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

STANLEY ROBERTS and REBECCA ROBERTS,
Petitioners,

vs.

CITY OF CANNON BEACH,
Respondent,

and

HAYSTACK ROCK, LLC,
Intervenor-Respondent.

LUBA No. 2023-066

FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Wendie L. Kellington filed the petition for review, reply briefs, and a cross-response brief and argued on behalf of petitioners. Also on the brief was Kellington Law Group, PC.

William K. Kabeiseman filed the respondent's brief and a cross-response brief and argued on behalf of respondent. Also on the briefs were Carrie A. Richter and Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

William L. Rasmussen filed the intervenor-respondent's brief, cross-petition for review, and cross-reply briefs and argued on behalf of intervenor-respondent. Also on the briefs were Steven G. Liday and Miller Nash LLP.

ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board Member, participated in the decision.

RYAN, Board Chair, concurring.

REMANDED 04/24/2024

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

Opinion by Zamudio.

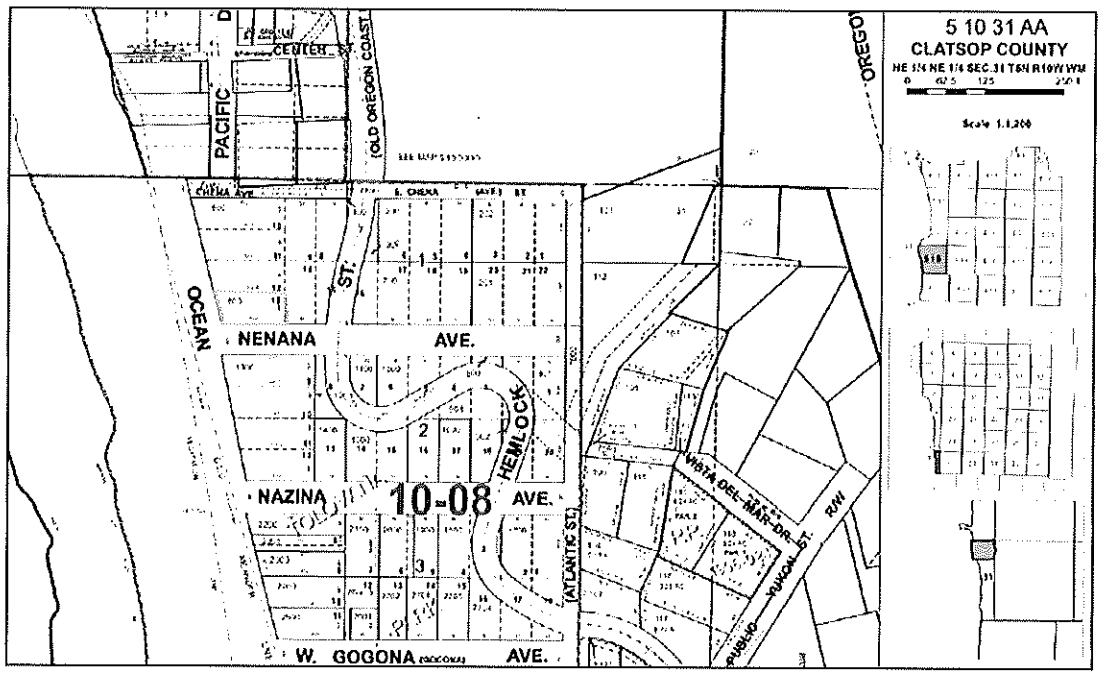
NATURE OF THE DECISION

Petitioners appeal a city council decision on remand from *Haystack Rock, LLC v. Cannon Beach*, ___ Or LUBA ___ (LUBA No 2022-041, Mar 16, 2023) (*Haystack Rock*) denying a development permit for a single-family dwelling and associated vehicular access and tree removal.

BACKGROUND

The subject property is a 5,394-square-foot lot on a steep hillside facing the Pacific Ocean in the Tolovana Park Subdivision. The property is vacant and is zoned Residential Lower Density (RL) with an Oceanfront Management (OM) overlay. The property slopes towards the ocean. To the east of the subject property is South Hemlock Street. Petitioners propose vehicular access to the proposed dwelling from South Hemlock Street via Nenana Avenue, an undeveloped right-of-way dedicated to the city in the 1908 Tolovana Park Subdivision plat.[1]

