BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ED BEMIS and TANYA BEMIS,
Petitioners,

vs.

CITY OF ASHLAND,
Respondent,

and

BILL STREET and JACK HARDESTY,
Intervenors-Respondent.

LUBA No. 2004-029

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Gregory S. Hathway and Davis Wright Tremaine, LLP.

Michael W. Franell, City Attorney, Ashland, filed the response brief and argued on behalf of respondent.

Bill Street and Jack Hardesty, Ashland, represented themselves.

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

AFFIRMED 10/13/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city decision denying their application for a land partition and site design review to construct a mixed-use building.

MOTION TO INTERVENE

Bill Street and Jack Hardesty move to intervene on the side of respondent. There is no opposition to the motions and they are allowed.

MOTION TO FILE REPLY BRIEF

Petitioners seek permission to file a reply brief to respond to an argument raised in the response brief that should LUBA sustain petitioners' second assignment of error that the decision be remanded to the city so the city "will have [the] opportunity to review and determine all relevant criteria." Respondent's Brief 12. Pursuant to OAR 661-010-0039, a reply "shall be confined solely to new matters raised in the respondent's brief." The city's request for specific authority to review additional criteria should the case be remanded is a new matter raised for the first time in respondent's brief. Therefore, petitioners are entitled to file a reply brief. *D.S. Parklane, Inc. v. Metro*, 35 Or LUBA 516, 526-27 (1999), *aff'd* 165 Or App 1, 994 P2d 1205 (2000).

The motion to file a reply brief is granted.

FACTS

Petitioners' site design review application proposed a five-level, mixed-use building with commercial space, condominiums, and two and a half floors of parking on a sloping lot adjacent to the Ashland Springs Hotel. The building footprint of the proposed building is 19,560 square feet. The proposed structure includes a 23,245-square foot basement, with 57,967 square feet of floor space above ground on three levels, including 23,671 square feet for parking. The total floor area of all five levels of the proposed building is 81,212 square feet.

In 1992, the city adopted amendments to the Ashland Land Use Ordinance (ALUO) and related site design standards to prohibit new buildings or contiguous groups of buildings that "exceed a gross square footage of 45,000 square feet[.]" The 1992 ordinance, commonly known as the "Big Box Ordinance," was codified at ALUO 18.72.050 and Site Design Standards II-C-3(a) (hereafter, old provisions).[1]

Apparently the city did not have occasion to apply the 45,000 gross square footage requirement of ALUO 18.72.050 and Site Design Standards II-C-3(a) to any development prior to 2000. In that year, the Oregon Shakespearean Festival (OSF) applied for site design review approval for a theatre and a multi-story parking structure. A dispute arose as to how to apply the 45,000 gross square footage requirement to the parking structure, in particular

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[1] *Former* ALUO 18.72.050 provided, in relevant part:

> "B. Any development in the Detail Site Review Zone as defined in the Site Review Standards adopted pursuant to this chapter, which exceeds 10,000 square feet or is longer than 100 feet in length or width, shall be reviewed according to the Type 2 procedure.
>
> "C. No new buildings or contiguous groups of buildings in the Detail Site Review Zone shall exceed a gross square footage of 45,000 square feet or a combined contiguous building length of 300 feet. Any building or contiguous group of buildings which exceed these limitations, which were in existence in 1992, may expand up to 15% in area or length beyond their 1992 area or length. Neither the gross square footage or combined contiguous building length as set forth in this section shall be subject to any variance authorized in the [ALUO]."

Approval of an application for site design review also requires compliance with city Site Design Standards. ALUO 18.72.070(C). Site Design Standards II-C-3(a) applies to "large-scale projects," and the version adopted in 1992 and applied here provided in relevant part:

> "Developments (1) involving a gross floor area in excess of 10,000 square feet or a building frontage in excess of 100 feet in length, (2) located within the Detail Site Review Zone, shall, in addition to complying with the standards for Basic and Detail Site Review, shall conform to the following standards:
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> "* * * * *
>
> "(2) No new buildings or contiguous groups of buildings shall exceed a gross square footage of 45,000 square feet or a combined contiguous building length of 300 feet. Any building or contiguous group of buildings which exceed these limitations, and which were in existence in 1992, may expand up to 15% in area or length beyond their 1992 area or length."

whether square footage is measured from the exterior of the building, as opponents argued, or whether it is measured from interior walls, as city staff argued. The city council's 84-page decision adopted alternative findings, drafted by the applicant, that determined that "gross square footage" referred to the footprint of the structure, not to the total square footage of all floors of a structure. In the alternative, the city council found that even if "gross square footage" refers to total square footage of all floors of a structure, or "gross floor area," as that term is used elsewhere in the code and in Site Design Standards II-3-C, "gross square footage" is properly measured from the interior walls. So measured, the city council found, the "gross square footage" of the multi-story parking structure did not exceed 45,000 square feet.[2]

In 2001, city staff and the city planning commission applied the city council's "footprint" interpretation to approve a multi-story YMCA project that exceeded 45,000 total square feet in size but with a footprint smaller than 45,000 square feet. The planning commission YMCA decision was not appealed to the city council, but it generated controversy. At some point a legislative process to clarify the city council's intent with

[2] The challenged decision quotes the 2000 OSF decision as stating, in relevant part:

> "The City Council does not interpret 'gross square footage of 45,000 square feet' to mean gross floor area square footage. This quoted phrase is to be interpreted as meaning 45,000 square foot footprint. It is to be distinguished from those provisions of the land use ordinance that specifically refer to gross floor area such as in section II-C-3 of the Site Design and Use Standards ('Developments (1) involving a *gross floor area* in excess of 10,000 square feet')(Emphasis added). The City Council finds that the parking structure does not exceed a footprint of 45,000 square feet. Even if the limitation were to be interpreted to mean 'gross floor area' the parking structure does not exceed the maximum allowed. During the City Council public hearing, Ashland Planning Director John McLaughlin testified that his staff had carefully computed the gross floor area square footage of the building and found it to be less than 45,000 gross floor area square feet. Mr. McLaughlin attributed the deviation to measurements taken by opponents from the exterior limits of the building rather than the interior limits. He further testified that the City always computes building gross floor area square footage based upon the interior size of a building and emphasized that even without subtracting the planter areas along Hargadine Street, that the building floors were less than 45,000 square feet. The City Council accepts and adopts the findings of its Planning Director and concludes that the parking structure does not violate the provisions of either ALUO 18.72.050(C) or [Site Design and Use Standards] II-C-3-a-2." Record 16.

respect to ALUO 18.72.050 and Site Design Standards II-C-3(a) was initiated. City staff drafted amendments that codified the OSF "footprint" interpretation. The city council conducted hearings on the proposed amendments in 2001 and 2002, but took no action other than to request further clarification and public testimony. At a February 11, 2003 planning commission meeting, the commission recommended that the city council should re-interpret the 45,000 gross square foot limitation as referring to the total square footage of all floors of a structure, or the "gross floor area," rather than to the "footprint." Staff presented the planning commission recommendation at a May 7, 2003 city council study session, at the conclusion of which the city council "voiced support" for the planning commission recommendation, and directed staff to bring the issue back to a city council hearing.

