BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NOBLE BUILT HOMES, LLC,
Petitioner,

vs.

CITY OF SILVERTON,
Respondent.

LUBA No. 2009-122

ORDER

MOTION TO DISMISS

The city moves to dismiss this appeal, the subject of which is an October 22, 2009 letter from a city building official denying petitioner's applications for building permits to construct six duplexes.

No record has been yet filed in this appeal, so we draw the facts from the parties' pleadings and attachments to their pleadings. We believe the following facts are undisputed.

On October 13, 2009, petitioner applied to the city for building permits to construct duplexes on six lots it owns in two subdivisions, the Monitor Road subdivision and the Noble Glen subdivision. Each subdivision was approved prior to 2008, under an earlier version of the Silverton Development Code (SDC).[1] The December 16, 2004 notice of final plat approval for the Monitor Road subdivision included a condition of approval that required that lots 4, 10, 12, 22, 37, 42, 56 and 58 "be identified on the final plat as duplex lots." Motion to Dismiss Appendix 1.2. The February 22, 2005 notice of final plat approval for the Noble Glen subdivision did not include a condition of approval requiring that specific lots be

[1] The SDC is Chapter 18 of the Silverton Municipal Code (SMC), and can be cited as SMC 18.x.x instead of SDC x.x. The parties use both the long SMC citation and short SDC citation in referring to the SDC provisions under SMC chapter 18. To avoid confusion, all code references in this order use the short SDC cite.

identified as duplex lots. Motion to Dismiss Appendix 2. Neither final subdivision plat approval decision was appealed.[2]

None of the six lots petitioner owns are identified on the Monitor Road or Noble Glen final subdivision plats as duplex lots. Each of the six lots is zoned R-1 (Single Family Residential). In 2008, the SDC was amended in relevant part to allow duplexes as a permitted use on any lot zoned R-1, subject to certain standards. SDC 2.2.110, Table 2.2.110.A.[3] On August 28, 2009, petitioner's attorney spoke with the city planning director, inquiring into whether duplexes are permitted on the six lots petitioner owns, based on Table 2.2.110.A. The city planning director responded that he believed Table 2.2.110.A applies only to lots created after the 2008 SDC amendments, and that the table does not authorize duplexes on R-1 zoned lots created prior to the date the SDC was amended in 2008, if development of duplexes would be inconsistent with the subdivision approval or conditions.

On August 29, 2009, petitioner's attorney wrote to the planning director requesting that he reconsider that position, arguing that the 2008 amendments govern development of all R-1 lots, no matter when created and notwithstanding any contrary conditions. The planning director responded by letter on September 3, 2009:

> "In your letter dated August 29, 2009, you have requested that I reconsider my position regarding the duplex development standards of [SDC] 2.2.200(C). It is my understanding that you would like to develop * * * lots in the Monitor Road Estates and Noble Glen subdivisions with duplex dwellings, although the conditions of approval specify a specific number and location of duplex and single-family lots within the developments. In response, I would like to elaborate why the City is unable to reverse its conclusion that additional duplex lots cannot be permitted outright within subdivisions that were created under a pre-existing land use decision.

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[2] We assume that, in accordance with these notices of final plat approval, the final plat for the Monitor Road subdivision showed lots 4, 10, 12, 22, 37, 42, 56 and 58 as duplex lots, and the final plat for Noble Glen subdivision showed no lots as duplex lots.

[3] Petitioner states that the pre-2008 version of SDC under which the two subdivisions were approved did not permit duplexes in the R-1 zone, at least not as outright permitted uses. LUBA does not possess a copy of the pre-2008 SDC, so it is not clear to us how duplexes were treated in the R-1 zone prior to 2008.

> "As a basis for this position, I refer to [SDC] 1.4.500(A) which states that developments and uses granted under previous development standards still retain legality with the adoption of the 2008 Development Code. Furthermore, under [SDC] 1.4.800(B), it is stated that developments which have been granted subject to conditions of approval are required to comply with those conditions of approval. This section also states that these conditions run with the land and all future owners are required to comply with the conditions of approval. Therefore, the 2008 Development Code standards cannot be directly applied to modify existing conditions of approval for the Monitor Road Estates and Noble Glen subdivisions.
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> "[SDC] 1.4.500(A) does state that modifications to pre-existing approvals are allowed when they occur in accordance with [SDC] 4.6. Under [SDC] 4.6.300(A), since there is a proposed change of use from single-family to duplex and since the use could possibly have a detrimental impact on adjoining properties, the request would be defined as a Major Modification. * * *" Motion to Dismiss, Appendix 4.