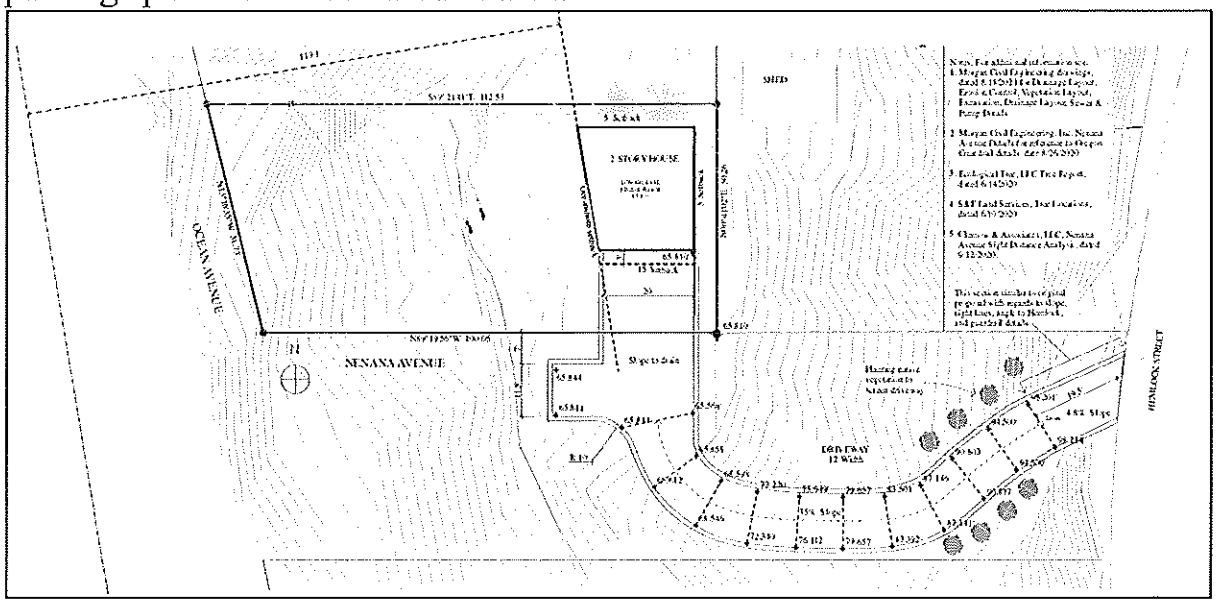
[1] Intervenor-respondent (intervenor) owns the adjacent property to the north and east of the subject property. Intervenor's property is developed with one dwelling.



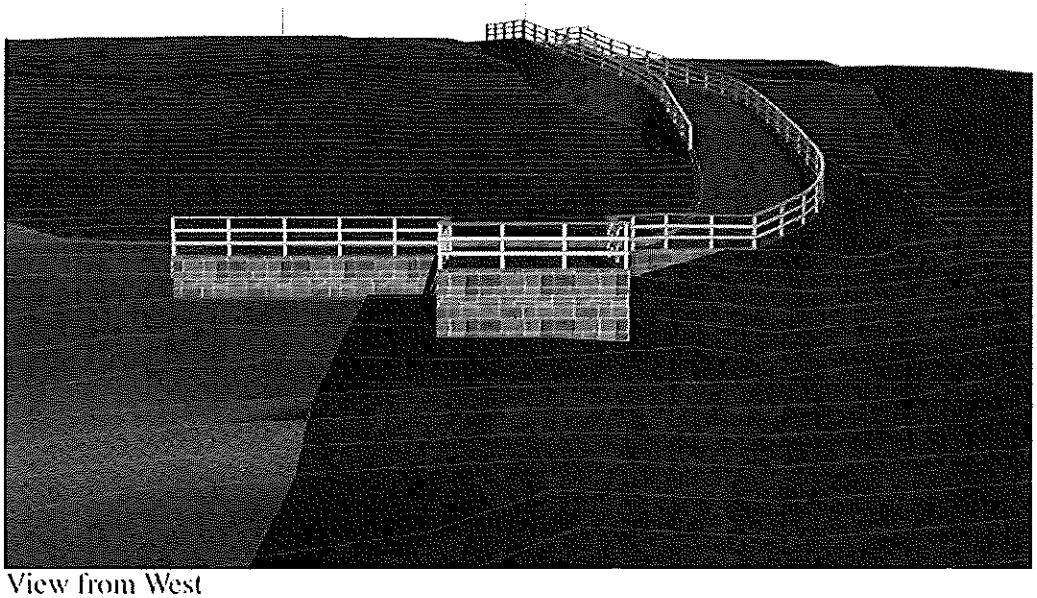
Record 1256.