Staff returned to city council with draft amendments providing that the 45,000 square foot limitation applied to the total square footage of all floors, although in the proposed draft neither above nor below ground parking counted toward the 45,000 square foot limitation. After a number of additional hearings and some revisions, the city council ultimately adopted Ordinance 2900 on September 16, 2003. As relevant here, Ordinance 2900 replaces the old provisions with new versions of ALUO 18.72.050 and Site Design Standards II-C-3(a) (hereafter, new provisions) providing that new development within the downtown design district shall not exceed either "a building footprint area of 45,000 sq. ft. or a gross floor area of 45,000 sq. ft., including roof top parking," with the exception of basement parking areas, which do not count toward the 45,000 square foot limitation.[3]

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[3] As amended by Ordinance 2900 and as relevant here, both ALUO 18.72.050(C)(2) and Site Design Standards II-C-3(a) provide, in identical language:

> "Inside the Downtown Design Standards Zone, new buildings or expansions of existing buildings shall not exceed a building footprint area of 45,000 sq. ft. or a gross floor area of 45,000 sq. ft., including roof top parking, with the following exception:
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> "Automobile parking areas located within the building footprint and in the basement shall not count toward the total gross floor area. For the purpose of this section, basement means any

Petitioners filed their application for the proposed building on September 12, 2003, four days prior to adoption of the new provisions. The city's historic commission and the planning commission approved the application, concluding in relevant part that the proposed structure complied with the old provisions under the "footprint" interpretation articulated in the city council's 2000 OSF decision.

Opponents appealed the planning commission decision to the city council, arguing that the proposed structure violated the 45,000-square foot limitation in the old provisions. Prior to the city council *de novo* hearings, the city attorney drafted a memorandum to the city council, opining that the city council had the authority to reinterpret the old provisions if it chose. During the hearings before the city council, members of the city council expressed frustration that staff had not informed the council of petitioners' pending application. Staff's failure, one city council member stated, put the council in a "difficult situation." Had the council known of the application, council members commented, the council "would have speeded up the process to complete the ordinance [Ordinance 2900]." The city council ultimately voted 3-2 to reinterpret the old provisions to limit the total square footage of the proposed structure, and to reject the footprint interpretation. The city council adopted findings denying the proposed structure because the total square footage, 81,212 square feet, exceeded the 45,000 gross square footage limitation by 36,212 square feet.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

ORS 227.178(3)(a) establishes a "fixed goal posts" rule for applications for permits, limited land use decisions and zone changes. ORS 227.178(3)(a) provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land

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floor level below the first story in a building. First story shall have the same meaning as provided in the building code."

> use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based on the standards and criteria that were applicable at the time the application was first submitted."

Petitioners' application was deemed complete as of September 12, 2003. The new provisions, the amended code and site design standards, were not adopted until September 16, 2003. The parties agree that the new provisions are not applicable to petitioners' permit application, and that the old provisions provide the applicable approval criterion under which the application must be approved or denied. Further, the parties agree that the city has the general authority to change prior interpretations of its code provisions in an ongoing application process. Petition for Review 13; Respondent's Brief 7. However, petitioners argue, the city council did not in fact reinterpret the old provisions and apply that reinterpretation to deny petitioners' application. According to petitioners, the city council instead effectively applied the new provisions to the proposed structure, under the guise of reinterpreting the old provisions, and denied the application because it did not conform to the new provisions.

Even if the city's action is understood as a reinterpretation, petitioners argue, the city committed to addressing the interpretative issue in a legislative process and not on a case-by-case basis in individual permit proceedings. Having made that choice, petitioners contend, the city is precluded from later attempting to reinterpret the old provisions in a particular application proceeding. Petitioners argue that, under the particular circumstances of this case, ORS 227.178(3) prohibits the city from reinterpreting the old provisions in a manner that is the legal equivalent of applying the new provisions. According to petitioners, reinterpreting the old provisions to mean the same as the new provisions is an impermissible attempt to circumvent the requirements of ORS 227.178(3).

We note, at the outset, that the reinterpreted old provisions do not have quite the same meaning as the new provisions, as petitioners' argument suggests. Under the new provisions, basement parking that is within the building footprint is not counted toward the 45,000

square foot limit. Under the city's reinterpretation (as well as under the old interpretation) all square footage devoted to parking is counted toward the 45,000 gross square footage limit. Record 16. In other words, had the city applied the new provisions to petitioners' application, it would have denied the application because the total square footage devoted to residential and commercial uses, combined with above-ground parking, was 57,967 square feet, 12,967 square feet in excess of the 45,000 square foot limitation. Instead, the city council denied the application because the total square footage, including below-ground parking, equaled 81,212 square feet, more than 36,000 square feet in excess of the 45,000-square foot limit. Record 15, 18. It is true that denial of petitioners' application would result in either case, and that the reinterpreted old provisions and the new provisions both apply the 45,000-square foot limit to more than the footprint. Nonetheless, it is not accurate to characterize the reinterpreted old provisions as being the legal and functional equivalent of the new provisions, as petitioners allege. If the above-ground portion of the proposed structure were 12,967 square feet smaller, it would comply with the new provisions, but still fail to comply with the old provisions as interpreted by the city council. Consequently, petitioners' argument that the city council simply applied the new provisions, in the guise of interpreting the old provisions, is incorrect. It is clear that the city council applied the reinterpreted old provisions.

Second, petitioners cite no authority for the proposition that, having chosen to clarify ambiguous code language through a legislative amendment, the city council is thereby prohibited from also exercising its general authority to interpret or reinterpret the existing code language in the course of a quasi-judicial proceeding. Ordinance 2900 was the result of a lengthy two-year legislative proceeding, indeed, a legislative proceeding with the object of clarifying the meaning of the ambiguous language at issue here, "gross square footage." In the course of that proceeding, the city council ultimately determined to change an earlier interpretation of that code language and clarify that the 45,000 gross square foot limitation

applied to the total square footage of a structure. Having made that determination, the city council presumably could have decided to terminate the legislative proceeding and await a suitable quasi-judicial proceeding to announce its new interpretation.[4] We do not understand petitioners to dispute that, had the city council chosen that course, no statute or other authority would preclude the city council from reinterpreting the existing code provision in a subsequent quasi-judicial permit proceeding to which that provision applied, including petitioners' application. It is difficult to see why the inherent authority of a local government to interpret the meaning of its land use regulations should be suspended simply because the local government chooses to clarify ambiguous code language by means of a legislative code amendment, rather than by waiting to interpret or reinterpret that code language in a quasi-judicial context that may or may not arise. Adopting that view either as a matter of law or under the circumstances of this case might discourage local governments from the entirely salutary practice of amending the code to clarify ambiguous language, out of concern that the local government would thereby be bound to apply an erroneous existing interpretation until the amendment takes effect. Petitioners have not demonstrated that the city council in the present case *in fact* intended its choice to proceed legislatively to preclude subsequent quasi-

[4] The city's code includes a procedure that allows the city "Staff Advisor" to interpret code language in the course of administering the ALUO. ALUO 18.108.160. The staff advisor interpretation is forwarded to the planning commission for review, and ultimately to the city council. *Id.* The city council could possibly have terminated the legislative proceeding and instructed planning staff to render an interpretation of "gross square footage" under ALUO 18.108.160, and forward that interpretation for city council review, although the record does not reflect that the city council considered that possibility or that anyone suggested it to the council. Petitioners do not suggest any way other than a quasi-judicial or code interpretation proceeding for the city council to have made an official or binding interpretation. In particular, we do not understand petitioner to argue that the city could have adopted an interpretation of the "gross square footage" standard during the legislative study sessions and other hearings that led up to adoption of Ordinance 2900, as an official or binding alternative to adopting that ordinance. In fact, we understand petitioner to argue that the city council *could not* do so, and did not do so. *See* Petition for Review 33.

judicial interpretation, nor do petitioners explain how such an intent could be binding on future city councils, if expressed.[5]

Petitioners are correct, however, that under certain circumstances ORS 227.178(3) and judicial doctrine limit the authority of local governments to change an existing interpretation of a local provision in the course of a quasi-judicial permit proceeding. Petitioners cite *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998) for the proposition that a local government may not use its authority to reinterpret code provisions in the course of a quasi-judicial proceeding in a manner that conflicts with the protections afforded by ORS 227.178(3), or that is inconsistent with the purpose of that statute, or that attempts to circumvent the requirements of the statute. According to petitioners, the city council's reinterpretation of "gross square footage" in the present case denies petitioners the protection afforded by ORS 227.178(3), is inconsistent with the purpose of the statute, and is a transparent attempt to circumvent that statute.