As far as we are informed, petitioner took no further action until October 13, 2009, when it filed with the city building official six building permit applications for duplexes on the disputed lots. As explained below, when the city receives a building permit application planning staff conducts a land use review to determine, among other things, whether the proposed construction is for a use permitted under the city's code. In following this process, the building official apparently was informed of the exchange of letters between petitioner's attorney and the planning director.

On October 22, 2009, the building official issued a letter decision denying the building permit applications, and that October 22, 2009 decision is the subject of this appeal. In the October 22, 2009 letter, the city building official states that he has reviewed the notices of decision for the two final subdivision plat approvals, petitioner's August 29, 2009 letter and the planning director's September 3, 2009 letter in response. The building official then discusses the Monitor Road Estates and Noble Glen subdivision approvals and concludes that neither one authorized duplexes on the six lots at issue. The building official concludes:

> "In your application, you are requesting approval to place duplexes on Lots 4 and 5. Since the pre-existing land use decision retains legality under [SDC]

> 1.4.500(A), you are required to modify the approval for this subdivision to permit the development of your proposed duplexes. Therefore, at this time we cannot process your building applications for the construction of your requested duplexes until the proper land use approvals are in place.
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> "When building permit applications are received, they undergo a Type I Land Use Review by the Planning Division. Per [SDC] 4.1.200(C), a Type I decision is made administratively and is the final decision of the City. Therefore, this decision cannot be appealed to City officials. * * *" Motion to Dismiss Appendix 5.2.

On November 2, 2009, petitioner appealed the October 22, 2009 building official decision to LUBA.

The city moves to dismiss this appeal, arguing that the October 22, 2009 decision is not a "land use decision" as defined at ORS 197.015(10) and therefore not subject to LUBA's jurisdiction, because the challenged decision is a "ministerial" decision subject to the exclusion set forth at ORS 197.015(10)(b)(A).

As relevant here, LUBA has exclusive jurisdiction over "land use decisions." ORS 197.825(1). ORS 197.015(10)(a) defines "land use decision" in relevant part as a "final decision or determination made by a local government" that concerns the application of a land use regulation. ORS 197.015(10)(b)(A) provides that "land use decision" does not include a decision of a local government "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." Similarly, ORS 197.015(10)(b)(B) excludes from the definition a decision "[t]hat approves or denies a building permit issued under clear and objective land use standards[.]"[4]

The city contends that the building official did not apply any land use standards that require interpretation or the exercise of policy or legal judgment. According to the city, the building official simply examined the notices of final plat approval for each subdivision and

[4] The city's motion to dismiss cites but does not discuss ORS 197.015(10)(b)(B), and bases almost all of its jurisdictional arguments on ORS 197.015(10)(b)(A). Because the city cites both provisions, and the city's arguments can be applied to both, we consider both provisions in this order.

determined that neither subdivision approval authorized duplexes on the proposed lots. The city contends that determination is a classic "ministerial" decision, and therefore the October 22, 2009 letter is not subject to LUBA's jurisdiction. The city notes that the "land use review" culminating in the October 22, 2009 decision was processed under the city's "Type I" procedure, which is intended to be used "when there are clear and objective review criteria, and applying city standards and criteria requires no use of discretion." SDC 4.1.100(B)(1).[5]

As a final argument, the city notes that "[p]etitioner is not appealing the letter of the City Community Development Director dated September 3, 2009, which contained the legal interpretation of the City Ordinance that the Petitioner finds objectionable. That letter (and its interpretation) was not appealed within 21 days of its decision." Motion to Dismiss 7.

Petitioner responds that, as noted in the October 22, 2009 decision, under the SDC when the city receives a building permit application it conducts a "land use review" under either its Type I or II procedures to determine, among other things, if the proposed use is permitted by the underlying zone.[6] The list of uses that require land use review includes

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[5] We note, however, that the type of procedures the city applies to make various types of decisions or how it characterizes such decisions for purposes of its land use reviews are not dispositive of LUBA's jurisdiction. If a decision on a building permit application concerns the application of a land use regulation and requires interpretation or the exercise of legal or policy judgment, or is not clear and objective, it does not fall within either of the exclusions at ORS 197.015(10)(b)(A) or (B). *Tirumali v. City of Portland*, 169 Or App 241, 247, 7 P3d 761, 764 (2000). Further, it is worth noting that even if a building permit decision is a "land use decision" subject to LUBA's jurisdiction because it concerns the application of an ambiguous land use regulation, that does not necessarily mean that it is also a discretionary "permit" decision as defined at ORS 227.160(2), which by statute must be issued pursuant to procedures providing notice and opportunity for a hearing. *Tirumali v. City of Portland*, 41 Or LUBA 231, 242 (2002).

