BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BONNIE BRODERSEN,
Petitioner,

vs.

CITY OF ASHLAND,
Respondent,

and

LYNN J. McDONALD
and WILLIAM J. McDONALD,
Intervenors-Respondent.

LUBA No. 2004-201

ORDER

MOTION TO DISMISS

The city moves to dismiss this appeal because the challenged decision, the city's approval of a building permit to construct a single-family residence, is not a land use decision subject to our jurisdiction.[1] Our jurisdiction, as relevant, is limited to land use decisions. ORS 197.825(1). Pursuant to ORS 197.015(10)(a), a "land use decision" includes:

> "(A) A final decision or determination made by a local government * * * that concerns the * * * application of:
>
> "* * * * *
>
> "(iii) A land use regulation[.]"

The statutes also provide certain exceptions to the definition of "land use decision." ORS 197.015(10)(b) provides that a "land use decision" does not include a decision:

[1] Single-family dwellings are permitted uses in the R-1 residential zone that applies to intervenors' property. Ashland Land Use Ordinance (ALUO) 18.20.020(A).

> "(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment; [or]
>
> "(B) Which approves or denies a building permit under clear and objective land use standards[.]"

The city argues that the building permit was approved under clear and objective standards and that the approval did not require interpretation or the exercise of policy or legal judgment. Petitioner counters that the city exercised policy and legal judgment when it determined: (1) a Type I review procedure was not required; (2) Site Design and Use Standards (SDUS) do not apply; (3) the "driveway" ended at a point that was 240 feet from the entrance to the property; and (4) a Physical Constraints Review Permit was not required.[2] We will address in turn each of petitioner's arguments supporting her contention that the city exercised policy and legal judgment.[3]

A. SDUS and Type I Procedures

Although the bulk of petitioner's argument regarding the SDUS and Type I procedures is essentially a procedural challenge that the city erred by violating the procedures in its own code, she does briefly raise the issue that we must address here; *i.e.*, whether the city exercised policy or legal judgment "to interpret its ordinance to not require SDUS review for the subject property." Petitioner's Response to Respondent's Motion to Dismiss 14. ALUO 18.108.040(A)(8)(c) provides that all new structures greater than 2,500 square feet are subject to SDUS and that such review must be made under a Type I procedure. The proposed residence appears to be over 2,500 square feet and would appear to require the application of SDUS and review under the Type

[2] Petitioner makes numerous arguments in opposition to the city's motion to dismiss in addition to those arguments outlined here. However, because of our disposition of the listed issues, we need not address all of petitioner's arguments.

[3] We note at the outset that the city's Motion to Dismiss is less than two pages long, and the city has not filed a reply to petitioner's response. Although the record includes a legal memorandum from the city attorney's office regarding the jurisdictional issue, that memorandum addresses only one of many issues raised by petitioner in her response. Record 21-23. At this juncture, we are therefore left to assume that the ordinances cited by petitioner apply, unless we can conclusively determine that they do not. *See Wetzel v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2204-046, Order, September 10, 2004) slip op 4-5 ("[a]bsent any assistance from the city, we will assume at this point that the cited provisions apply").

I procedures. While we need not resolve the factual issue in deciding this motion to dismiss, we conclude that the city exercised legal or policy judgment in determining that the SDUS do not apply. *See Davis v. City of Ashland*, 37 Or LUBA 224, 234-35 (1999) (where proposed structure is over 2,500 feet and subject to City of Ashland's discretionary SDUS approval criteria, city decision allowing such structure is a "permit" because it is "*discretionary* approval of proposed development of land").

For the foregoing reason, the challenged decision is a "land use decision" subject to our jurisdiction.

B. Driveway

The parties apparently agree that if intervenor's driveway is "greater than 250 feet in length," intervener must provide a fire vehicle turnaround. ALUO 18.76.060(B); *see also* Record 4.[4] The city found the driveway was 240 feet in length. Record 4. Petitioner argues that the term "driveway" is ambiguous "because there can be different plausible interpretations as to where a driveway ends." Petitioner's Response to Respondent's Motion to Dismiss 6. ALUO 18.08.195 defines driveways in relation to "travel distance in length."[5] Petitioner also argues that the term "travel distance in length" is not dear and objective and cannot be applied without interpretation. *Id*. She contends that "travel distance" "ends at the point where a car could no longer proceed

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[4] Under the city's code, partitions involving flag lots can be approved if the following condition is satisfied:

> "Flag drives greater than 250 feet in length shall provide a turnaround as defined in the Performance Standard Guidelines in 18.88.090." ALUO 18.76.060(B).

Although ALUO chapter 18.76 applies to partitions, and the challenged decision does not involve a partition, we assume some other provision incorporates ALUO 18.76.060 because the city appears to consider it an approval criterion. Record 4.

[5] ALUO 18.08.195 defines "driveway" as follows:

> "An access way serving a single dwelling unit or parcel of land, and no greater than 50' travel distance in length. A flag drive serving a flag lot shall not be a driveway. Single dwelling or parcel accesses greater than 50' in length shall be considered as a flag drive, and subject to all of the development requirements thereof."

forward on the access way" or in this case, "when it reaches the garage or the turnaround area in the northern setback." *Id*. at 5. The city, according to petitioner, "interpreted 'travel distance' to be some arbitrary point significantly short of the garage or parking area." *Id*.

In *Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000), the petitioners appealed the issuance of a building permit, challenging the city's interpretation of "finished grade." The city moved to dismiss for the same reasons as the city does in this appeal, and the Court of Appeals, on appeal, stated:

> "We emphasize that our inquiry here is not to determine what the relevant terms in fact mean but only to determine whether they can plausibly be interpreted in more than one way. If so, they are ambiguous, and it would follow that the relevant city provisions are not 'clear and objective,' ORS 197.015(10)(b)(B), and they cannot be applied without interpretation, ORS 197.015(10)(b)(A) * * *. Consequently, if the terms are ambiguous, the city's application of the provisions would constitute a 'land use decision' that falls within LUBA's jurisdiction * * *." *Id*. at 246.

As with the term "finished grade" in *Tirumali*, the terms "driveway" and "travel distance" are subject to different interpretations and are therefore ambiguous in this situation. The city exercised legal or policy judgment in making its interpretation.

C. Physical Constraints Review Permit

The subject property is in the city's Floodplain Corridor Lands and within the Wrights Creek Riparian protected area. ALUO 18.62.040 requires a Physical Constraints Review Permit for "development" in such areas. The proposed driveway appears to go through the protected area. Record 43-44. The city, however, found that the "proposed activities in the regulated area * * * do not qualify as development as defined in Chapter 18.62." Record 4. Among other things, "development" is defined to include "[c]onstruction of a building, road, driveway, parking area, or other structure * * *." ALUO 18.62.030(E)(2). Apparently the city did not require a Physical Constraints Review Permit because it considered paving of an existing driveway not to constitute "construction." Without addressing the merits of the parties' positions, we conclude that the city exercised legal or policy judgment in making that determination.

D. Conclusion

For the foregoing reasons, the city's decision approving the building permit required interpretation or the exercise of policy or legal judgment and was not issued under clear and objective standards. The challenged decision is a land use decision, and falls under our jurisdiction. The city's motion to dismiss is denied.

RECORD

We previously sustained petitioner's record objections, and the city subsequently filed a supplemental record. Petitioner informs us that she has no objections to the supplemental record. Therefore, the record is settled as of this date. The petition for review is due 21 days after the date of this order. The response briefs are due 42 days after the date of this order. The Board's final order and opinion is due 77 days after the date of this order.

Dated this 14th day of April, 2005.

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Anne C. Davies
Board Member