

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

3
4 WAL-MART STORES, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HOOD RIVER,
10 *Respondent,*

11
12 AND

13
14 HOOD RIVER CITIZENS FOR A LOCAL ECONOMY,
15 BECKY BRUN, HOOD RIVER VALLEY RESIDENTS
16 COMMITTEE and MARY ELLEN BARILOTTI,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2015-004

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Hood River.

25
26 Gregory S. Hathaway, Portland, filed the petition for review and argued
27 on behalf of petitioner. With him on the brief was Hathaway Koback Connors
28 LLP.

29
30 Daniel Kearns, Portland, filed a joint response brief on behalf of
31 respondent. With him on the brief was Reeve Kearns PC.

32
33 Sean T. Malone, Eugene, filed a joint response brief and argued on behalf
34 of intervenors-respondents Hood River Citizens For a Local Economy, Becky
35 Brun and Hood River Valley Residents Committee.

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37 Mary Ellen Barilotti, Hood River, filed a response brief and argued on
38 her own behalf.

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BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board Member, participated in the decision.

AFFIRMED

07/08/2015

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

NATURE OF THE DECISION

Petitioner Wal-Mart appeals a city council decision that approves its application to alter an existing retail store as a nonconforming use, but concludes that Wal-Mart lost its vested right to construct a 30,000-square-foot expansion.

MOTION TO FILE REPLY BRIEF

Wal-Mart moves to file a reply brief to address waiver challenges in the response briefs. As discussed below, we reject respondents’ arguments that we should not consider Wal-Mart’s arguments regarding waiver. The reply brief is otherwise not opposed, and it is allowed.

FACTS

In 1991, the city approved Wal-Mart’s site plan review application for (1) a 72,000-square-foot commercial retail store and (2) a 30,000-square-foot “future expansion.” The subject property is zoned Light Industrial (LI), and at that time commercial retail uses were allowed outright in the LI zone, subject to site plan review. The 1991 site plan decision approved infrastructure, e.g., the parking lot, which was sized to accommodate both the 72,000-square-foot main store and the 30,000-square-foot future expansion. The 1991 site plan approval had no expiration date or conditions requiring construction within any particular timeframe.

In 1992, Wal-Mart constructed the 72,000-square-foot main store, and that store has operated continuously since then. In 1997, the city amended the LI zone to prohibit commercial uses, making the existing store a nonconforming use.

1 In 2011, Wal-Mart applied to the city for (1) non-conforming use
2 approval for minor alterations to the existing store, and (2) construction of the
3 30,000-square-foot “future expansion” authorized in the 1991 decision, which
4 Wal-Mart claimed it had a vested right to construct under the common law
5 doctrine described in *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190
6 (1973). The city approved the application. Opponents appealed the decision to
7 LUBA, which remanded for the city to consider whether the discontinuance
8 provisions of the city’s nonconforming use code, at Hood River Municipal
9 Code (HRMC) 17.05.020, applied to the vested right to construct the
10 expansion.¹ *Hood River Citizens for a Local Econ. et al. v. City of Hood River*,
11 65 Or LUBA 392 (2012) (*Wal-Mart I*).

12 On remand, the city council concluded that the nonconforming use
13 discontinuance limitation of HRMC 17.05.020 applied to the vested right to
14 construct the expansion, and that pursuant to HRMC 17.05.020(2) that vested

¹ Hood River Municipal Code (“HRMC”) 17.05.020 provides:

“A use that was legally allowed when established, but which is no longer permitted in the zone, in which it is located, may continue so long as it complies with all of the following requirements:

* * * * *

“(2) Discontinuance: If a nonconforming use is discontinued for any reason for more than twelve (12) consecutive months, any subsequent use shall conform to all of the regulations of the subject zone. For the purpose of this ordinance, rental payments, lease payments, or the payment of taxes shall not be alone or together sufficient to constitute continuance of the use.”

1 right had been lost between 1997 and 2011, due to the lapse of more than 12
2 months without any steps taken toward construction of the expansion.