Understanding the facts in *Holland* is of considerable importance. In *Holland*, the city attorney issued an opinion letter in 1993, in which he concluded that comprehensive plan amendments had implicitly repealed certain slope and density subdivision design standards. The city subsequently did not apply those standards as approval criteria. In 1994, the petitioner submitted a subdivision application. In the initial proceedings on the petitioner's application, planning staff relied on the city attorney's opinion to determine that the slope and density provisions were not applicable approval standards. On local appeal of the initial approval, the city council denied petitioner's application on the grounds that it did not comply with various comprehensive plan provisions. The city council decision did not

[5] Petitioner cites to a statement by the planning director during the legislative process before the planning commission, explaining that "the Council has said they want the ordinance clarified explicitly so there wouldn't just be an interpretation." Record 247. However, at most that statement indicates that the city council preferred an explicit legislative clarification to an interpretation standing by itself, not that the city council viewed legislative clarification and quasi-judicial reinterpretation to be mutually exclusive options.

explicitly affirm the staff determination that the slope and density standards were not applicable approval criteria, although it later, in 1995, expressly affirmed that interpretation in a different subdivision application involving a different applicant (the Chapman point subdivision). In February 1996, the city council reversed course, and denied a second, separate application involving petitioner's property for failure to comply with the slope and density provisions. Meanwhile, the Court of Appeals remanded the city's initial decision denying the petitioner's subdivision application, because the comprehensive plan provisions that constituted the basis for the city's denial of the subdivision application were found to be inapplicable. *Holland v. City of Cannon Beach*, 142 Or App 5, 920 P2d 562, *rev den* 324 Or 229 (1996). On remand, the city council again denied petitioner's subdivision application, this time for failure to comply with the slope and density provisions. The city council concluded that the slope and density provisions had not been repealed, and were thus applicable approval criteria, contrary to the prior staff determination in the initial proceedings on the petitioner's application, and contrary to the city council's own interpretation in the Chapman Point decision. The petitioner appealed the city's decision to LUBA, arguing that the city's re-interpretation concerning the applicability of the slope and density standards violated ORS 227.178(3). We disagreed with the petitioner:

> "[R]egardless of whether the city had interpreted SDS 16.04.220(A) as inapplicable during the course of the initial proceedings in this case, we conclude that ORS 227.178(3) does not prevent the council from reversing its prior interpretation and applying its new interpretation in the proceedings on remand." *Holland v. City of Cannon Beach*, 34 Or LUBA 1, 9 (1998).

The Court of Appeals reversed our decision, stating:

> "We do not categorically foreclose the possibility that, as LUBA concluded, there may be circumstances under which a governing body may appropriately change a previous interpretation as to whether a particular provision is an approval standard during its proceedings on a particular application. However, no such circumstance was shown to be present here. * * * We accept, at least as an abstract proposition, the premise that a local government may 'correct' its earlier interpretations of its legislation. However, where ORS 227.178(3) applies, its emphasis is on consistency, not correctness." 154 Or App at 459.

Holland can be understood in several ways.[6] With respect to ORS 227.178(3), we understand *Holland* to hold that, once a local government has taken a position in the course of a permit proceeding that a land use regulation is not an approval criterion, the local government cannot change that position on remand, which the court viewed as part of the same permit proceeding, and apply the regulation to approve or deny the permit application. To do so is a *de facto* "shifting of the goal posts" contrary to the statute, because it effectively allows the local government to approve or deny a permit application based on standards that the local government deemed were not applicable at the time the permit application was filed.

The question in the present case is how far the court's reading of ORS 227.178(3) in *Holland* extends beyond the circumstances of that case to include the circumstances of this case. The text of ORS 227.178(3) does not mention interpretation or expressly purport to limit the intrinsic authority of local governments to interpret or reinterpret their land use regulations and comprehensive plan provisions. The focus of the statute is on ensuring that approval or denial of a permit is "based upon the standards and criteria that were applicable at the time the application was first submitted." In several cases subsequent to *Holland*, we have read that case as a relatively narrow extension of the logic of ORS 227.178(3), to constrain a local government's ability to change interpretations regarding the *applicability* of a particular provision as an approval standard in the course of a permit proceeding. *Greer v. Josephine County*, 37 Or LUBA 261, 275 (1999); *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472, 481 (2000); *Anderson v. City of Medford*, 38 Or LUBA 792, 812 (2000). We

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[6] The particular circumstances present in *Holland* arguably invoked distinct, but overlapping principles. One is the limitation on reinterpretation of approval standards suggested in *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873, *rev den* 319 Or 150 (1994), discussed in *Holland*, where such reinterpretation is "the product of a design to act arbitrarily or inconsistently from case to case[.]" While not purporting to discuss that principle in its "full breadth," the court in *Holland* suggests that the city's course of conduct in applying the slope and density standard to petitioner's two subdivision applications, while treating that standard as being repealed and hence inapplicable with respect to the contemporaneously decided Chapman Point subdivision application, was arbitrary, irrespective of ORS 227.178(3). *Holland* can be understood as a case where the local government's actions violated both the "arbitrary and inconsistent" standard and the statutory prohibition on "shifting the goal posts."

have consistently declined to read *Holland* or the statute more broadly to prohibit local governments from reinterpreting the *meaning* of indisputably applicable approval criteria. That much broader and categorical view of the statute is not compelled by the text or logic of ORS 227.178(3), nor the facts or holding of *Holland*.[7] It is in fact contrary to language in *Holland* accepting, at least as an abstract proposition, the premise that a local government may correct earlier interpretations of its legislation. 154 Or App at 459.[8] We again see no textual or other basis to read the statute as compelling local governments as a matter of law to adhere to prior interpretations of indisputably applicable approval criteria that the local government now believes are erroneous.

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[7] Perhaps the strongest support for that broad reading is found in language in *Davenport v. City of Tigard*, 121 Or App 135, 141, 854, P2d 483 (1993), quoted in *Holland*. At issue in *Davenport* was whether the city could approve a development based on comprehensive plan amendments that went into effect after a development application was filed, where it was clear the application would not be approved but for the amendments. The city took the position that it could do so, notwithstanding ORS 227.178(3), because the city did not interpret the plan amendments to be approval criteria, or "standards and criteria" subject to the statute. The court disagreed, stating that "a city could not circumvent ORS 227.178(3) by 'interpreting' approval standards or criteria in its legislation as not being approval standards or criteria." 121 Or App at 140 (footnote omitted). The court further stated:

> "We conclude that the term 'standards and criteria,' as used in ORS 227.178(3) and ORS 215.428(3), is not limited to the provisions that may be characterized as 'approval criteria' in a local comprehensive plan or land use regulation. * * * *The role that the terms play in the two statutes is to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings.* * * *." 121 Or App at 141 (emphasis added).