Petitioners submitted to the city consolidated applications for land use approval to develop a new dwelling, vehicular access, and associated tree removal. We refer to those consolidated applications as the application. The 1,233-square-foot dwelling would be two stories with two required parking spaces to the south of the dwelling. Petitioners proposed to provide vehicular access by constructing a paved surface over the Nenana Avenue right-of-way from South Hemlock Street to the parking area. The application included two options for vehicular access for the city to choose from: (1) a driving surface on an elevated bridge-like structure that would be supported by columns (columnar access), or (2) a driving surface that would be raised but not be supported by columns (graded access). Due to the slope of the right-of-way, the proposed graded access is designed to be supported by constructed raised elements at the

bottom, western edge of the paved surface, including at the western edge of the parking spaces and a turnaround area.

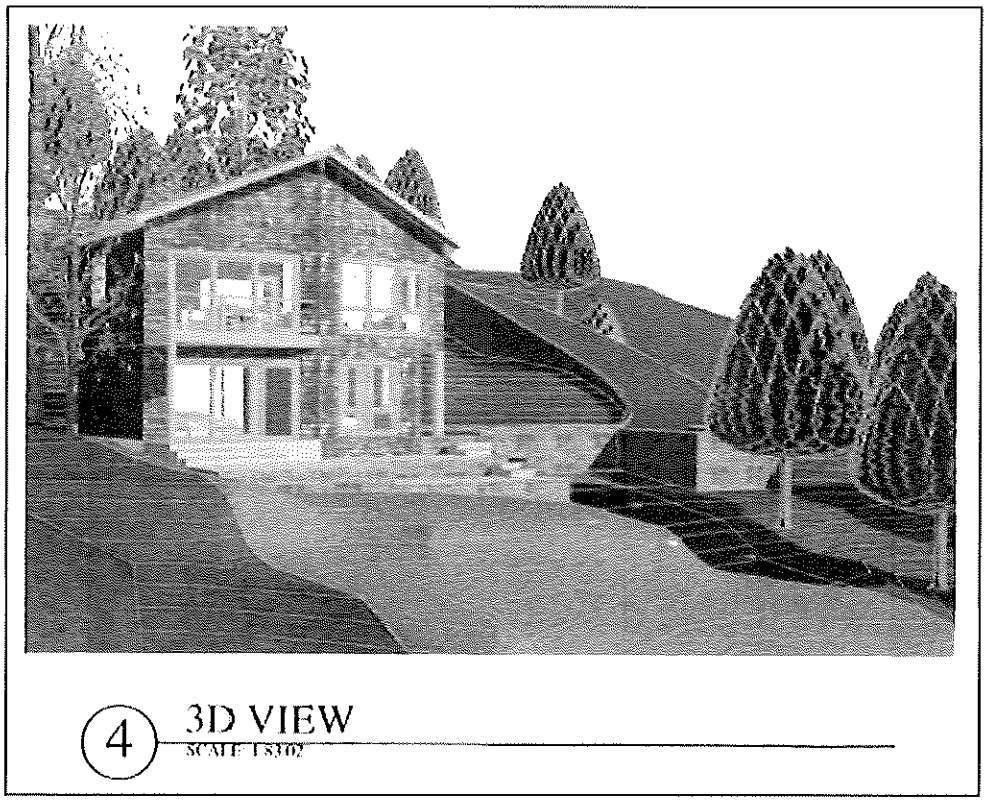


Record 650.



View from West

Record 652.



Record 37.

This is the third time that a city decision related to petitioners' efforts to develop a dwelling on the subject property has been before us. In 2021, we affirmed the city's denial in *Roberts v. City of Cannon Beach*, ___ Or LUBA ___ (LUBA No 2020-116, July 23, 2021) (*Roberts I*), *aff'd*, 316 Or App 305, 504 P3d 1249 (2021), *rev den*, 370 Or 56 (2022). In 2023, in *Haystack Rock*, we remanded a city community development director decision approving the application. On remand, the city council denied the application. As explained further below, the city council determined that the raised elements on the western edge of the proposed vehicular access and parking area are prohibited structures and that

petitioners had not satisfied the city's clear-vision area standard with respect to the proposed intersection at Nenana Avenue and South Hemlock Street.

This appeal followed.

MOTIONS TO TAKE OFFICIAL NOTICE AND MOTIONS TO STRIKE

We may take official notice of relevant law as defined in ORS 40.090. OAR 661-010-0046(1). A motion for official notice must explain "with particularity what the material sought to be noticed is intended to establish, how it is relevant to an issue on appeal, and the authority for notice under ORS 40.090." OAR 661-010-0046(2)(a).