3 Wal-Mart appealed the city's decision to LUBA, challenging both the
4 conclusion that the vested right had been lost under HRMC 17.05.020(2), and
5 the impartiality of a city councilor who had participated in the city council vote
6 under the rule of necessity in order to break a tie vote. The Board remanded,
7 concluding that the city had prematurely invoked the rule of necessity, and that
8 a new vote on the application was necessary, either without the city councilor
9 or, if her participation was necessary, only after other avenues to reach a
10 decision had been exhausted. LUBA did not reach the merits of Wal-Mart's
11 third assignment of error, which challenged the city council's conclusion that
12 the vested right to construct the expansion had been lost under HRMC
13 17.05.020(2). *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332
14 (2013) (*Wal-Mart II*).

15 On December 15, 2014, the city conducted a second remand hearing
16 where the city exhausted all other means to reach a decision without the
17 participation of the biased councilor. Ultimately the city council, with the
18 biased councilor's participation, reached the same vote and adopted
19 substantially the same decision and findings it had adopted in its 2012 decision.
20 The city's final decision again concludes that Wal-Mart's vested right had
21 expired pursuant to the city's nonconforming use standards, and approved with
22 conditions the remainder of Wal-Mart's proposed site plan.

23 This appeal followed.

24 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

25 On appeal to LUBA, Wal-Mart does not challenge the city council's vote
26 or the procedures on remand. Wal-Mart also does not challenge the city

1 council’s conclusion that the nonconforming use provisions at HRMC
2 17.05.020, including the discontinuance provisions of HRMC 17.05.020(2),
3 apply to Wal-Mart’s vested right to construct the expansion. The first
4 assignment of error argues that the city’s findings regarding HRMC
5 17.05.020(2) are inadequate, because the findings do not explain how HRMC
6 17.05.020(2) can be applied “retroactively” to extinguish Wal-Mart’s vested
7 right.²

² The city’s findings state, in relevant part:

“* * * [W]e interpret HRMC ch 17.05 to apply not only to established uses, but also to inchoate uses not yet established but existing as legally protected vested rights pursuant to some prior approval, in this case, the 1991 site plan approval. To interpret the code otherwise would be to grant a nonexistent use (never begun or established) immunity from new land use regulations in perpetuity.

“Once the site’s zoning changed to prohibit commercial uses and the owner was subject to nonconforming use regulations, it was obligated to take action to keep alive its nonconforming vested right for the ‘future expansion.’ In other words, the Code’s nonconforming use discontinuation limitations became applicable. Prior to that zone text amendment there was no time limit within which the owner had to activate the vested right because it was for a use allowed outright. Once the vested right became nonconforming, a time limit was automatically imposed for acting on that inchoate development right. In particular, we interpret HRMC 17.05.020(2) as imposing a 12-month time limit within which the owner had to take action, *i.e.* had to pull building permits and at least begin construction of the 30,000 sf ‘future expansion.’ Thus, in 1997 when Wal-Mart’s vested right became nonconforming relative to the uses allowed in the zone, ‘future’ became subject to the 12-month limitation.

1 Relatedly, under the second assignment of error, Wal-Mart argues that
2 the city council misconstrued HRMC 17.050.020(2) in concluding that the
3 city’s nonconforming use provisions can be applied retroactively to a vested
4 right prior in time to the city’s decision to apply its nonconforming use
5 provisions to a vested right, and prior to the city’s determination that Wal-Mart
6 had a vested right. According to Wal-Mart, the city council’s interpretation is
7 inconsistent with the express language of HRMC 17.050.020(2) and not
8 sustainable under the deferential standard of review LUBA applies to a
9 governing body’s code interpretation, pursuant to ORS 197.829(1) and *Siporen*
10 *v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).³ Wal-Mart argues that a

“The record shows that Wal-Mart never began action of any discernible form to activate its ‘future expansion’ until this 2011 application, which raises the question of what was ‘discontinued’ within the meaning of HRMC 17.05.020(2). We interpret this operative term to also encompass periods of inaction or inactivity when there was a particular right to develop a particular nonconforming use. * * * The record shows no activity or effort by Wal-Mart to effectuate its nonconforming vested right to a ‘future expansion’ from the time of the 1997 zone text amendment until the present application. This period of inaction, in our view, constitutes a discontinuance in excess of 12 months in Wal-Mart’s effort to act upon its nonconforming vested right to expand.” Record 8-9.