[6] SDC 4.2.300 provides in relevant part:

> "When land use review is required, it shall be conducted prior to issuance of building permits, occupancy permits, business licenses, or public improvement permits, as determined by the community development director. The city shall conduct land use reviews using either a Type I or Type II procedure, as described in SDC 4.1.200 and 4.1.300. A Type I procedure shall be used when the community development director finds that the applicable standards are clear and objective and do not require the exercise of discretion. A Type II procedure shall be used when the decision is discretionary in nature, but it does not involve any requested adjustments under SDC 4.2.510. The community development director shall be

single-family dwellings and duplexes.[7] SDC 4.2.200(A). Petitioner argues that the city apparently chose to conduct that land use review under the city's Type I procedures, and the October 22, 2009 decision was the city's final determination of that land use review. In that October 22, 2009 decision, petitioner argues that the building official concluded that because "the pre-existing land use decision retains legality under SDC 1.4.500(A)," the city cannot process the building permit applications unless and until petitioner applies and the city

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responsible for determining the required review procedure. An application for land use review shall be approved only upon meeting all of the following criteria:

"A. The proposed land use and development are permitted by the underlying zone (Article 2);

"B. The applicable development and design standards of the underlying zone and any applicable overlay district(s) are met (Article 2); and

"C. The applicable access, parking, landscaping, signage and other requirements of Article 3 are met.

Building permits must be obtained subsequent to Land Use Review. Land Use Reviews do not address a project's compliance with applicable building, fire and life safety regulations."

[7] SDC 4.2.200 provides, in relevant part:

"Land use review or design review shall be required for all new developments and modifications of existing developments described below, except existing single-family dwellings undergoing a remodel or minor addition (i.e., lot coverage increase by less than 50 percent over existing lot coverage). * * *

"A. Land Use Review. Land use review is a review conducted by the community development director or designee without a public hearing (Type I or II). See Chapter 4.1 SDC for review procedures. It is for changes in land use and developments that do not require a conditional use or design review approval. Land use review ensures compliance with the basic land use and development standards of the zone, such as lot area, building setbacks and orientation, lot coverage, maximum building height, and other provisions of Article 2. Land use review is required for all of the types of land uses and development listed below. Land uses and developments exceeding the thresholds below require design review.

"1. Change in occupancy from one type of land use to a different land use where any change in floor area or on-site parking is limited to 10 percent or less;

"2. Single-family detached dwelling (including manufactured home on its own lot);

"3. A single duplex, or up to two single-family attached (townhome) units not requiring a land division[.]"

approves a modification of the subdivision decisions to authorize duplexes on the proposed lots. According to petitioner, in so concluding the building official made a decision under land use standards that require interpretation and the exercise of legal judgment, and therefore the October 22, 2009 decision does not fall within the exclusion to LUBA's jurisdiction at ORS 197.15(10)(b)(A).

We agree with petitioner that the building official did more than simply examine the two subdivision notice of decisions and determine that duplexes were not authorized under those approvals.[8] The building official concluded, consistent with the reasoning set forth in the planning director's September 3, 2009 letter, that "the pre-existing land use decision retains legality under SDC 1.4.500(A)," and that because the two subdivision approvals did not expressly authorize duplexes on the disputed lots the city cannot process the building permit applications unless petitioner seeks a modification of the subdivision approvals. We understand the building official to have relied on the "retains legality" language in SCD 1.4.500(A) to conclude that the prior subdivision approval decisions prohibited duplexes except on the lots where they were expressly allowed and that prohibition survived the 2008 SDC amendments. The October 22, 2009 decision clearly applies SDC 1.4.500(A), a land use regulation, and purports to be the city's final decision under its land use review procedures. It therefore meets the definition of "land use decision" at ORS 197.015(10)(a), unless it falls within at least one of the exclusions to the definition set out in ORS 197.015(10)(b).

[8] Petitioner disputes that the two subdivision approvals in fact prohibit duplexes on the lots in question, and argues that the building official erroneously concluded that they do. According to petitioner, the Noble Glen decision includes no conditions of approval that mention duplexes, or single family dwellings for that matter, and that nothing in the Noble Glen decision prohibits developing a lot in that subdivision as a duplex, if otherwise permitted under the city's code. With respect to the Monitor Road Estates subdivision, petitioner argues that the conditions of approval do identify eight lots as "duplex" lots but do not reserve other lots for single family use or explicitly prohibit developing other lots with duplexes. Petitioner appears to be correct that there are no *explicit* conditions of approval attached to either subdivision that would prohibit duplexes on the disputed lots, or that expressly reserve those lots for single-family dwellings. However, for purposes of determining our jurisdiction we need not and do not address these arguments.

