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

JUSTIN LENHARDT, HEATHER ORR,
and SHANNON BERNARD,
Petitioners,

vs.

CITY OF NEWBERG,
Respondent,

and

NORTH VALLEY FRIENDS CHURCH,
Intervenor-Respondent.

LUBA Nos. 2023-021/023

FINAL OPINION
AND ORDER

Appeal from City of Newberg.

J. Drew Hancherick filed the petition for review and Matthew A. Martin filed the reply brief and argued on behalf of petitioners. Also on the briefs were Andrew H. Stamp, T. Beau Ellis, and Vial Fotheringham LLP.

No appearance by City of Newberg.

Wendie L. Kellington filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Kellington Law Group PC.

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

AFFIRMED 07/31/2023

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

Opinion by Ryan.

NATURE OF THE DECISION

In LUBA No. 2023-023, petitioners appeal a decision by the city planning director approving an application for an eight-unit cottage cluster. In LUBA No. 2023-021, petitioners appeal an email from the planning director to petitioners stating that no local appeal is available for petitioners to appeal the city's decision approving the application.

FACTS

The subject property is owned by intervenor-respondent North Valley Friends Church (intervenor), is 7.6 acres in size, and is zoned Institutional (I). In December 2022, intervenor applied for site design review for a "cottage cluster" as defined in Newberg Development Code (NDC) 15.05.030, consisting of eight residential cottages on a 0.6-acre portion of the property. The eight cottages are between 270 to 350 square feet in size. Each cottage has one bedroom, one bathroom, a kitchen and living area, a porch, and a storage area. The cottages are directly connected to, and placed around, a common courtyard. A common building with a laundry room is located in the courtyard area.

After the application was submitted, petitioners submitted two letters to the planning director that argued that the proposed development was a "residential care facility" as defined in NDC 15.05.030, and that city should process the application according to its Type II procedures in NDC 15.100.030. Record 5-8. On February 2, 2023, the planning director sent an email to

petitioners' counsel that advised that intervenor submitted an application for design review of a "cottage cluster" proposal, and that the city processes design review applications for cottage cluster proposals according to its Type I procedures.[1] Record 4. That email was appealed in LUBA No. 2023-021.[2]

On February 10, 2023, the planning director approved intervenor's application, concluding that each of the criteria that apply to cottage clusters was met. That decision was appealed in LUBA No. 2023-023.

SECOND ASSIGNMENT OF ERROR

The planning director's decision approving intervenor's application is a limited land use decision because it is a final decision "pertaining to a site within an urban growth boundary that concerns * * * approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review." ORS 197.015(12)(a)(B). LUBA will reverse or remand a limited land use decision if "[t]he local government committed a procedural error which

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[1] NDC 15.100.020(B) and NDC 15.220.020(A)(1)(f) provide that cottage cluster proposals are processed using the city's Type I procedures at NDC 15.100.020.

[2] Petitioners do not develop any argument that challenges the planning director's decision, that was appealed in LUBA No. 2023-021, that no local appeal of the planning director's decision was available. Intervenor does not argue that the email is not a final decision, and thus is not a land use decision, so we do not address that issue.

prejudiced the substantial rights of the petitioner." ORS 197.828(2)(d). The substantial rights referred to in ORS 197.828(2)(d) are the same as those referred to in ORS 197.835(9)(a)(B). *Warren v. City of Aurora*, 25 Or LUBA 11, 16 (1993). In order to establish a procedural error, a petitioner must identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560, 563-64 (2006).