One could argue, based on the above-emphasized language, that reinterpretation of the meaning of an indisputably applicable standard fails to assure that the "substantive factors" applied in making the decision "remain constant" throughout the proceedings, and thus any attempt to reinterpret the meaning of an applicable standard in the course of a permit proceeding violates ORS 227.178(3). However, we do not believe that the court intended, in either *Davenport* or *Holland*, to espouse that broad view of the statute.

[8] It would also require limiting *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), and its progeny. In *Gutoski*, the Court of Appeals described the circumstances under which local governments must provide additional evidentiary proceedings when the local government "significantly change[s] an existing interpretation[.]" 155 Or App at 374. *Gutoski* does not discuss ORS 227.178(3), of course, but it is difficult to see what would survive of that aspect of *Gutoski* if ORS 227.178(3) is read broadly to prohibit a local government from changing a prior existing interpretation in the course of a permit proceeding.

That does not mean that local governments have unfettered discretion to change prior existing interpretations. The new interpretation is of course subject to challenge under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003). Depending on circumstances, reinterpretation of an approval criterion that has already been applied in proceedings on a particular application may run afoul of law of the case principles described in *Beck v. City of Tillamook*, 105 Or App 276, 278, 805 P2d 144 (1991), *aff'd in part, rev'd in part*, 313 Or 148, 831 P2d 678 (1992). Where the new interpretation has the effect of allowing the local government to change positions in the same proceeding with respect to what criteria are applicable approval standards, as in *Holland*, ORS 227.178(3) applies. Further, as discussed further below, a local government may not change an existing interpretation where such reinterpretation is "the product of a design to act arbitrarily or inconsistently from case to case[.]" *Alexanderson v. Clackamas County*, 126 Or App at 552. Finally, where a local government changes a pre-existing interpretation in the course of a permit proceeding, it must provide participants the opportunity to address the reinterpretation and, in some circumstances, must re-open the evidentiary record to allow the parties the opportunity to present new evidence with respect to whether the application complies with applicable approval standards, as reinterpreted. *Gutoski v. Lane County*, 155 Or App 369; *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

In the present case we understand petitioners to argue, not for the above-described broad reading of the statute, but rather for a more limited extension of the statute based on the circumstances of this case. Petitioners particularly emphasize two circumstances: that (1) the city council chose to reverse its earlier interpretation by means of a legislative amendment rather than to await a suitable quasi-judicial application or initiate a code interpretation proceeding, and (2) city council members made comments in the current proceeding suggesting that the council was motivated by the intent to circumvent ORS 227.178(3), rather than by the intent to correctly interpret ALUO 18.72.050 and Site Design Standards II-C-3(a).

According to petitioners, the city council's choice to reverse its earlier interpretation legislatively rather than to await a quasi-judicial permit application or to initiate a code-interpretation procedure reasonably led petitioners to expect that the city council would be bound to apply the old interpretation to their application. While petitioners may in fact have had that expectation, it is not clear how reasonable it was.[9] The old interpretation was highly controversial. Petitioners or their representatives participated in the legislative proceedings leading up to Ordinance 2900, during which it became apparent that the city council believed the old interpretation was erroneous and was determined to overturn it. As noted above, nothing cited to us indicates that the city council intended that its choice to overturn the old interpretation by amendment would preclude re-interpretation in an appropriate quasi-judicial setting. A reasonable permit applicant might hope that the city council would refrain from re-interpreting the standard under such circumstances, and argue for that result, but we do not see that a reasonable permit applicant would expect that result with much confidence.

Petitioners' arguments that the city council's comments in this proceeding reveal an impermissible motive or intent present a closer question. In our view, those arguments sound more clearly under standard cited in *Alexanderson v. Clackamas County*, as a design to act arbitrarily or inconsistently from case to case, than under ORS 227.178(3).[10] As noted earlier, it appears to us that the *Alexanderson* standard and ORS 227.178(3) as interpreted by

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[9] As petitioners point out, albeit for a different reason, the timing of their application was not motivated by a perceived need to take advantage of the old interpretation before the new provisions took effect, because the version of Ordinance 2900 being considered on the date they filed their application did not count above or below ground parking toward the 45,000 square footage limit, and the proposed development met the requirements of that version. Petition for Review 35-36.

[10] If we are correct that the focus of ORS 227.178(3) is on ensuring that permit applications are approved or denied based on the criteria that were *applicable* at the time the application was filed, and not based on *inapplicable* criteria, then the question of whether a local government decision violates the statute is a relatively narrow legal and factual issue: did the local government base its decision on applicable standards and criteria or inapplicable standards and criteria? A decision-maker that attempts to comply with the statute but mistakenly applies an inapplicable standard has violated the statute, while a decision-maker that intends to circumvent the statute but in fact applies the applicable criteria has not violated the statute. Under that view, it is difficult to see why compliance with the statute turns on the particular motivations or intent of individual members of the decision-making body or the body as a whole, as revealed by their comments or actions.

Holland are independent limitations on the authority of a local government to reinterpret its land use legislation. Those two principles may overlap in particular circumstances, as in *Holland*, which involved a reinterpretation regarding the applicability of an approval standard and the inconsistent application of the standard from case to case. The present circumstances, which do not involve reinterpretation regarding the applicability of an approval standard, do not invoke ORS 227.178(3) or *Holland* at all, at least as our decisions following *Holland* have understood that case. Nonetheless, our analysis below assumes, without deciding, that a local government reinterpretation of an approval criterion that violates the *Alexanderson* arbitrary and inconsistent standard also violates ORS 227.178(3).

Neither *Alexanderson* nor *Holland* describe the arbitrary and inconsistent standard in any detail. The key elements, however, seem to be the presence of a "design to act arbitrarily or inconsistently from case to case." 126 Or App at 522. Here, petitioners cite to comments made during the proceedings leading up to the city council's denial of petitioners' application, as evidence that the city council acted with improper motive and in contravention of the statute. At the January 22, 2004 hearing, the city council questioned the planning staff as to why it had not been informed of petitioners' application while they were developing the new provision. Record 34. The city council commented that "had they known there was an application in process, that they would have speeded up the process to complete the ordinance." Record 34-35. At the January 28, 2004 hearing a councilor who voted in the minority stated that "he was disappointed that the Council was not informed of the Bemis project any sooner and that this puts the Council in a difficult situation." Record 37. Further, in response to a councilor's comment that the council should consistently apply the existing interpretation, a councilor who voted in the majority stated that "there are always loopholes and unclear phrases," and that "she would feel comfortable using the authority that the State offers to uphold the values of the community." Record 37. According to petitioners, these comments demonstrate that the city council members became frustrated when they realized

that the new provisions would not apply to petitioners' application, and the majority consequently set about finding a way to circumvent ORS 227.178(3). Petitioners contend that the majority ultimately determined to circumvent the statute by means of a putative "reinterpretation" of the old provisions that was for all practical purposes an application of the new provisions.