³ ORS 197.829(1) provides:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1 better, sustainable interpretation of HRMC 17.050.020(2) more consistent with
2 the code’s express language is that the 12-month time limit does not commence
3 until the city issues a final decision that Wal-Mart has a vested right. That is,
4 Wal-Mart argues that the 12-month period specified in HRMC 17.050.020(2)
5 should begin on December 15, 2014, the date the city council issued the
6 decision challenged in this appeal.

7 We address these related two assignments of error together. But we first
8 address the parties’ contentions regarding waiver.

9 **A. OAR 661-010-0030(4)(d)**

10 In 2014, LUBA amended OAR 661-010-0030(4) to require that each
11 assignment of error “demonstrate that the issue raised in the assignment of error
12 was preserved during the proceedings below[,]” or explain why preservation is
13 not required. The petition for review does not include the demonstration
14 required by the rule, for either assignment of error. Instead, as noted, petitioner
15 attempts to make that demonstration in the reply brief, which was filed after the
16 response briefs raised waiver challenges.

17 The joint response brief argues that Wal-Mart’s noncompliance with
18 OAR 661-010-0030(4) means that petitioner should not be allowed to respond
19 to the waiver challenges in a reply brief, or perhaps at all. We disagree. OAR
20 660-010-0005 provides that “[t]echnical violations not affecting the substantial
21 rights of parties shall not interfere with the review of a land use decision or

“(b) Is inconsistent with the purpose for the comprehensive plan
or land use regulation; [or]

“(c) Is inconsistent with the underlying policy that provides the
basis for the comprehensive plan or land use regulation[.]”

1 limited land use decision.” Respondents do not argue that petitioner’s failure to
2 demonstrate preservation in the petition for review prejudiced their substantial
3 rights to present their case, or to a full and fair hearing. Moreover, our 2014
4 rule change is relatively new, and some flexibility is appropriate as practitioners
5 adjust. We caution, however, that our amendment to OAR 661-010-0030(4)
6 was adopted for a reason. Compliance with OAR 661-010-0030(4) helps
7 eliminate waiver disputes or frame waiver disputes earlier in an appeal, and in
8 many cases will eliminate the need for a reply brief altogether with attendant
9 efficiencies to LUBA’s appellate review. Our decision to overlook petitioner’s
10 failure to comply with OAR 661-010-0030(4) in this case should not be viewed
11 as an indication that LUBA necessarily will overlook such failures in the future.

12 **B. ORS 197.763(1) Waiver**

13 Respondents also argue that during the proceedings below Wal-Mart
14 raised no issues or objections to the “retroactive” application of HRMC
15 17.05.020(2), or argued that the correct application of HRMC 17.05.020(2) is to
16 start the 12-month period from the date the city issues a final decision
17 determining that Wal-Mart has a vested right. Respondents contend that such
18 issues could have been raised below, but were not, and therefore Wal-Mart has
19 waived those issues on appeal, pursuant to ORS 197.763(1).⁴

⁴ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning

1 Petitioner replies that it had no opportunity to challenge the city’s
2 findings and interpretation of HRMC 17.05.020(2) before the city adopted the
3 findings and interpretation in the city’s final decision. According to petitioner,
4 “issues regarding inadequate findings and the City’s interpretation only became
5 apparent after the City’s Final Order was issued.” Reply Brief 2.

