

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

3
4 JUSTIN LENHARDT, HEATHER ORR,
5 and SHANNON BERNARD,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF NEWBERG,
11 *Respondent,*

12
13 and

14
15 NORTH VALLEY FRIENDS CHURCH,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2023-021/023

19
20 ORDER

21 **BACKGROUND**

22 Intervenor-respondent (intervenor) applied for site design review approval
23 for an eight-unit “cottage cluster” with a separate community building for laundry
24 and storage facilities, on intervenor’s property zoned Institutional, and for a
25 related lot consolidation.¹ In LUBA No. 2023-021, petitioners appeal an email

¹ Newberg Development Code (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.’”

1 from the city planning manager to petitioners stating that no local appeal is
2 available for petitioners to appeal the city's decision approving intervenor's
3 applications. Record 4. In LUBA No. 2023-023, petitioners appeal the city's
4 February 10, 2023 decision approving intervenor's applications. Record 11.

5 **JURISDICTION**

6 On April 5, 2023, intervenor filed a motion to dismiss the appeals on the
7 basis that the challenged decisions fall within the exceptions to LUBA's
8 jurisdiction in ORS 197.015(10)(b)(A) or ORS 197.015(10)(b)(B). On April 21,
9 2023, LUBA received petitioners' response to the motion to dismiss. For the
10 reasons set forth below, intervenor's motion to dismiss is denied.

11 LUBA has exclusive jurisdiction to review land use decisions. ORS
12 197.825(1).² ORS 197.015(10)(a)(A) defines "[l]and use decision" to include "[a]
13 final decision or determination made by a local government or special district
14 that concerns the adoption, amendment or application of * * * [a] land use
15 regulation[.]" ORS 197.015(10)(a)(A)(iii).

16 As relevant here, ORS 197.015(10)(b)(A) excludes from LUBA's
17 jurisdiction a local government decision "made under land use standards that do

² ORS 197.825(1) provides in part:

"[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845."

1 not require interpretation or the exercise of policy or legal judgment[.]” We
2 sometimes refer to that exclusion as “the ministerial decision exclusion.” ORS
3 197.015(10)(b)(B) excludes from LUBA’s jurisdiction a local government
4 decision to approve or deny a building permit made under “clear and objective
5 land use standards.” We sometimes refer to that provision as “the building permit
6 exclusion.” As a preliminary matter, we note that although intervenor’s motion
7 to dismiss cites both ORS 197.015(10)(b)(A) and (B), intervenor does not
8 develop any argument under either provision.

9 **A. Building Permit Exclusion**

10 In their response to the motion to dismiss, petitioners argue that the
11 decisions are not subject to the building permit exclusion because the decisions
12 are not building permits. Absent any developed argument from intervenor
13 establishing that the challenged decisions are building permits, we agree. *See*
14 *Haystack Rock, LLC v. City of Cannon Beach*, ___ Or LUBA ___, ___ (LUBA
15 No 2022-041, Mar 16, 2023) (“The plain meaning of ‘building permit’ is a
16 written document that authorizes the development of a structure.”) (slip op at 9).

17 **B. Ministerial Decision Exclusion**

18 Also in their response to the motion to dismiss, petitioners argue that
19 Newberg Development Code (NDC) 15.100.080(A) required the city to exercise
20 legal judgment by requiring the city to evaluate and categorize the proposal and

1 determine whether a Type I or a Type II procedure was required.³ Petitioners
2 argue that that determination regarding the appropriate procedure required the
3 city to exercise legal judgment.⁴ For the reasons set forth below, we agree with
4 petitioners.

5 NDC 15.100.080(A) provides:

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

³ Petitioners argue that intervenor’s proposed development is in fact a “residential care facility” within the meaning of NDC 15.05.030 because, according to petitioners, intervenor’s intended use includes on-site care and treatment of persons occupying the buildings. An application for a residential care facility is processed as a Type II action. NDC 15.220.020(A)(2); *see* NDC 15.220.030(B) (showing what is required to be submitted with all Type II applications for site design review). NDC 15.05.030 defines “residential care facility” to mean

“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 related to each other or to any resident of the residential care facility.”

⁴ Design review applications for a cottage cluster are processed as “Type I” actions and are subject to the standards in NDC 15.220.030(A). NDC 15.220.020(A)(1)(f).

1 NDC 15.100.080(A) is ambiguous, where it provides that “if there is a question
2 as to the appropriate type of procedure” the planning director shall apply the
3 higher procedure type number. It is not clear from the express language of the
4 provision whether only the planning director may raise a question, or whether
5 others may raise a question. It is also not clear when, after an application is filed,
6 a question may be raised. In a January 6, 2023 letter to the city’s planning
7 director, petitioners raised a question regarding the appropriate type of procedure
8 for the application. Record 7-8. For that reason, we conclude that NDC
9 15.100.080(A) required the planning director to exercise legal judgment in
10 determining the applicable procedure for the proposed cottage cluster
11 development.

12 Petitioners’ response to the motion to dismiss includes argument on the
13 merits of whether the application is an application for a cottage cluster or for a
14 residential care facility. However, we need not address the merits of those
15 arguments to agree with petitioners that NDC 15.100.080(A) required the city to
16 exercise legal judgment in determining whether a Type I or a Type II procedure
17 applies to an application for a development action after petitioners raised a
18 question regarding the appropriate type of procedure. Stated differently, even if
19 we ultimately conclude that the city correctly concluded that intervenor’s
20 application proposed a cottage cluster, and therefore correctly applied the Type I
21 procedures, where petitioners raised a question to the city regarding the
22 appropriate type of procedure, the city’s determination regarding the proper

1 procedure for the development action pursuant to NDC 15.100.080(A) required
2 the city to exercise legal judgment. Accordingly, the ministerial decision
3 exclusion does not apply. There is no dispute that the city applied provisions of
4 the NDC to the applications, and accordingly, the city's decisions are land use
5 decisions.

6 The motion to dismiss is denied.

7 **BRIEFING SCHEDULE**

8 The petition for review shall be due 21 days after the date of this order.

9 The response briefs shall be due 42 days after the date of this order. The final
10 opinion and order shall be due 77 days after the date of this order.

11 Dated this 28th day of April 2023.

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Melissa M. Ryan

17 Board Chair