That the city council was engaged in an effort to circumvent the statute rather than a valid interpretive exercise is apparent from the record and the decision itself, petitioners argue. Petitioners point out that when discussing adoption of the findings in support of denial, city council members debated, but ultimately decided against, removing any reference to Ordinance 2900 from the decision. Record 26-27. Petitioners argue that that debate reflects the city council's awareness of the legal vulnerability of its putative reinterpretation. That culpable awareness is also evident in the four pages of findings adopted in support of the decision, petitioners contend.[11] According to petitioners, the findings strain to

[11] The city council findings state, in relevant part:

> "1. We find that the project has a total gross floor area of 81,212 square feet and is therefore subject to the large scale project site design standards set forth in section II-C-3. Of this total gross floor area, 23,245 square feet is designated by the applicants as a basement area leaving 57,967 square feet of gross floor area above-ground. Of the above-ground area, 23,671 square feet is designated for above-ground parking, leaving a total gross floor area above ground designated for commercial and residential areas. The project has a building footprint of approximately 19,000 square feet. The applicant produced no evidence to show that the size of the building is within the limitation as we interpret it.
>
> "2. The planning commission approved this application because it found that the project did not exceed the maximum square footage allowed by the above-quoted standards. The commission applied the interpretation of a previous city council that 45,000 gross square footage was to be interpreted as meaning the footprint of a proposed building not the gross floor area. We disagree with that interpretation and find that it is wrong.
>
> "3. We find that the applicants have failed to meet the limitation 45,000 gross square footage feet imposed by ALUO 18.72.050.C and Site Design Standard II-C-3a)2) because we determine that the gross square footage of the proposed project is 81,212 and thus exceeds the limitations imposed by these standards by over 36,000 square feet.

"4. The interpretation used by the planning commission was made in the year 2000 by the then sitting city council. The council approved an application by [OSF] in planning action #2000-074 by interpreting these standards as follows: [quoting from the OSF decision, *see* n 2)]

"5. Our extensive review of the standards involved in that decision, which we determine are the same standards involved in this proceeding, lead us to a different conclusion and interpretation. First, we believe that such an interpretation was unnecessary in the OSF decision. The structure involved did not have a gross floor area in excess of 45,000 square feet. Here, there is no question the gross floor area of the structure exceeds 45,000 square feet. We interpret this provision to mean 45,000 gross floor area square footage and includes all floors within the structure, whether underground, in a basement, designated for parking or otherwise. As noted above, we find that the gross square footage of the proposed structure exceeds 81,000 square feet.

"6. We do not arrive at this conclusion capriciously or arbitrarily. The 45,000 square footage limitation was adopted in 1992 for important reasons and after a lengthy public process. This provision was not interpreted by the council until the OSF project in the year 2000. For that project the footprint interpretation was first applied and then shortly thereafter in 2001, it was last applied for the YMCA project. After the YMCA project, the interpretation has prompted controversy and has been the subject of many public hearings, meetings and discussions before the planning commission and this council.

"7. These public hearings began in August 2001 when the planning commission conducted a hearing regarding the interpretation. Then followed a hearing before the council in September 2001 plus several public discussions by the council in 2002, culminating in a joint study session with the council and planning commission in June 2002. In addition, the planning commission held two subsequent study sessions and a public hearing in early 2003 where the commission recommended that the council not interpret the ordinance as referring to footprint. Following the commission public hearing this council held a study session and indicated that the limitation should be interpreted to mean gross floor area of all spaces. At that time, we voiced support of the planning commission recommendation for a limitation of 45,000 square foot gross floor area.

"8. This extensive public process occurred completely outside the quasi-judicial process associated with the application being considered in this appeal. The applicants were well aware of the public process as at least one of them appeared before us to comment on the proposed ordinance amendments and one of the principal architects in the firm representing the applicants serves on the planning commission. In addition, the representative of the owner of the property subject to the application * * * appeared before the council in the May 2003 study session to comment on the matter.

"* * * * *

"10. We acknowledge that the standards in effect at the time of the filing of the application are the standards to be applied to this application. ORS 227.178(3). The application was filed on September 12, 2003, and deemed complete on October 3, 2003. While the council adopted amendments to ALUO 18.72.050 and the site design review standards in II-C-3)a on September 16, 2003, with an effective date

characterize the reinterpretation as occurring before the application was filed, during the May 2003 legislative hearing at which the city council "voiced support" for the planning commission recommendation. Petitioners argue that there is no basis for that "voicing" to constitute an official determination or interpretation under the city's code. Finally, petitioners argue that the findings contain no discussion of the relevant text, context or purpose of the old provisions, or an explanation why the new interpretation is consistent with the text, context and purpose. According to petitioners, the lack of interpretative analysis is a further indication the city council was motivated by an improper desire to apply the new provisions rather than a legitimate desire to correctly interpret the old provisions.

In our view, petitioners have failed to demonstrate that the city's reinterpretation was "the product of a design to act arbitrarily or inconsistently from case to case" or, to the extent

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> October 15, 2003, the standards to be applied to this application are the standards adopted in 1992. The provisions of ORS 227.178(3) do not prohibit us from reinterpreting the meaning of the applicable standards.
>
> "11. This is not a case of whether the 1992 version of ALUO 18.72.050.C or its identical site design standard is the applicable standard. These standards were applicable to the OSF proceeding and are applicable to this proceeding.
>
> "12. The question before us is what the application of those provisions mean to this project. We think the circumstances involving the OSF interpretation and the significant public process after that interpretation, involving both the planning commission and this council, allow us to acknowledge that this council's interpretation of those standards was effectively made as of May 2003. As noted above, we voiced our support, at a study session in May, of the planning commission recommendation that buildings should not exceed a gross floor area of 45,000 square feet.
>
> "13. Even if it can be argued that May 2003 was not an interpretation by this council, we feel we have the authority to appropriately change that interpretation in the course of this proceeding.
>
> "* * * * *
>
> "**Ultimate Conclusions and Decision**. We find that the applicants' project exceeds the limitation of 45,000 gross square footage imposed by ALUO 18.72.050.C and Site Design Standard II-C-3a)2) because we determine that the gross square footage of the proposed project is 81,212 and thus exceeds the limitations imposed by these standards by over 36,000 square feet. The application is denied." Record 15-18 (footnotes omitted).

it is invoked here, a violation of or attempt to circumvent ORS 227.178(3).[12] The comments cited by petitioners indicate that the council was frustrated at being placed in the position of either having to reinterpret the old provisions or to apply an existing interpretation that all five city council members apparently believed was erroneous.[13] Those comments fall short of demonstrating that the city's reinterpretation was the product of a design to act arbitrarily or inconsistently from case to case, or that the city council was motivated by a desire to circumvent the statute rather than correctly interpret the ordinance. Further, those comments cannot be read in isolation. Reading the city council minutes as a whole leaves a different impression than the one petitioners advance. For example, the council member who made the motion to deny the application focused most of his discussion on the interpretive issue. Record 37 ("[I]t disturbed him that it was the City who started this misunderstanding by interpreting a rule in a way that was a total misuse of the English language"). Other comments emphasize that the city council had never discussed the old interpretation during the OSF proceedings, that the city council did not know who put that interpretation into the OSF findings, and that the city council had been questioning and retreating from that

[12] The dissent is certainly correct that a reinterpretation, even an initial interpretation, that constitutes a *de facto* amendment of an applicable approval criterion would be inconsistent with ORS 227.178(3). The difficulty is to distinguish interpretations that are *de facto* amendments from legitimate interpretations that simply choose among two or more plausible meanings of an ambiguous standard. We bear in mind the Court of Appeals' statement in *Holland* that, where ORS 227.178(3) applies, the emphasis is on consistency rather than correctness. 154 Or App at 459. Nonetheless, in our view, the class of interpretations or reinterpretations that might constitute *de facto* amendments invoking the statute most clearly includes interpretations that depart so profoundly from the text that the meaning assigned to that text falls outside the range of plausible textual readings. Conversely, where the ambiguous language is equally susceptible to two different readings, as in the present case, we do not believe it is accurate to characterize the local government's choice between those two plausible readings as an "amendment" of the standard, for purposes of the statute. It may be that the local government's choice between two plausible meanings is constrained by other considerations, for example the obligation under *Alexanderson* to refrain from acting arbitrarily or inconsistently from case to case. Because in the present case the city chose between two equally plausible readings of an ambiguous standard, we do not see that the present circumstance is one of those extreme cases that involves a *de facto* amendment, invoking the statute.