As explained above, after the application was filed, petitioners argued in a letter to the planning director that (1) the application proposed a "residential care facility" within the meaning of NDC 15.05.030; (2) under NDC 15.220.020(A)(2)(a), residential care facilities are subject to Type II procedures; and (3) pursuant to NDC 15.100.080(A), the city was required to apply its Type II procedure to intervenor's application. Record 7-8. Petitioners' second assignment of error is that the city committed a procedural error that prejudiced their substantial rights when it processed intervenor's application according to the city's Type I procedure at NDC 15.100.020. Petitioners argue that the city's failure to follow the Type II procedure prejudiced their right to a local appeal of the planning director's decision to the planning commission under NDC 15.100.030(E) and NDC 15.100.160(B).[3]

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[3] NDC 15.100.020 provides for a Type I procedure that results in a decision by the planning director without public notice or a public hearing. Only an applicant is entitled to file a local appeal of a Type I decision. NDC 15.100.020(C); NDC 15.100.160(A); *see* n 1.

Our resolution of this assignment of error centers on the meaning of NDC 15.100.080(A). In construing the meaning of a local code provision, our task is to determine the enacting body's intent in adopting the provisions, looking at the text, context, and legislative history of the statute, and resorting, if necessary, to maxims of statutory construction. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), *as modified by*, *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

NDC 15.100.080(A) provides:

> "The director shall determine the proper procedure for all development actions. *If there is a question* as to the appropriate type of procedure, the director shall resolve it in favor of the higher procedure type number." (Emphasis added).

Petitioners argue that NDC 15.100.080(A) requires the planning director to apply the higher procedure if any person raises a "legitimate, bona fide question as to the appropriate type of procedure." Petition for Review 32. According to petitioners, their letter to the planning director that argued that the application proposes a "residential care facility" means that "there [was] a question as to the appropriate type of procedure" within the meaning of NDC 15.100.080(A), and accordingly that question, raised by petitioners, required the planning director to apply the Type II procedure. Petition for Review 31 (citing *Webster's Third New Int'l Dictionary* 1863 (unabridged ed 2003) (defining "question")).

Intervenor responds that by implication, the planning director, in adopting the decision approving the application, interpreted NDC 15.100.080 to mean that

only if *the planning director* has a question as to the appropriate procedure type must the planning director resolve their question in favor of the higher procedure type. Intervenor-Respondent's Brief 17, 31. We agree with intervenor that the planning director impliedly interpreted NDC 15.100.080(A) to mean that the planning director is the individual who must have a question as to the applicable procedure, when they rejected petitioners' argument, or "question," that the Type II procedures apply and adopted a decision including 62 pages of supporting findings approving intervenor's application for a cottage cluster. *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 267-68, 942 P2d 836 (1997), *rev dismissed as improvidently allowed*, 327 Or 555 (1998); *Underhill v. Wasco County*, 45 Or LUBA 566 (2003); *Webb v. City of Bandon*, 39 Or LUBA 584 (2001).

The next question we must address is whether that implied interpretation is correct. We review city staff interpretations of the NDC to determine whether those interpretations are correct. *Gage v. City of Portland*, 28 Or LUBA 307, 309 (1994), *aff'd*, 133 Or App 346, 891 P2d 1331 (1995). NDC 15.100.080(A) is not a model of artful drafting. Due to the provision's use of the passive voice ("if there is a question"), it is ambiguous regarding the identity of who may have a question regarding the appropriate procedure type for a development action in order for a higher procedure level to be required. *Brentmar v. Jackson County*, 321 Or 481, 487, 900 P2d 1030 (1995) (noting that the use of passive voice creates ambiguity in statute). Given that ambiguity, we resort to context provided

by other parts of the provision, which provides support for the planning director's implicit interpretation.

First, the planning director is the only individual identified in the code section as establishing the authority to determine the procedure type. NDC 15.100.080(A). More importantly, to accept petitioners' interpretation that any person who raises a question regarding the proper procedure type may elevate the procedure type for a development action would require us to insert the words "raised by anyone" after the word "question," which we cannot do. ORS 174.010. Further, context provided by other provisions of the NDC demonstrates that the city knows how to place the authority to decide on the type of procedure somewhere other than the planning director, such as in an applicant. For example, NDC 15.100.080(B) provides:

> "An application that involves two or more procedures *may be processed collectively under the highest numbered procedure required for any part of the application or processed individually under each of the procedures identified by this code. The applicant may determine whether the application shall be processed collectively or individually.* If the application is processed under the individual procedure option, the highest numbered type procedure must be processed prior to subsequent lower numbered procedure." (Emphasis and underscoring added).