A. Petitioners' Motions to Take Official Notice

Petitioners move LUBA to take official notice of the following two items: (1) a chapter from the Clatsop County Comprehensive Plan and (2) a Clatsop County Circuit Court decision on summary judgment, dated September 5, 2023, in *Haystack Rock LLC v. Rebecca Roberts, Stanley Roberts, and the City of Cannon Beach*, Case No. 22CV07199.[2]

ORS 40.090(7) provides that law that may be judicially noticed includes "An ordinance, comprehensive plan or enactment of any county * * * or a right derived therefrom." Petitioners rely on that portion of the Clatsop County Comprehensive Plan in support of their argument that their proposed housing is

[2] At oral argument, petitioners withdrew their motion to take official notice of excerpts from the City of Cannon Beach Zoning Map, which the city had opposed.

needed housing as identified by Clatsop County. No party opposes the motion and it is allowed.

ORS 40.090(1) provides that law that may be judicially noticed includes "[t]he decisional, constitutional and public statutory law of Oregon[.]" Petitioners rely on the circuit court decision to establish that legal issues raised by intervenor in their cross petition for review with respect to the Nenana Avenue public right-of-way have been resolved in circuit court. Intervenor argues that the circuit court decision is irrelevant to our review and disposition of this appeal. We agree with petitioners that the circuit court decision is potentially relevant to intervenor's argument in intervenor's sixth contingent cross-assignment of error that petitioners must obtain an easement over Nenana Avenue right-of-way before the city may approve petitioners' land use application. Petitioners also argue, and we agree, that we should take notice of and consider the circuit court decision to avoid the risk of inconsistent adjudications. *See J4J Miscellaneous PAC v. City of Jefferson*, 75 Or LUBA 120, 150 (2017) (recognizing that where issue has been resolved in another forum, it is inappropriate for LUBA to risk inconsistent decisions, citing ORS 197.805). The motions are allowed.

B. Intervenor's Motions to Take Official Notice

Intervenor moves LUBA to take official notice of the following four items: (1) the St. Helens Housing Policy adopted by the Land Conservation and Development Commission (LCDC) in 1979; (2) an audio recording of the public hearing and work session before the Senate Committee on Environment and

Natural Resources for House Bill (HB) 2131-A (2011), on May 24, 2011, at 57:00 to 59:56, statement of an LCDC representative, Bob Rindy; (3) the Staff Measure Summary for HB 2131-A for the House Committee on Transportation and Economic Development; and (4) the Staff Measure Summary for HB 2131-A for the Senate Committee on Environment and Natural Resources. Intervenor relies on those documents as legislative history in support of its argument regarding the scope of the requirement for clear and objective standards under *former* ORS 197.307(4) (2022), *amended by* Oregon Laws 2023, chapter 533, section 1, *renumbered as* ORS 197A.400(1) (2023).[3] No party opposes the motion.[4] We may take official notice of the St. Helens Housing Policy as a public act of LCDC. ORS 40.090(2). While ORS 40.090 does not provide a basis for judicial notice of state legislative history, a party may offer and we may consider legislative history for purposes of examining legislative intent in construing a statute without a motion for official notice. ORS 174.020. We will consider those items for those purposes. The motions are allowed.

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[3] In this decision, we refer to the statute numbers and versions in effect at the time of the application, as do the parties in their briefs.

[4] Petitioners filed a response supporting the motion to take official notice of the St. Helens Housing Policy.

C. City's Motion to Take Official Notice and Petitioners' Motion to Strike Portions of the Respondent's Brief

The city moves LUBA to take official notice of Section R101 of the Oregon Residential Specialty Code, commonly known as the Building Code. ORS 40.090(2) provides that law that may be judicially noticed includes "[p]ublic and private official acts of the legislative, executive and judicial departments of this state," which includes the Oregon Administrative Rules. In OAR 918-480-0005(2)(a), the Department of Consumer and Business Services adopted the Building Code and, thus, that code is subject to official notice. Petitioners object that the city has not established that the Building Code is relevant to any issue on appeal, as required by OAR 661-010-0046. Petitioners move LUBA to strike or disregard the portions of respondent's brief that refer to the Building Code. The city relies on the Building Code to support its interpretation of its code. We conclude that the Building Code is relevant to an issue on appeal. The city's motion to take official notice is allowed. Petitioners' motion to strike portions of the respondent's brief is denied.