[13] The minority votes were apparently based more on equitable considerations than a belief in the correctness of the old interpretation. *See, e.g.*, Record 37 (member voting in the minority commenting that "[t]wo wrongs don't make a right[.]")

interpretation since it was inserted into the OSF decision. Record 35. The bulk of the remaining comments tend to address the issue of fairness or normative issues such as the council's desire to restore trust in government and to protect community values. The dominant impression is of a city council attempting to make a legally correct and defensible decision, not, as petitioners would have it, a city council deliberately seeking to circumvent a statutory obligation or to act inconsistently from case to case.

Similarly, the fact that the city council debated a proposal by one member to delete references to Ordinance 2900, but ultimately decided to include in its findings a discussion of that ordinance and the history leading up to its adoption, tends to show, if anything, that the city council was determined to make a legally correct and defensible decision.

As to the city's findings, we tend to agree with petitioners that one of the city council's alternative findings—that the city council had already reinterpreted the old provisions at the May 2003 study session, when it "voiced support" for the planning commission recommendation—is a problematic basis to apply the new interpretation. *See* n 11, finding 12. As petitioners note, there is no cited basis for the city council to adopt an official or binding interpretation as part of a legislative study session. However, any error in that regard is harmless, because the other cited basis to apply the new interpretation—that the city council has the authority to "appropriately change [the old] interpretation in the course of this proceeding"—is sufficient and, in our view, legally correct.

It is true, as petitioners point out, that the city's findings do not engage in an explicit text and context justification of the new interpretation. However, while an interpretation that is adequate for review must explain the local government's understanding of the interpreted standard, we have never held that a local government has the additional obligation to conduct a text and context analysis along the lines of that described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), in adopting an interpretation. Given the probable nature of petitioner's arguments on appeal, and the fact that the city was

reinterpreting a standard rather than adopting an initial interpretation, it would perhaps have been advisable for the city to have done so in the present case. Nonetheless, the city's findings set forth the old interpretation, explain why the city now rejects that interpretation, and clearly set out the city's understanding of what the standard means, correctly interpreted. In our view, the lack of an explicit text and context analysis in the city's findings is not a particularly strong indication that the city was engaged in an illicit policy change or amendment rather than a legitimate interpretative exercise. Consideration of the city council findings does little to advance petitioners' claim that the city acted arbitrarily or part of design to act inconsistently from case to case, or motivated by a desire to circumvent ORS 227.178(3).[14]

In sum, we question whether the city's authority to reinterpret the meaning of the old provision under the circumstances of this case is limited by ORS 227.178(3), as interpreted in *Holland*. To the extent it is, petitioners have not demonstrated that the city's reinterpretation is inconsistent with ORS 227.178(3) or that the city acted with the intent or the result of circumventing the statute. In our view, the more appropriate frame of analysis for petitioners' arguments is under the *Alexanderson* standard. For the reasons explained above, petitioners have not demonstrated that the city's reinterpretation is "the product of a design to act arbitrarily or inconsistently from case to case[.]" Viewing the circumstances as a whole, we do not see any "design" at all, much less one to act arbitrarily or inconsistently from case to case. As far as we can tell, the city council has been more or less consistently distancing

[14] Our analysis under the first assignment of error assumes that both the old interpretation and new interpretation are equally plausible readings of the old provisions. For the reasons stated in the second assignment of error below, we tend to believe that the new interpretation is more consistent with the text and context than the old interpretation, although both interpretations are plausible. In our view, the relative superiority of one interpretation over another is a relevant consideration under the *Alexanderson* arbitrary standard. That is, if in reinterpreting an approval standard the local government chooses an interpretation that is less consistent with the text and context, etc., than another interpretation, that would tend to support the inference that the local government deliberately acted arbitrarily and inconsistently from case to case. Conversely, the choice of the interpretation that is more consistent with the text and context supports the opposite inference.

itself from the old interpretation since the first, and only, time a city council decision applied that interpretation, in the 2000 OSF decision. The city council's reversal of that interpretation in the present case, following a lengthy legislative proceeding to clarify the intended meaning of ALUO 18.72.050 and Site Design Standards II-C-3(a), is not inconsistent or arbitrary conduct prohibited by *Alexanderson*.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that, even if LUBA concludes that the city council's actions did not violate ORS 227.178(3), the city's interpretation of the "gross square footage" standard is inconsistent with the express language, context and purpose of that standard. ORS 197.829(1); *Church v. Grant County*.[15]

According to petitioners, in adopting the big box ordinance and site design standards the city chose to use the term "gross square footage" rather than a different term, "gross floor area," that is used and defined at various points in the code to mean the "total floor space of all floors." *See, e.g.*, ALUO 18.20.040(I) (providing that the maximum permitted floor area for single family dwellings in the historic district is the "total floor space of all floors (gross floor area)"). If the city council had intended the term "gross square footage" to mean the same thing as "gross floor area," petitioners argue, it would have used the latter term. When a governing body uses different language in similar code provisions, petitioners argue, it is presumed to have intended different meanings. Further, petitioners point out that ALUO

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[15] ORS 197.829(1) provides, in relevant part:

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

18.72.050 and Site Design Standards II-C-3(a) include a restriction on building length, which suggests that the regulatory focus of the "gross square footage" standard is the footprint of the building, not its total floor area. If the city had been concerned with the total floor area, petitioners argue, it would have included restrictions on height as well as length.

The pertinent text of ALUO 18.72.050 and Site Design Standards II-C-3(a) is ambiguous. The term "gross square footage" can be read to mean the equivalent of either "footprint" or "gross floor area." However, in our view the city's interpretation that it means the equivalent of "gross floor area" rather than the equivalent of "footprint" is at least as plausible, if not more, than the contrary interpretation.

As discussed below, at least one other ALUO provision uses the term "footprint." The code does not define "footprint," but the commonly understood meaning of that term is the area of the exterior lines of a building where it touches the ground. The code also does not define "square footage," but the commonly understood meaning of that term is a calculation of the floor area of a building. While in particular building designs the footprint and the square footage may be the same, in many other designs (cantilevered buildings, multi-story buildings) the footprint and square footage of a building can be very different. The calculation of a building's "square footage" may include the footprint, but nothing in the relevant text indicates that it is *limited* to the footprint, *i.e.*, the area of a building where it touches the ground. In short, "square footage" has more semantic similarity to "floor area" than it does to "footprint." The addition of the adjective "gross" to both "gross square footage" and "gross floor area," but not to "footprint," strengthens the lexical and semantic association between "gross square footage" and "gross floor area." Further, the adjective "gross" suggests either an additive component, a total sum of discrete numbers, or a net versus gross distinction, for example in measuring area of a space from the interior walls rather than exterior walls. Neither meaning of "gross" has much if any application to the commonly understood meaning of "footprint." However, both senses of "gross" have

meaning as applied to the term "square footage," if that term is the equivalent of "floor area." The use of the adjective "gross" to modify both "square footage" and "floor area," but not "footprint," is an additional textual indication that the meaning of "gross square footage" is equivalent to the code term "gross floor area" and not to the code term "footprint."