6 In anticipation of that response, intervenor-respondent Mary Ellen
7 Barilotti (intervenor) argues that the findings and interpretation of HRMC
8 17.05.020(2) adopted in the city’s December 15, 2014 decision on appeal to
9 LUBA are substantially the same findings and interpretation adopted in the
10 city’s December 2012 decision that was at issue in *Wal-Mart II*. Intervenor
11 argues that during the 2014 remand proceedings, which resulted in the same
12 vote and adoption of the same findings and interpretation as the 2012 decision,
13 Wal-Mart could have raised issues regarding those findings and interpretation.
14 Specifically, intervenor argues, Wal-Mart could have objected to “retroactive”
15 application of HRMC 17.05.020(2) and argued, as it does on appeal, that
16 HRMC 17.05.020(2) must be interpreted to provide that the 12-month
17 discontinuance period does not commence until the city issues its final decision
18 determining that petitioner has a vested right.

19 Intervenor may be correct that petitioner has waived its ability to
20 challenge the adequacy of the findings and the interpretation of HRMC
21 17.05.020(2) therein, although the operative principle intervenor invokes may
22 more accurately be described as the “law of the case” doctrine articulated in
23 *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), rather than ORS

commission, hearings body or hearings officer, and the parties an
adequate opportunity to respond to each issue.”

1 197.763(1) waiver. If the findings and interpretation adopted in the 2012
2 decision are substantially the same as those re-adopted in the decision before us,
3 then we do not believe that Wal-Mart can advance in the present appeal
4 challenges to those re-adopted findings that could have been advanced in the
5 2012 appeal, but were not, even if such issues were raised during the remand
6 proceedings.

7 But there are two complications to applying the *Beck* law of the case
8 doctrine in this appeal. First, as explained above, Wal-Mart's third assignment
9 of error in its appeal of the 2012 decision, at issue in *Wal-Mart II*, challenged
10 the adequacy of the findings regarding HRMC 17.05.020(2) and the city council
11 interpretation of that code provision, but LUBA did not reach or resolve that
12 assignment of error. If that unresolved assignment of error raised substantially
13 the same challenges to the city's interpretation that are raised in this appeal,
14 then "law of the case" waiver would not apply to bar re-assertion of those
15 unresolved challenges. However, without some assistance from intervenor on
16 this point, we have no basis to conclude that the issues raised in that unresolved
17 third assignment of error differ significantly from the issues raised in the
18 present appeal.

19 The second complication is that the findings re-adopted in the 2014
20 decision are not exactly the same as those adopted in 2012. Although the gist
21 of the city's findings and interpretation appears to be the same, the city
22 modified several paragraphs in the three-page section of findings that set out its
23 interpretation of HRMC 17.05.020(2). *Compare* Record 7-9 with Intervenor's
24 Response Brief, Appendix 5-6. Whether those modifications would allow Wal-
25 Mart to raise new issues or arguments in the present appeal consistent with the
26 law of the case doctrine is unclear. Accordingly, to the extent intervenor

1 invokes the law of the case doctrine to bar LUBA’s consideration of the two
2 assignments of error in this appeal, intervenor has not established that it is
3 appropriate to apply the law of the case doctrine in this appeal.

4 If the question is framed purely in terms of ORS 197.763(1) waiver, Wal-
5 Mart argues that it repeatedly objected during the 2014 remand proceedings to
6 any interpretation or application of HRMC 17.05.020(2) that would extinguish
7 its vested right. In particular, Wal-Mart objected to the view that it had lost its
8 vested right because it did not file for building permits and commence
9 construction of the expansion within 12 months of the store becoming a non-
10 conforming use. Record 62. We understand Wal-Mart to argue that making
11 such arguments during the remand proceedings were sufficient to allow it to
12 argue now, on appeal, that the city’s findings regarding “retroactive”
13 application of HRMC 17.05.020(2) are inadequate and that the city’s
14 interpretation to allow retroactive application of HRMC 17.05.020(2)
15 misconstrues the applicable law.

16 We agree with Wal-Mart that, having raised issues below regarding the
17 correct interpretation and application of HRMC 17.05.020(2), Wal-Mart may
18 now challenge the adequacy of the findings the city adopted to explain its
19 interpretation and application of that code provision, and may also challenge the
20 specific interpretation the city council adopted on remand.