D. Petitioners' Motion to Strike Portions of Intervenor-Respondent's Brief

Petitioners move LUBA "to strike or otherwise disregard" portions of the intervenor-respondent's brief that include cross-assignments of error. *See* OAR 661-010-0035(3)(c) ("A response brief shall not include an assignment of error or cross-assignment of error."). On January 18, 2024, petitioners filed the petition for review, asserting four assignments of error. The first assignment of error

asserts, in relevant part, that the city violated the requirement for clear and objective standards in *former* ORS 197.307(4) (2022) by applying unclear and subjective standards to their application for a dwelling and vehicular access on both petitioners' lot and in the Nenana Avenue right-of-way. The second assignment of error asserts that the city erred in concluding that the evidence does not support satisfaction of the city's clear-vision area standard with respect to the intersection of the proposed vehicular access on Nenana Avenue and South Hemlock Street.

On January 18, 2024, intervenor filed a cross-petition for review including six contingent cross-assignments of error. OAR 661-010-0030(7).[5] In the sixth contingent cross-assignment of error, intervenor asserts that the city improperly

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[5] OAR 661-010-0030(7) provides:

> "Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such. The cover page shall identify the petition as a cross petition and the party filing the cross petition. The cross petition shall be filed within the time required for filing the petition for review and must comply in all respects with the requirements of this rule governing the petition for review, except that a notice of intent to appeal need not have been filed by such party."

determined that petitioners had satisfied certain standards regulating development in the Nenana Avenue right-of-way because, among other things, petitioners' applications did not seek approval of development in the right-of-way and, alternatively, development in the right-of-way required conditional use approval. Intervenor argues that the city should have denied the applications because petitioners' proposed vehicular access does not satisfy the city's geological hazard standards, which the city determined it could not apply because those standards are unclear and subjective. Intervenor argues that the requirement for clear and objective standards does not apply to development of vehicular access in the right-of-way.

On February 8, 2024, intervenor filed the intervenor-respondent's brief. In response to the first assignment of error, intervenor argues that the approval standards for improvements to the Nenana Avenue right-of-way are not required by state law to be only clear and objective. Intervenor-Respondent's Brief 35:17-47:2. In response to the second assignment of error, intervenor argues that the application did not seek approval of development in the right-of-way. Intervenor-Respondent's Brief 48:4-49:11. In response to the fourth assignment of error, intervenor argues that the city erred in concluding it could not apply geological hazard standards that are unclear and subjective to the improvements in the right-of-way. Intervenor-Respondent's Brief 57:17-57:19.

Petitioners argue that those arguments are contingent cross-assignments of error that are not permitted in a response brief. Intervenor responds that assertions

that the city erred in the intervenor-respondent's brief are not contingent cross-assignments of error and instead are responsive to petitioners' arguments in the first, second, and fourth assignments of error. Intervenor contends that it asserts those arguments in defense of the city's denial decision and in support of intervenor's argument that we should affirm the decision.

We agree with petitioners' characterization of the arguments. Intervenor's position is that the city erred in concluding that the requirement for clear and objective standards prohibits the city from applying unclear and subjective criteria to development in the right-of-way. That argument is not defending the challenged decision. Instead, it is providing an alternative basis for denial premised on an asserted error in the challenged decision. If we agree with intervenor, then the remedy is remand. The fact that intervenor ultimately seeks LUBA to affirm the city's denial makes those arguments *contingent* cross-assignments of error, which are not properly presented in intervenor-respondent's brief. OAR 661-010-0030(7); OAR 661-010-0035(3)(c); *Bergmann v. City of Brookings* (Order, LUBA No 2020-096, May 7, 2021) (slip op at 7-8); *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37, 43-45 (2014); *see also Hendrickson v. Lane County*, ___ Or LUBA ___, ___ (LUBA No 2021-117, Apr 11, 2022) (observing that a right-for-the-wrong-reason argument could have been raised in a contingent cross-assignment of error as a basis for remand)

(slip op at 13). We will not consider the arguments in intervenor-respondent's brief at page 35 line 17 to page 47 line 2 and page 57 lines 17 to 19.[6]

Similarly, intervenor's argument that the city erred in concluding that aspects of the vehicular access satisfy city standards because petitioners did not apply for approval to develop vehicular access in the right-of-way is not a defense of the challenged decision denying the application. Instead, it is an argument that the city erred and it is a contingent cross-assignment of error that is not properly presented in intervenor-respondent's brief. We will not consider the arguments in intervenor-respondent's brief at page 48 line 4 to page 49 line 11.[7]

FIRST ASSIGNMENT OF ERROR

A single-family dwelling and accessory uses are outright permitted uses in the RL zone. Cannon Beach Municipal Code (CBMC) 17.10.020. The city council denied the application after the city concluded that the constructed raised elements that are part of the proposed vehicular access and parking area are not

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[6] Nevertheless, we ultimately address that same statutory interpretation issue in resolving intervenor's sixth contingent cross-assignment of error. We have an independent obligation to attempt to correctly construe the statute.