As to context, petitioner is correct that Site Design Standard II-C-3 and various code provisions use the term "gross floor area," clearly meaning "total floor space of all floors." While that does not necessarily indicate that "gross square footage" means "footprint," the use of different terms suggests that the city council did not intend "gross square footage" to mean the same thing as "gross floor area." However, the same argument can be made against the "footprint" interpretation. At least one ALUO standard uses the term "building footprint." ALUO 18.92.020(F) (providing that parking spaces within the "building footprint of a structure" do not count toward the maximum parking space limitation). Petition for Review App 39. It is worth noting in this respect that, as far as we are informed, the term "gross square footage" is used nowhere else in the code or site design standards. Probably the most accurate conclusion based on context is that the city's choice to employ the term "gross square footage" rather than the code terms "footprint" or "gross floor area" reflects poor drafting rather than a deliberate choice.

Petitioners further point out that ALUO 18.72.050 and Site Design Standards II-C-3(a) include a restriction on building *length* in addition to the limitation on "gross square footage." *See* n 1. Petitioners argue that restricting building *length* rather than building *height* suggests that the regulatory purpose of ALUO 18.72.050 and Site Design Standards II-C-3(a) as a whole, including the "gross square footage" language, is to limit the size of single-story structures rather than multi-story buildings, *i.e.*, to limit the size of the footprint, not the total floor area. However, while the regulatory purposes of ALUO 18.72.050 and Site Design Standards II-C-3(a) may have included limiting the size of single story buildings, nothing in those provisions or elsewhere cited to us suggest they are limited to that purpose.

Both provisions express a limitation on the size or square footage of buildings, and nothing in their text or context confines the regulatory effect to single-story buildings. Further, the omission of an express height limitation in ALUO 18.72.050 and Site Design Standards II-C-3(a) is understandable, since each zoning district in the city has a different height standard, and it would be odd to duplicate those different height standards in the site design code provisions.

In sum, the city's interpretation of the term "gross square footage" in ALUO 18.72.050 and Site Design Standards II-C-3(a) to mean the same thing as the code term "gross floor area" rather than the code term "footprint" is at least as consistent, if not more, with the express language and purpose of those provisions as the interpretation petitioners prefer. Petitioners have not demonstrated that the city council's interpretation of ALUO 18.72.050 and Site Design Standards II-C-3(a) is reversible under ORS 197.829(1) and *Church*.

The second assignment of error is denied.

The city's decision is affirmed.

Holstun, Board Member, dissenting.

Like the majority, I will refer to the "old provisions" and the "new provisions" to distinguish between the 45,000 square foot limit that was in effect when the application that led to the decision on appeal was filed on September 12, 2003 (the old provision) and the amended 45,000 square foot limit that took effect shortly after the application was filed, which the city contends was not applied here (the new provisions). I also will refer to the interpretation that the city council adopted in reviewing the OSF application as the "old interpretation" or "prior interpretation" and refer to the new interpretation adopted in this decision as the "reinterpretation."

I agree with much of the majority's analysis. I agree that *Holland v. Cannon Beach* has both factual and legal differences, compared to this case, that make it of little direct

assistance in resolving this case. While I agree with the majority that the principle noted by the Court of Appeals in both *Alexanderson v. Clackamas County* and *Friends of Bryant Woods Park v. City of Lake Oswego*, 126 Or App 205, 868 P2d 24 (1994) could have some applicability here, those cases and *Holland* seem to envision multiple interpretive inconsistencies and perhaps some actions by the decision maker that call into question the decision maker's neutrality toward the permit applicant. Neither of those circumstances seem to be present in this case.

Turning to what I believe is the heart of the matter, I generally agree with the principle that local governments have a qualified right, and perhaps a qualified duty, to correct what they conclude are erroneous past interpretations of their land use legislation. I also generally agree that they may do so in the context of a permit proceeding where they are called upon to apply those land use laws. *See Gutoski v. Lane County*, 155 Or App at 373 (discussing circumstances where additional evidentiary proceedings may be required if existing interpretation of local land use legislation is significantly changed in a rezoning proceeding). I also agree that nothing in the fixed goal post rule established by ORS 227.178(3) necessarily trumps or overrules that qualified right. That said, in the context of this appeal, ORS 227.178(3) establishes another valid principle. A permit applicant has a right to have a completed application reviewed against the criteria that are in effect on the date the application is submitted. As the majority correctly notes, at a superficial level, it is easy to give effect to both of these principles. At that superficial level, LUBA needs only to determine the effective date of the land use legislation and the effective date of any amendments to that legislation. If LUBA does not go past that superficial level, the city prevails in this case, because there is no dispute that the old provisions were in effect when petitioners submitted their application and there is no dispute that the city purports to apply the old provisions, albeit with the city council's reinterpretation of the old provisions.

I will not attempt to go into the current state of the level of deference the city remains entitled to under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), as recently discussed in *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003). Suffice it to say that LUBA is still required to extend some level of deference to a local government's interpretation of its own land use legislation, as it performs its obligation to review a local government's interpretations under ORS 197.829(1). Given this interpretive discretion and the frequent ambiguity that is present in local land use legislation, I do not believe it is appropriate, in all cases, for LUBA to stop at the superficial level noted above. This is because what purports to be a reinterpretation can, in extreme cases, be a thinly veiled or unveiled *de facto* amendment of the applicable criteria. If the record clearly shows that the city's action in this case constituted a *de facto* amendment of the old provisions that the city then applied to petitioners' previously filed permit application in violation of ORS 227.178(3), then LUBA must recognize the local government's decision for what it is, a *de facto* shift of the goal posts.

I turn to the factors that convince me that the city's decision in this matter was a *de facto* shift of the goal posts. None of these factors is determinative in and of itself, although some factors are more important. I begin with the majority's point that the city should not be discouraged from amending its land use legislation "to clarify ambiguous language, out of concern that the local government would thereby be bound to apply an erroneous existing interpretation until the amendment takes effect." Slip op at 9. I could not agree more. However, as the majority recognizes, the city has mechanisms in place that would have allowed it to pursue *both* a reinterpretation and a legislative clarification, if the city was concerned that a permit applicant might try to take advantage of the old interpretation before the new legislation could be adopted and take effect. *See* n 4. The city elected to proceed with a legislative amendment and elected not to pursue a reinterpretation. While I agree with the majority that this choice does not necessarily mean the city council believed it could not

proceed solely via a reinterpretation, it is at least some indication that a majority of the city council may have had questions about whether the old interpretation was legally incorrect. Based on my review of the record, the evolution of that legislative process and the new provision that was ultimately adopted, that choice seems to be entirely consistent with a city council that was more concerned about what the big box ordinance "should" say than whether the city's council's interpretation of the old provision was legally incorrect.

Next, I agree with the majority that there is nothing in the Court of Appeals' decision in *Holland* that suggests the city is bound to adhere to prior interpretations that the city now believes are wrong. I also agree with the majority that, quite to the contrary, *Holland* suggests that there is no such rule and that local governments are generally free to correct prior erroneous interpretations, subject perhaps to the limitations on arbitrary shifting interpretations discussed in *Holland*, *Alexanderson* and *Friends of Bryant Woods Park*. However, the logical beginning point for a decision by a local government to correct an earlier erroneous interpretation is identification of an *erroneous* interpretation. That is not the same thing as identifying a prior interpretation that produces a result that the city council disagrees with. An existing standard that has been interpreted and applied to produce an undesired result can be corrected by amending the standard so that it will produce the desired regulatory result, without regard to whether the prior interpretation was correct or erroneous. From all appearances, the city elected to (1) reject any attempt to correct the undesirable result that was produced under the old provisions via a reinterpretation and (2) pursue a legislative process that would more clearly identify the desired limit on big box development and then impose a less ambiguous regulation to achieve that desired limit.[16]

[16] As the majority points out the new provisions are the product of a legislative process, and they differ in their treatment of parking when compared to the old provisions, as interpreted in the old interpretation, and the old provisions, as interpreted in the reinterpretation.