21 In general, a petitioner is not required to anticipate the specific findings
22 or interpretations adopted in the final decision, in order to challenge those
23 findings or interpretations on appeal. *See Lucier v. City of Medford*, 26 Or
24 LUBA 213, 216 (1993) (the particular findings ultimately adopted or evidence
25 ultimately relied on by the decision maker need not be anticipated and
26 specifically challenged during the local proceedings, in order to challenge the

1 adequacy of findings on appeal). The present case is unusual in that the 2014
2 proceeding was on remand from *Wal-Mart II* for a new city council vote, and
3 on remand the city council re-adopted its 2012 findings (with some
4 modifications) and essentially the same interpretation it adopted in its 2012
5 decision. Wal-Mart was presumably aware of the possibility that, on remand in
6 *Wal-Mart II* for a new vote, the city council might re-adopt substantially the
7 same findings and interpretation. Arguably, in this circumstance Wal-Mart was
8 required to anticipate that possibility and specifically challenge the adequacy of
9 the findings and the correctness of the 2012 interpretation, in order to preserve
10 the ability to challenge on appeal those findings and that interpretation.

11 While it is a close call, we conclude that the issues raised in Wal-Mart's
12 two assignments of error were adequately raised below. Wal-Mart specifically
13 objected to the position that it lost its vested right due to failure to seek building
14 permits and to pursue construction after the store became a nonconforming use.
15 Record 62. Wal-Mart also argued for an interpretation of HRMC 17.05.020(2)
16 that would result in a conclusion that the vested right had not been
17 discontinued. *Id.* at 62-63. Wal-Mart did not couch those arguments in terms
18 of "retroactivity," or specifically argue that the 12-month discontinuous period
19 should commence only after the city council determines that a vested right
20 exists. However, the line between "issues raised below" and specific arguments
21 under those raised issues that may be advanced on appeal is notoriously
22 difficult to draw. Rather than struggle further with such line-drawing, we will
23 assume for purposes of this appeal that Wal-Mart has sufficiently preserved the
24 findings and interpretational challenges it presents on appeal.

1 **C. Retroactive Application of HRMC 17.05.020(2)**

2 The core of Wal-Mart’s findings and interpretational challenges is Wal-
3 Mart’s assertions that (1) the discontinuance provisions of HRMC 17.05.020(2)
4 cannot be applied to a vested right unless and until the city makes a
5 determination that the vested right exists, and (2) the 12-month discontinuance
6 period necessarily begins on the date that the vested rights determination
7 becomes final. From those premises, Wal-Mart argues first that the city’s
8 findings are inadequate, because they do not explain how HRMC 17.05.020(2)
9 can be applied “retroactively” to Wal-Mart’s vested right as far back as 1997,
10 when the retail store became a nonconforming use. Second, Wal-Mart argues
11 that the city’s interpretation to that effect is inconsistent with the express
12 language of HRMC 17.05.020(2), and therefore cannot be affirmed even under
13 the deferential standard of review that governs LUBA’s review of a governing
14 body’s code interpretation, pursuant to ORS 197.829(1) and *Siporen v. City of*
15 *Medford*, 349 Or 247, 243 P3d 776 (2010).

16 However, neither argument provides a basis for reversal or remand. A
17 vested right is essentially the right to finish construction or to fully implement
18 the use that is, or will be, a nonconforming use when completed. As such
19 vested rights are essentially a species of nonconforming use. *Fountain Village*
20 *Development Co. v. Multnomah County*, 176 Or App 213, 224, 31 P3d 458
21 (2001); *Crosley v. Columbia County*, 251 Or App 653, 286 P3d 911, *rev den*
22 353 Or 127, 295 P3d 640 (2012). The general principles of nonconforming
23 uses (including discontinuance) apply to vested rights, at least in counties
24 subject to ORS 215.130, the statute that provides for nonconforming uses. As
25 respondents argue, analysis of discontinuance under ORS 215.130 or county
26 codes implementing the statute generally involves looking back in time to

1 determine the status of the nonconforming use, and whether that nonconforming
2 use has been lost due to discontinuance. Depending on the facts, it is entirely
3 possible for a nonconforming use to be discontinued or abandoned prior to the
4 date that the applicant seeks a verification of the lawful existence and scope of
5 the nonconforming use, and prior to the date the local government issues a
6 decision verifying the lawful existence and scope of the nonconforming use.