SDC 1.4.500, entitled "Pre-existing approvals," provides in relevant part:

> "A. Legality of Pre-Existing Approvals. Developments and uses for which approvals were granted prior to the effective date of the ordinance codified in this code ('pre-existing approvals') may occur pursuant to such approvals. Pre-existing approvals may be extended pursuant to the standards in effect at the time of the original approval notwithstanding any state or federal law or rule precluding such extension. * * *
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> "B. Subsequent Development Applications. All developments and uses begun on or after November 5, 2008, shall conform to the provisions of this code."

For purposes of our jurisdiction, the question is whether the city's application of SDC 1.4.500 in this case did not require "interpretation or the exercise of policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A), or whether the building official's denial of the building permits was a decision that was rendered "under clear and objective land use standards" within the meaning of ORS 197.015(10)(b)(B).

In the planning director's September 3, 2009 letter, quoted above, the planning director clearly interpreted SDC 1.4.500, to the effect that it prohibits development otherwise allowed under the 2008 code if that development would conflict with a previous land use decision or condition of approval. In the October 22, 2009 decision, the buildings official reached the same conclusion, presumably based on the planning director's letter. In denying petitioner's applications, the building official interpreted SDC 1.4.500 and, at least as applied in the present case, SDC 1.4.500 clearly required interpretation and the exercise of legal judgment.[9] Therefore, the October 22, 2009 decision was not "made under land use

[9] We note that SDC 1.4.500(A) simply provides that developments and uses approved prior to the 2008 amendments may occur "pursuant to such approvals," presumably even in circumstances where such development or uses would, if applied for after 2008, not be permitted under the 2008 code. SDC 1.4.500(A) is silent, or at best ambiguous, regarding other circumstances, for example whether development that is allowed outright under the 2008 code is nonetheless prohibited if its approval would arguably conflict with a condition of approval in a pre-2008 decision affecting that property. SDC 1.4.500(A) perhaps supplies an implicit answer to that question, and there is context discussed in the planning director's letter that suggests such an implication is intended, but we do not see how that answer can be derived absent interpretation and the exercise of legal

standards that do not require interpretation or the exercise of policy or legal judgment," for purposes of ORS 197.015(10)(b)(A).

For similar reasons, we cannot say that SDC 1.4.500 is a "clear and objective land use standard" for purposes of ORS 197.015(10)(b)(B). Petitioner argues that SDC 1.4.500 "retains legality" language is intended to recognize the lawfulness of previously approved uses and development when subsequent zoning code amendments render those uses and development non-conforming According to petitioner, SDC 1.4.500 does not operate to impose explicit or implicit development prohibitions, when the zoning code is subsequently amended to allow such uses or development, simply because such uses or development were not allowed under the prior zoning code. That view of SDC 1.4.500 is not implausible. While the city may ultimately prevail in its contrary view of SDC 1.4.500, if petitioner challenges it in this appeal, for jurisdictional purposes we cannot say that SDC 1.4.500 is either "clear" or "objective."

The more difficult issue is the city's final two-sentence argument that in essence petitioner challenges the interpretation first articulated in the planning director's September 3, 2009 letter, yet petitioner failed to file a timely appeal of that September 3, 2009 letter. The city does not elaborate on that argument, but we understand the city to contend that the September 3, 2009 letter was a final land use decision that could have been appealed to LUBA, and that petitioner cannot challenge the interpretation articulated in that September 3, 2009 letter, in an appeal of the building official's subsequent October 22, 2009 letter denying the building permit applications.

The city is correct that petitioner cannot, in an appeal of one decision, collaterally attack a different, final land use decision. The city suggests that the planning director's September 3, 2009 letter was a land use decision that could have been appealed to LUBA,

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judgment. We pass no judgment, of course, on the merits of the city's interpretation. We simply observe that as applied to the present circumstances SDC 1.4.500(A) requires interpretation.

and we assume for purposes of our analysis that that is correct. However, no petition for review has yet been filed in this appeal, and it is not clear whether petitioner intends to challenge the interpretation in the planning director's September 3, 2009 letter in this appeal. As discussed above, in his October 22, 2009 decision the building official also interpreted and applied SDC 1.4.500, presumably based on the planning director's interpretation, and it is the application of that interpretation in the October 22, 2009 decision that petitioner challenges in this appeal. Whether a challenge to the interpretation in the building official's decision, or the application of that interpretation in the decision, is precluded by petitioner's failure to appeal the planning director's September 3, 2009 letter presents a more difficult question.