The majority summarizes the city council's deliberations and concludes "[i]n our view, petitioners have failed to demonstrate that the city's reinterpretation is 'the product of a design to act arbitrarily or inconsistently from case to case', *or to the extent it is invoked here, a violation of or attempt to circumvent ORS 227.178.*" Slip op at 19-20 (emphasis added, footnote omitted). I agree with the first part of the majority's conclusion, but I disagree with the emphasized part. My review of the city council's action here strongly suggests to me that the city council was acting to reject a proposal that would be larger than allowed under the new provisions; it was not acting to deny an application that it believed violated a correct reading of the old provisions. While isolated statements can be read to support the majority's view of the city council's deliberations, I believe my view of those deliberations is the more accurate, particularly when they are viewed in context with the city council's final decision in this matter.

Turning to what I believe is perhaps the most important and telling factor that suggests the city adopted a *de facto* change of the goal posts, the city's decision that purports to be a reinterpretation is really an announcement of a new interpretation with no supporting analysis and no attempt to explain what the city council believes was erroneous about the prior interpretation, other than a statement of disagreement with the prior interpretation.

To reduce the interpretive question in this case to its most elementary terms, the old provisions that require that a building not "exceed a gross square footage of 45,000 square feet" contain an inherent ambiguity. The old provisions fail to identify the object of the 45,000-square foot limit.[17] The old interpretation concludes, without much explanation, that the object of the old provision is the *building footprint*. *See* n 2. But in this regard, the old

[17] Unlike the majority, it seems to me that given the "big box" short hand description of the old provisions, the building's footprint and floor area are equally plausible objects for the old provisions 45,000-square foot limit. Stated differently, it does not seem unlikely to me that the old provisions are directed at the modern large-scale single-story one-stop retail commercial buildings that are becoming increasingly common today, for which footprint and floor area are essentially the same.

interpretation is no weaker than the city council's reinterpretation that the object of the old provision is the *floor area*. Other than citing to the controversy and legislative process that followed the old interpretation, the challenged decision does not offer a single reason for why the object of the old provision's 45,000 gross square foot limit is a building's *floor area* rather than its *footprint*. From this shared shortcoming in the two interpretations, the old interpretation of the old provisions has one significant strength that the reinterpretation lacks. The old interpretation offers a brief contextual analysis for why the object of the old provision's 45,000 gross square foot limit is not a building's floor area. The old interpretation points out that one of the old provisions uses the term "gross floor area," suggesting that had gross floor area been the object of the limit imposed by the old provisions, the city council would have used that term. The decision challenged in this appeal, which purports to reverse the old prior interpretation and replace it with the reinterpretation, offers no explanation for why that prior contextual analysis is wrong and offers no contrary contextual analysis to justify city council's switch in positions concerning the object of the 45,000 square foot limit in the old provisions.

Next, the majority overlooks the city council's failure to adopt any textual or contextual analysis in its decision in support of its purported new interpretation. Given that the Oregon Supreme Court's direction in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) is explicitly directed at reviewing courts, it may be that *PGE's* direction that the first level of analysis must begin with the text and context does not apply to the city council in the same way it applies to a court. But the city council is purporting to reinterpret the old provision. Presumably in interpreting or reinterpreting its land use legislation the city council is not left to its absolute discretion in approaching that interpretive task, because LUBA and the appellate courts that ultimately must review that interpretation are certainly going to be guided by *PGE*. In this case, the city council (1) makes no attempt to explain why the text or context of the old provision lead it to believe that

the object of the old provision's 45,000 gross square foot limit is floor area rather than footprint, (2) offers no legislative history to support the changed interpretation (second level of analysis), and (3) offers no general maxim of statutory construction to support the changed interpretation (third level). Even if the city is not obligated by *PGE* to approach its interpretive task in precisely the same way a court is obligated to, its failure to employ any of those interpretive devices or any other accepted interpretive device other than an expression of disagreement with the result produced by the old interpretation, strongly suggests that the city felt it could change the old provision via a reinterpretation into a regulation that is similar to the new provision without explaining why the old interpretation was wrong and why the reinterpretation is correct.

Finally, in rejecting the second assignment of error, the majority not only overlooks the city council's failure to supply a textual and contextual defense of its reinterpretation, it supplies a defense. Even if it is appropriate in this case to overlook the city council's failure to supply a rationale for its purported reinterpretation, and supply that rationale for the city, there are problems with the majority's textual and contextual defense. The majority finds a "lexical and semantic association between 'gross square footage' and 'gross floor area." Slip Op at 24. The majority finds this lexical and semantic support by removing "gross square footage" (the words the city actually adopted in the old provisions) and substituting the words "gross floor area" and "footprint" (words the city did not adopt as part of the old provisions). The majority finds the use of the word "gross" in "gross square footage" to support a conclusion that the city more likely meant to say "gross floor area" than "gross footprint." The majority's approach of substituting words the city did not adopt for the words that the city did adopt is the wrong way to go about it. As I have already pointed out, "gross square footage" is a measure of area. There is no dispute in this appeal that the old provisions imposed a 45,000-square foot limit. The problem is the city's failure to identify the object of

that limit. It could be a limit on gross square feet of *floor area*, and it could be a limit on gross square feet of *footprint*.

I find the contextual argument the city council adopted in the OSF case far more compelling than the lexical and semantic argument the majority advances here. See n 2. One of the old provisions is Site Design Standard II-C-3(a). See n 1. It is worth requoting part of that old provision:

> "Developments * * * involving a *gross floor area* in excess of 10,000 square feet or a building frontage of in excess of 100 feet in length * * * shall conform to the following standards:
>
> "* * * * *
>
> "(2) No new buildings or contiguous groups of buildings shall exceed a *gross square footage* of 45,000 square feet or a combined contiguous building length of 300 feet. Any building our contiguous group of buildings which exceed these limitations, and which were in existence in 1992, may expand up to 15% in area or length beyond their 1992 area or length." (Emphases added.)

Because the city used the term "gross floor area" at the beginning of this old provision and then used the term "gross square footage" later in that same old provision, I believe the strongest inference is that the city did not mean "gross square footage" to mean "gross floor area" or "gross square footage of gross floor area." If the city meant to say "gross floor area," it would have said "gross floor area," as it did earlier in this old provision. The other part of this old provision limits building length without limiting building height. That also suggests that it is the exterior dimensions of the building that the old provision is concerned with, rather than gross floor area. It is perhaps these very problems with reading the old provisions as a limitation on gross floor area that led the city council initially to proceed by amending the old provisions rather than via a reinterpretation that would be difficult or impossible to defend.

The majority also points out that ALUO 18.92.020(F), which regulates parking spaces, does refer to "building footprint of a structure." Slip op at 25. That reference lends

little or no support to the interpretation of the old provisions that the majority advances here. First, this reference makes it clear that a building's footprint is a recognized concept under the ALUO and thus every bit as much a potential target for regulation under the old provisions as gross floor area is. More importantly, this reference to building footprint is in a different part of the ALUO, whereas the reference to gross floor area is in one of the old provisions itself. Even if the reference to "building footprint of a structure" in ALUO 18.92.020(F) could be read to lend some contextual support to the city's interpretation, the city's failure to cite that provision as contextual support in its purported reinterpretation only reinforces what is otherwise apparent from the record in this case. The city council's contrary characterization notwithstanding, the challenged decision is a *de facto* shift of the goal posts to a spot where the city, as a matter of policy, wanted those goal posts to be; it is not an attempt to correct a prior interpretation that a majority of the city council determined was erroneous.

I would sustain the first assignment of error.