7 In the present case, the city is not subject to ORS 215.130. *City of*
8 *Mosier v. Hood River Sand, Gravel and Ready-Mix, Inc.*, 206 Or App 292, 306,
9 136 P3d 1160 (2006). The city presumably could interpret its local
10 nonconforming use discontinuance provisions to apply differently to vested
11 rights, than would be the case under ORS 215.130. The city could potentially
12 agree with petitioner that application of the 12-month discontinuance provision
13 at HRMC 17.05.020(2) to Wal-Mart's vested right would be delayed until the
14 city issues a final decision verifying the existence and scope of the vested
15 right.⁵ LUBA would be required to affirm such an interpretation under ORS
16 197.829(1), unless it was inconsistent with the express language, purpose or
17 underlying policy of the city's nonconforming use code. *See* n 3.

18 However, the relevant question under ORS 197.829(1) is whether the
19 interpretation the city did adopt, that the 12-month discontinuance provision
20 becomes applicable once Wal-Mart's store became a nonconforming use, is
21 inconsistent with the express language of HRMC 17.05.020(2), or its purpose or

⁵ We note that Wal-Mart's characterization of the city's application of HRMC 17.05.020(2) in this case to its vested right as "retroactive" application is questionable. It is at least as accurate to describe Wal-Mart's view of how HRMC 17.05.020(2) should be applied as "delayed" until the applicant decided to seek a vested rights determination.

1 underlying policy. Wal-Mart has not established that the city misconstrued
2 HRMC 17.05.020(2) to allow such “retroactive” application of the 12-month
3 discontinuance period. Wal-Mart identifies no code language that the city’s
4 interpretation is inconsistent with, and does not dispute the city’s findings that
5 its interpretation is consistent with the purpose and policy underlying HRMC
6 17.05.020(2). In particular, Wal-Mart identifies no code language,
7 comprehensive plan provision or other source of authority that would compel
8 the city to interpret HRMC 17.05.020(2) to apply the 12-month discontinuance
9 period only after the city issues a final decision verifying the vested right. As
10 explained above, the city’s interpretation is entirely consistent with how
11 discontinuance periods are applied to vested rights where ORS 215.130 applies.
12 While the city might have interpreted HRMC 17.05.020(2) to allow vested
13 rights to be treated differently, the city chose not to, and we cannot say that that
14 choice is inconsistent with the express language of HRMC 17.05.020(2) or any
15 other code or comprehensive plan language cited to us. In a word, petitioner
16 has not established that the city’s interpretation of HRMC 17.05.020(2) is
17 “implausible.” Accordingly, we must affirm that interpretation.

18 Similarly, petitioner has not established that the city’s findings are
19 inadequate. The city’s findings regarding HRMC 17.05.020(2) are three pages
20 long, single-spaced. The findings are a bit imprecise at times in distinguishing
21 between existing nonconforming uses and the inchoate proposed expansion in
22 this case which is no longer allowed by the LI zone, but for which at one time
23 petitioner had a vested right to begin and complete construction. But the
24 findings quoted earlier set out the text and context of the discontinuance
25 standard, including a discussion of the purpose and policy of the city’s
26 nonconforming use code provisions. The findings discuss the relevant facts,

1 apply the discontinuance standard to those facts, and provide a reasonably
2 understandable explanation for the city's conclusion that Wal-Mart's vested
3 right to complete the expansion as part of a nonconforming use was lost through
4 elapse of more than 12 months between the years 1997 to 2011, during which
5 time Wal-Mart made no effort to pursue a vested rights determination or
6 completion of the expansion. The city's findings are adequate.

7 The first and second assignments of error are denied.

8 The city's decision is affirmed.