[7] Petitioners also argue that intervenor-respondent's brief at page 48 line 4 to page 49 line 11 impermissibly incorporates 15 pages of argument from intervenor's cross-petition for review, thereby violating the word-count limitation for the intervenor-respondent's brief. We grant petitioners' motion to strike the arguments in intervenor-respondent's brief at page 48 line 4 to page 49 line 11. Hence, petitioners' word-limit argument provides no basis for further relief.

permitted in the ocean yard or OM overlay zone. Record 6-9. Petitioners argue that, in so concluding, the city misconstrued the applicable law and made findings not supported by substantial evidence. ORS 197.835(9)(a)(C), (D).

A. Oceanfront Management Overlay Zone Regulations

We set out the legal framework that the city applied as useful context before describing petitioners' specific challenges.

> "The intent of the oceanfront management overlay (OM) zone is to regulate uses and activities in the affected areas in order to: ensure that development is consistent with the natural limitations of the oceanshore; to ensure that identified recreational, aesthetic, wildlife habitat and other resources are protected; to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of beach and dune areas; and to reduce the hazards to property and human life resulting from both natural events and development activities." CBMC 17.42.010.

Uses and activities within the OM zone are subject to the provisions and standards of the underlying zone and CBMC 17.42. Where the provisions of the OM overlay zone and the underlying zone conflict, the provisions of the OM overlay zone prevail. CBMC 17.42.020(B).

CBMC 17.42.030 identifies "uses and activities" that are permitted "for lots or right-of-way" in the OM zone and provides, in part:

> "D. For lots or right-of-way that do not consist of a beach, active dunes, or other foredunes which are conditionally stable and that are subject to wave overtopping or ocean undercutting, or interdune areas that are subject to ocean flooding: *in addition to the uses permitted in the underlying zone*, the following uses and activities are permitted subject to provisions of Section 17.92.010, Development permits:

"1. Private beach access improvements, subject to the provisions of Section 17.42.060(A)(7);

"2. Maintenance and repair to existing shoreline stabilization structure, subject to the provisions of Section 17.80.230(K);

"3. Remedial dune grading.

"E. For lots or right-of-way that do not consist of a beach, active dunes, or other foredunes which are conditionally stable and that are subject to wave overtopping or ocean undercutting, or interdune areas that are subject to ocean flooding: *in addition to the uses permitted in the underlying zone*, the following uses and activities are permitted subject to provision of Chapter 17.44, Design Review:

"1. Public beach access improvements, subject to the provisions of Section 17.42.060(A)(7);

"2. Stormwater outfalls or facilities, which may include infiltration or water quality systems." (Boldface omitted; emphases added.)

CBMC 17.42.040 identifies "uses and activities" that are prohibited in the OM zone. Residential development is "prohibited on beaches, active dunes, or other foredunes which are conditionally stable and that are subject to wave overtopping or ocean undercutting, or interdune areas that are subject to ocean flooding." CBMC 17.42.040(A). It is undisputed that petitioners do not propose any development prohibited by CBMC 17.42.040(A).

"The uses and activities permitted in all areas contained in the OM zone are subject to the [standards in CBMC 17.42.050]." CBMC 17.42.050(A). All uses and activities are subject to the geologic hazard area requirements in CBMC 17.50. CBMC 17.42.050(A)(2).

"[A]ll lots abutting the oceanshore" are subject to an oceanfront setback standard establishing the "ocean yard," in which most development is prohibited. CBMC 17.42.050(A)(6). "'Yard' means an open space on a lot which is unobstructed from the ground upward except as otherwise provided in this title." CBMC 17.04.570. "'Ocean yard' means a yard measured horizontally at right angles from the most easterly of [the] Oregon Coordinate Line or the western property line, to the nearest point of a building. An ocean yard may be a front yard, a rear yard or a side yard." CBMC 17.04.578. "For the purpose of determining the oceanfront setback line, the term 'building' refers to the residential or commercial structures on a lot. The term 'building' does not include accessory structures." CBMC 17.42.050(A)(6)(b).

