent the assistant city engineer an email asking them to
7 “review all of the submitted materials before making a final decision.” Record 3.
8 That same day, the assistant city engineer responded, “I have reviewed your
9 submitted material. *The decision has not changed from back in December.* Your
10 property has access to a public alley. As such, access must continue from the
11 alley. A new approach will not be granted off of Newport.” Record 2 (emphasis
12 added). The record contains a printout of the city’s online permit center, which
13 states, “Permit cancelled on 4/4/2022 because City will not grant this property an
14 access off of Newport Avenue.” Record 14. This appeal of the online permit
15 center printout followed.

16 **JURISDICTION**

17 On August 1, 2022, petitioner filed the petition for review. On August 23,
18 2022, the city filed a motion to dismiss the appeal on the basis that the challenged
19 decision is not a “land use decision,” as defined in ORS 197.015(10)(a), or is
20 excluded from LUBA’s jurisdiction under ORS 197.015(10)(b)(A) or (D). On
21 September 6, 2022, petitioner filed a response to the motion to dismiss. On
22 September 20, 2022, the city filed a reply to the response to the motion to dismiss.

1 LUBA has exclusive jurisdiction to review appeals of land use decisions.

2 ORS 197.825(1). A “land use decision” includes:

3 “A final decision or determination made by a local government or
4 special district that concerns the adoption, amendment or
5 application of:

6 “(i) The goals;

7 “(ii) A comprehensive plan provision; [or]

8 “(iii) A land use regulation[.]” ORS 197.015(10)(a)(A).

9 We have explained that a decision “concerns” the application of a comprehensive
10 plan provision or land use regulation if a provision or regulation (1) is actually
11 applied in making the decision or (2) should have been applied in making the
12 decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004).

13 BDC 3.1.400(F) provides, in part:

14 “2. If a lot or parcel has frontage on two or more streets of
15 different street classifications, the property must access the
16 street with the lowest classification.

17 “3. For lots or parcels abutting an alley, access may be required
18 to be taken from the alley. Outside of the Downtown Wall
19 Street/Bond Street couplet, the City Engineer may determine
20 that an alley is not an adequate roadway for primary access if
21 both of the following criteria are met:

22 “a. The alley does not provide adequate or sufficient
23 access to the proposed development; and

24 “b. Access to the higher classification roadway will be
25 safe.”

26 In the petition for review, petitioner argues that the challenged decision is a “land

1 use decision” because the city (1) actually applied BDC 3.1.400(F)(3) to the
2 application and (2) was required to apply all of the provisions of BDC 3.1.400 to
3 the application.

4 In the motion to dismiss, the city argues that the city (1) did not actually
5 apply BDC 3.1.400(F)(3) to the application and (2) was not required to apply any
6 of the provisions of BDC 3.1.400 to the application. The city first argues that the
7 city did not *actually* apply BDC 3.1.400(F)(3) to the application. The city
8 acknowledges that the senior project engineer who initially reviewed petitioner’s
9 inquiries regarding the driveway access stated in their October 20, 2021 email
10 that they would not recommend approval pursuant to “BDC 3.1.400.F.3.” Record
11 51-52. However, the city also argues that the assistant city engineer’s December
12 28, 2021 email states, “*Our standards* require the driveway on the alley to reduce
13 conflicts on the adjacent higher volume, multi modal street.” Record 8 (emphasis
14 added).

15 The city explains that Bend Municipal Code (BMC) 3.40.005(B) provides,
16 in part, “A right-of-way permit may be issued if the proposed improvement
17 complies with this code, *the Standards and Specifications*, the [BDC], and if the
18 applicant is in compliance with all outstanding right-of-way permits.” (Emphasis
19 added.) The referenced “Standards and Specifications” is a document adopted by
20 the city council that sets forth the requirements for the construction of
21 infrastructure in the city’s rights-of-way. The city points out that Design Standard
22 3.4.6 provides, in part, “The access is to the lowest classified roadway facility

1 abutting the property (order of classification (lowest to highest): alley, local,
2 collector, arterial).”