Although the city does not cite it, we have held that where a local government merely repeats a determination made in an earlier land use decision, that repetition does not necessarily result in a new final land use decision that is appealable to LUBA. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390, *aff'd* 141 Or App 29, 916 P2d 884 (1996). *Lloyd Dist. Community Assoc.* concerned a February 21, 1995 decision that interpreted and applied a land use standard regarding whether a particular use was permitted, concluding that no further discretionary review was necessary to allow the use. The city mailed that use determination to the petitioner, a neighborhood association, but failed to provide notice of that decision to nearby property owners. Two months later, the city issued building permits for the proposed use. A month later, on May 9, 1995, the city issued a "Notice of Use Determination" that reiterated its initial determination that no further discretionary review was required for the proposed use, and referred interested parties to the initial use determination. Petitioner then appealed that May 9, 1995 notice. We dismissed the appeal, concluding:

> "That notice does no more than reiterate a determination the city previously made. Other than a statement of appeal rights, the May 9, 1995 notice contains no new analysis, information or decision. It is not an independently

> appealable decision. Even assuming that the city's February 21, 1995 determination was a land use decision, an affirmation of a previous land use decision does not create a new appealable decision. * * *" *Id.* at 395.

The present circumstances are similar, but with some important differences. First, the building official's October 22, 2009 decision is in response to petitioner's October 13, 2009 building permit applications, and the land use review required of such applications under the city's code. The decision at issue in *Lloyd Dist. Community Assoc.* was not approving or denying an application, but rather simply provided public notice of the earlier use determination, notice that the city had previously failed to provide to anyone other than the petitioner.

Second, the October 22, 2009 decision does not simply reiterate the interpretation in the planning director's September 3, 2009 letter, unlike the notice at issue in *Lloyd Dist. Community Assoc.*. The building official refers to the planning director's September 3, 2009 letter, and he certainly applies SDC 1.4.500 in a manner consistent with the planning director's interpretation. It seems fair to characterize the October 22, 2009 decision as applying the planning director's interpretation to the facts presented in the building permit applications. However, it is important to note that the planning director apparently did not evaluate the specific conditions of approval in the Monitor Road Estates and Noble Glen subdivisions, as the building official did. The planning director's letter is instead based on his "understanding" that the conditions of approval for the Monitor Road Estates and Noble Glen subdivisions "specify a specific number and location of duplex and single-family lots within the developments."[10] Motion to Dismiss, Appendix 4. In other words, the planning director's letter is somewhat hypothetical, based on assumed facts with respect to a hypothetical application yet to be filed, while the building official actually evaluates a pending application and the specific conditions of approval at issue.

[10] As explained above, that understanding may have been incorrect, at least with respect to the Noble Glen subdivision.

Finally, under the city's "land use review" scheme for building permits, the city was required to apply criteria at SDC 4.2.300 to determine, among other things, whether the duplexes proposed in the applications are "permitted by the underlying zone." SDC 4.2.300(A); *see* n 6. Under the city's code, the result of that determination is a final decision, and the building official's October 22, 2009 decision states that it is the city's final decision on the land use review. In responding to the motion to dismiss, petitioner argues that the building official erred in failing to properly address the criteria at SDC 4.2.300. Whether that contention is correct or not, we agree with petitioner that in conducting the land use review required by SDC 4.2.300 the building official was required to apply the criteria at SDC 4.2.300(A) through (C). That is quite different from the circumstances at issue in *Lloyd Dist. Community Assoc.*, where no new criteria apparently applied in issuing the notice of use determination challenged in that appeal.

For the foregoing reasons, we disagree with the city that the challenged October 22, 2009 decision is a "ministerial" decision excluded from our jurisdiction under ORS 197.015(10)(b)(A) or (B), or that it merely reiterates a determination made in a prior land use decision.

The motion to dismiss is denied.

RECORD OBJECTIONS

As noted, the record has not yet been filed in this appeal. The city, however, attached to its motion to dismiss a number of documents that the city requests we consider as the record, for purposes of resolving the motion to dismiss. Petitioner filed precautionary objections to that record.

The documents attached to the city's motion to dismiss do not purport to be the record of the proceedings below that must be filed under OAR 661-010-0025. Accordingly, within 21 days of the date of this order the city shall transmit the record required by OAR 661-010-0025. Petitioner's precautionary objections are denied, as premature.

Dated this 22nd day of January, 2010

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Tod A. Bassham
Board Chair