We conclude that the planning director's interpretation is correct. *Gage*, 28 Or LUBA at 309. For the above reasons, we disagree with petitioners that the city committed a procedural error when it failed to process the application according to the Type II procedure. The planning director did not question the appropriate

procedure type and accordingly, correctly processed the application for a cottage cluster as a Type I procedure, as required by NDC 15.100.020(B) and NDC 15.220.020(A)(1)(f), which provide that cottage cluster proposals are processed using the city's Type I procedures at NDC 15.100.020.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

As noted in our resolution of the first assignment of error, the challenged decision is a "limited land use decision." LUBA's standard of review of a limited land use decision is in ORS 197.828(2), which provides as relevant here that:

> "The board shall reverse or remand a limited land use decision if:
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> "(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision; [or]
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> "(b) The decision does not comply with applicable provisions of the land use regulations[.]"

ORS 197.195(4) also requires that

> "Approval or denial of a limited land use decision shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

In their first assignment of error, petitioners argue in three subassignments of error that the decision "does not comply with the applicable land use regulations,"

"is not supported by evidence in the record," and that the city's findings are in adequate. ORS 197.828(2)(a), (b).

A. The Decision Complies with the NDC and Is Supported by Evidence in the Record

Petitioners' related subassignments of error argue (1) that the proposal is not a "cottage cluster"; (2) that the proposed development qualifies as a "residential care facility"; and (3) that intervenor's proposal is not supported by evidence in the record. These subassignments of error rely in part on NDC 15.100.080(A), discussed above, and therefore are related to and somewhat derivative of their second assignment of error, which we reject above.

1. The Proposal Is for a Cottage Cluster Development

NDC 15.05.030 defines "cottage cluster" to mean

> "a grouping of no fewer than four detached dwelling units per acre, each with a footprint of less than 900 square feet, located on a single lot or parcel that includes a common courtyard. Cottage cluster may also be known as 'cluster housing,' 'cottage housing,' 'bungalow court,' 'cottage court,' or 'pocket neighborhood.'"[4]

NDC 15.05.030 defines "residential care facility" as

> "a residential care, residential training or residential treatment facility, as those terms are defined in ORS 443.400, that provides residential care alone or in conjunction with treatment or training or a combination thereof for six to 15 individuals who need not be related. Staff persons required to meet licensing requirements shall not be counted in the number of facility residents, and need not be

[4] ORS 197.758(1)(a) defines "cottage cluster" in a nearly identical manner.

related to each other or to any resident of the residential care facility."[5]

Petitioners first argue that the planning director was required to determine whether intervenor's application really proposes a "residential care facility." We reject that argument.[6] The city is entitled to rely on the application materials that are submitted as evidence to support its decision. Those application materials refer to the cottages as "dwelling units," calculate parking requirements based on dwelling units, and otherwise contain materials that support a conclusion that intervenor's proposal is for a "cottage cluster." Record 77-106, 347.

Petitioners also argue that the proposal does not meet the definition of "cottage cluster." Petitioners cite the NDC 15.05.030 definition of "dwelling," which is "a building or portion of a building which is occupied in whole or in part as a home, residence, or sleeping place, *either permanently or temporarily by one or more families*, but excluding hotels, motels and tourist courts." Petitioners argue that intervenor proposes what petitioners call "transitory occupancy" rather than occupancy that is permanent or temporary. Petition for Review 14, 16. In support of its argument that intervenor proposes "transitory

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[5] ORS 443.405(10) defines "residential care facility" as one that must provide "care and treatment on * * * a 24-hour basis." *See also* OAR 411-054-0005(79); OAR 309-035-0105(55).