The only "structures" that are permitted in the ocean yard are fences, decks, or beach access stairs. CBMC 17.42.060(A)(9); CBMC 17.90.070(E).[8] With

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[8] CBMC 17.90.070(E) provides:

> "Patios and decks, including any fixed benches, railings, or other attachments, which are no more than thirty inches in height above the existing grade may project into a required yard, but may not be closer than two feet to any property line. For lots abutting the oceanshore, a deck or patio permitted in the required yard may not be closer than two feet to the western property line or the Oregon Coordinate Line, whichever is further east. Patios and decks constructed in a required yard shall not obstruct significant views of the ocean, mountains or similar features from abutting property."

exceptions that are not relevant here, "[s]tructures and buildings accessory to a residential use shall comply with all yard requirements." CBMC 17.54.030(A).

> "'Structure' means any man-made assemblage of materials extending above the surface of the ground and permanently affixed or attached, or where not permanently affixed or attached to the ground not readily portable, *but not including landscape improvements such as rock walls, retaining walls less than four feet in height*, flag poles, and other minor incidental improvements similar to those described above." CBMC 17.04.540 (emphasis added).

As set out above, residential development is allowed with restrictions in the RL zone OM overlay. The city reasoned that the proposed dwelling complies with the oceanfront setback, but that the raised elements on the west side of the proposed parking area and vehicular access will result in development that is prohibited in the ocean yard and in the OM overlay. In so concluding, the city reasoned that the raised elements are prohibited by CBMC 17.42.030, 17.42.050(A)(6), 17.42.060(A)(9), 17.54.030, and 17.90.070(E). Record 6-9.

B. CBMC 17.42.030

With respect to CBMC 17.42.030, the city found:

> "Subsections (D) and (E) are applicable to this application, but neither allows for the development as proposed by the applicant. Accordingly, this criterion is not met." Record 6.

Petitioners argue that the city misconstrues CBMC 17.42.030(D) and (E). We review the city council's interpretation of the CBMC under ORS 197.829(1) and we are required to affirm an interpretation so long as it is not inconsistent with the regulation's express language, purposes, or underlying policies—that is,

if it is plausible.[9] *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

CBMC 17.42.030(D) and (E) allow "the uses permitted in the underlying zone[.]" The city did not make any express finding that the proposed parking area and vehicular access are *not* uses permitted in the RL zone. Residential use is permitted outright in the RL zone and subject to restrictions in the OM overlay zone. CBMC 17.42.020(B). Vehicle parking is a required part of the residential use. *See* CBMC 17.10.040(G) (requiring that parking be provided "[a]s required

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[9] ORS 197.829 provides:

> "(1) [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:
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> "(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;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct."

by [CBMC] 17.78.020."). Vehicular access is a primary residential use and not an accessory use. *See* CBMC 17.54 (regulating accessory structures and uses and not including vehicular access). Petitioners' single-family dwelling must have two off-street parking spaces located on the same lot with the dwelling. CBMC 17.78.010(E); CBMC 17.78.020(D). The required parking spaces must be "available for the parking of passenger vehicles of residents[.]" CBMC 17.78.010(F). The parking area must be accessible from a public street. CBMC 17.78.030(A)(9), (C). Given that, under the city's code, parking that is accessible from a public street is a required part of the residential use, vehicular access from the required parking area to the public road system must also be a permitted residential use in the RL zone.

Petitioners argue, and we agree, that the city's interpretation that the OM zone is limited to only those improvements enumerated in CBMC 17.42.030(D) and (E) is inconsistent with the text of those sections and implausibly prohibits uses permitted in the underlying residential zone.

C. Ocean Yard Restrictions

With respect to 17.42.050(A)(6), 17.42.060(A)(9), 17.54.030, and 17.90.070(E), the city reasoned that the raised elements are "structures" that violate the ocean yard restrictions both on the property and within the Nenana Avenue right-of-way. Record 7. Petitioners argue that city erred in concluding that the raised elements are not permitted in the OM overlay because, according to petitioners, the raised elements are not prohibited "structures" and are, instead,

retaining walls that are excluded from the definition of "structure" in CBMC 17.04.540. Petitioners also argue that the Nenana Avenue right-of-way is not subject to ocean yard restrictions, and so the city may not base its denial on petitioners' request for approval to develop raised vehicular access in the right-of-way. Finally, petitioners argue that, even if the city's interpretation does not misconstrue the applicable law, and the city's findings are supported by substantial evidence, the CBMC 17.04.540 definition of the term "structure" is not clear and objective and, thus, may not be applied to deny the application.