3 The city argues that the assistant city engineer’s reference in the December
4 28, 2021 email to “[o]ur standards” means that they applied Design Standard
5 3.4.6 to the application, not BDC 3.1.400(F)(3). The city observes that the city’s
6 online permit center does not refer to any land use regulation in explaining why
7 the application was “cancelled.” Record 14. Accordingly, the city argues that the
8 city did not actually apply BDC 3.1.400(F)(3) to the application.

9 The city also argues that the city was not *required* to apply any of the
10 provisions of BDC 3.1.400 to the application. BDC 3.1.400(C)(1) provides,
11 “Permission to access City streets shall be subject to review and approval by the
12 City based on the standards contained in this chapter and the provisions of BDC
13 Chapter 3.4, Public Improvement Standards. *Access will be evaluated and*
14 *determined as a component of the development review process.*” (Emphasis
15 added.) Citing BDC 3.1.400(1)(C), the city argues that access must be evaluated
16 under the provisions of BDC 3.1.400 when it is a component of the *development*
17 *review process*, not when it is a component of the *right-of-way permit review*
18 *process*. In other words, the city argues that the provisions of BDC 3.1.400 apply
19 when driveway access is proposed as part of a development application. Because
20 petitioner’s application was for *only* a right-of-way permit, the city argues that

1 the provisions of BDC 3.1.400 did not apply.¹

2 Because the city (1) did not actually apply BDC 3.1.400(F)(3) to the
3 application and (2) was not required to apply any of the provisions of BDC
4 3.1.400 to the application, the city argues that the challenged decision is not a
5 “land use decision,” as defined in ORS 197.015(10)(a).

6 In the response to the motion to dismiss, petitioner repeats their argument
7 that, because the senior project engineer who initially spoke with petitioner stated
8 in the October 20, 2021 email that they would not recommend approval pursuant
9 to BDC 3.1.400(F)(3), the city actually applied BDC 3.1.400(F)(3) to the
10 application and the decision is therefore a “land use decision,” as defined in ORS
11 197.015(10)(a).

12 As the party seeking LUBA review, the burden is on petitioner to establish
13 that the appealed decision is a land use decision. *Billington v. Polk County*, 299
14 Or 471, 475, 703 P2d 232 (1985). Petitioner does not develop a response to the
15 city’s argument that the assistant city engineer’s reference in the December 28,
16 2021 email to “[o]ur standards” means that they applied Design Standard 3.4.6
17 to the application, not BDC 3.1.400(F)(3). And while petitioner indicates that the

¹ The notice of intent to appeal states that the challenged decision “involves a site design review for access to an urban residential use.” Notice of Intent to Appeal 1. The record contains a site plan for the proposed driveway access from petitioner’s property onto Newport Avenue. Record 21. However, there is no application for site design review in the record, and we conclude that the challenged decision is not a site design review decision.

1 driveway access is necessary “to further develop their property with additional
2 needed housing,” petitioner does not develop a response to the city’s argument
3 that the provisions of BDC 3.1.400 apply when driveway access is proposed as
4 part of a development application and that, because petitioner’s application was
5 for only a right-of-way permit, the provisions of BDC 3.1.400 did not apply.
6 Petition for Review 10.

7 We conclude that petitioner has not met their burden to establish that the
8 city (1) actually applied BDC 3.1.400(F)(3) to the application or (2) was required
9 to apply any of the provisions of BDC 3.1.400 to the application. Accordingly,
10 we conclude that the challenged decision is not a “land use decision,” as defined
11 in ORS 197.015(10)(a). Because we conclude that the challenged decision is not
12 a “land use decision,” as defined in ORS 197.015(10)(a), we do not reach the
13 city’s arguments that it is excluded from LUBA’s jurisdiction under ORS
14 197.015(10)(b)(A) or (D).

15 **MOTION TO TRANSFER**

16 Petitioner filed a contingent motion to transfer the appeal to circuit court.
17 The city does not oppose the motion, and it is granted. ORS 34.102(4); OAR 661-
18 010-0075(11)(a).

19 The appeal is transferred to Deschutes County Circuit Court.