[6] For the first time in the reply brief, petitioners cite NDC 15.303.010(A)(1) and argue that the provision requires the city to determine what use is proposed in a development action application. We do not consider issues raised for the first time in a reply brief. *Porter v. Marion County*, 56 Or LUBA 635, 641 (2008).

occupancy," petitioners point to a building official's comment on the application that the "2017 Oregon Transitional Housing Standards" (OHTS) should apply to the building permits for the cottages. Petition for Review 23 (citing Record 16). Petitioners argue that a condition of approval requires the cottages to be constructed in accordance with the OTHS. Record 70. Petitioners argue that if the cottages must be constructed to comply with OTHS, and the OTHS *only* applies to "transitional housing units," which the OTHS define as "a single story, detached structure providing transitional housing accommodations for use as temporary living units by one or more individuals or families," then the development is not a proposal for cottage clusters. Petition for Review 25 (quoting OHTS).

The relevant phrase that is used in the definition of "cottage cluster" is "dwelling unit," which NDC 15.05.030 defines as "a single unit of one or more habitable rooms providing complete independent facilities for occupants, including permanent provisions for living, sleeping, eating, cooking and sanitation." While we question whether the differently defined term "dwelling" is relevant for purposes of determining whether the proposal is for a cottage cluster, even if we assume the term "dwelling" is relevant, we agree with intervenor that nothing in the record supports petitioners' assertion that the cottages will be occupied as something other than "a home, residence or sleeping

place, *either permanently or temporarily* by one or more families[.]"[7] NDC 15.05.030 (emphasis added.) Intervenor also responds that the building official's comment was a request only, and that the condition of approval does not require the development to be constructed according to the OTHS standards, but rather requires intervenor to receive approval for "all required building permits." Record 70.

More importantly, intervenor also responds, and we agree, that the definition of "dwelling" includes permanent or temporary occupancy of housing and thus, what petitioners characterize as "transitional" housing is temporary occupancy of housing, whether or not it is subject to the OTHS. Stated differently, even if the proposal is for temporary occupancy of housing, temporary occupancy of housing does not convert the proposal into something other than a cottage cluster, because there is no requirement in the NDC that a cottage cluster development be occupied as "permanent" rather than "temporary" housing.

2. The Proposal Is Not for a Residential Care Facility

Petitioners also argue that the proposal qualifies as a "residential care facility" as defined in NDC 15.05.030. Petitioners first point to a letter from petitioners' counsel to the planning director that takes the position that

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[7] Petitioners do not argue that the proposed cottages are not "dwelling units" as defined in NDC 15.05.030.

intervenor's website describes the development as providing "transitional housing," and that "wrap around services" will be provided at a local hospital. Petition for Review 14, 20. Accordingly, petitioners argue, the proposal is for a place where care or treatment will be administered by supervising staff and is a residential care facility.

Intervenor responds that nothing in the record establishes that the proposal is for a "residential care facility," which, by definition, must provide "care and treatment" "on a 24-hour basis." *See* n 5. We agree. Petitioners do not cite to anything in the record that supports their assertion that the proposal is for "care and treatment" on a 24-hour basis. We reject petitioners' argument that the application proposes a residential care facility.

B. The Findings Are Adequate

Also in the first assignment of error, petitioners argue that the city's findings are inadequate to satisfy ORS 227.173(3), which requires a decision approving or denying a permit to be supported by written findings. As noted above, the decision is a limited land use decision and the provisions of ORS 227.173(3) do not apply. However, even if we assume petitioners meant to cite and refer to ORS 197.195(4), we disagree with petitioners that the planning director's findings are inadequate. The planning director adopted 62 pages of findings explaining their conclusion that intervenor's proposed cottage cluster development satisfied each of the applicable criteria. As explained above, the planning director was not required to adopt findings that also explain why a

proposal that, on the face of the application materials, was a proposal for a cottage cluster development was in fact a proposal for a cottage cluster development. In other words, the planning director's findings were not required to evaluate and explain what a proposed development does not in fact propose. The approval is limited by the use proposed in the application.

The first assignment of error is denied.

The city's decisions are affirmed.