1. Right-of-way is not subject to "ocean yard" restrictions.

It is undisputed that the portion of the Nenana Avenue right-of-way at issue is located within the OM overlay zone. The city council reasoned that the requirements of CBMC 17.42.050, including the oceanfront setback, apply to "all areas contained in the OM [overlay] zone," and the Nenana Avenue right-of-way is within the OM overlay zone. Record 7. The city council reasoned that their interpretation of CBMC 17.42.050(A)(6) is supported by the language in CBMC 17.42.030, which refers to uses and activities permitted "[f]or lots or right-of-way" in the OM overlay.

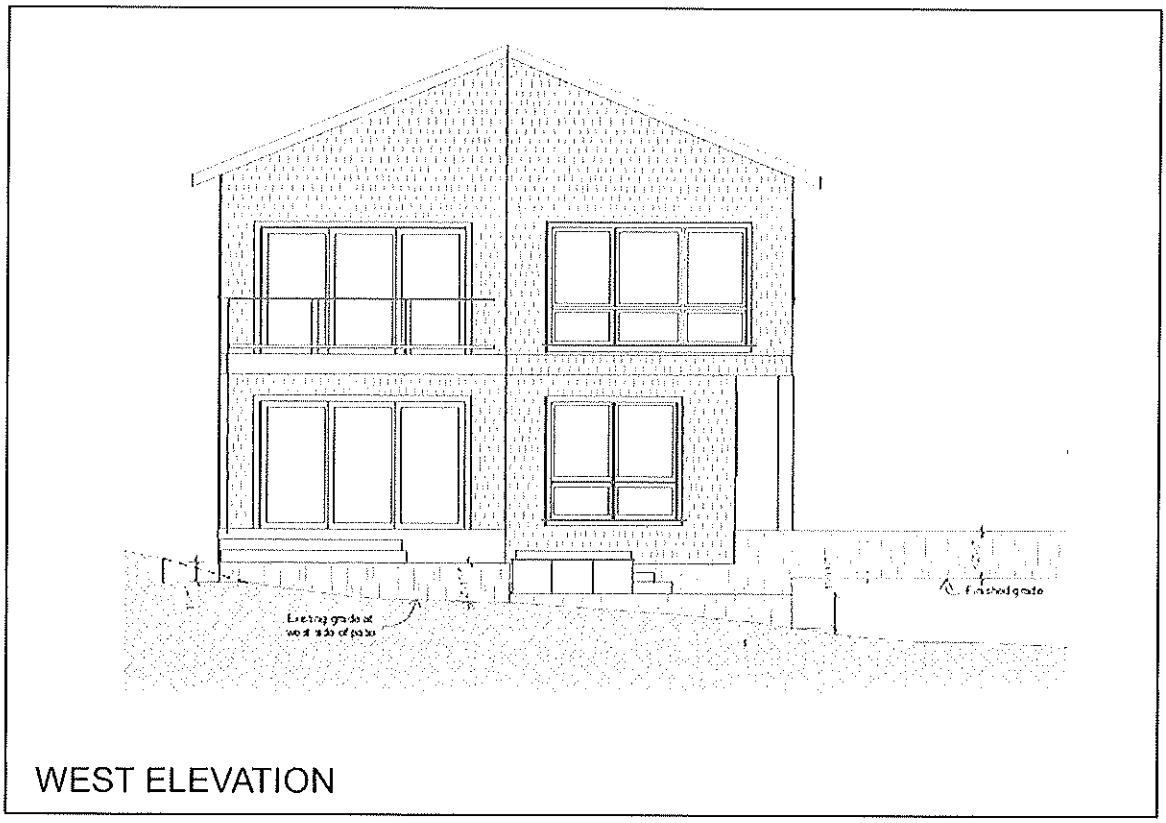
We agree with petitioners that the city's conclusion that city rights-of-way are subject to "ocean yard" restrictions depends on an interpretation of the city's code that it inconsistent with the code text. The oceanfront setback applies to "all *lots* abutting the oceanshore," and is determined by "the location of *buildings on lots* abutting the oceanshore in the vicinity of the proposed building site." CBMC

17.42.050(A)(6)(a) (emphases added). "For the purpose of determining the oceanfront setback line, the term "'building' refers to the residential or commercial structures *on a lot*." CBMC 17.42.050(A)(6)(b) (emphasis added). The "ocean yard" is defined by reference "to the nearest part of a building." CBMC 17.04.578. Because the "ocean yard" regulations apply to lots and limit development in the ocean yard, which is defined by buildings "on a lot," the city's interpretation that rights-of-way are subject to the ocean yard restrictions is inconsistent with the code's express language. Accordingly, the city erred in denying petitioners' application based on the application of the ocean yard restrictions to petitioners' proposed development in the Nenana Avenue right-of-way.

2. The term "structure" is impermissibly unclear.

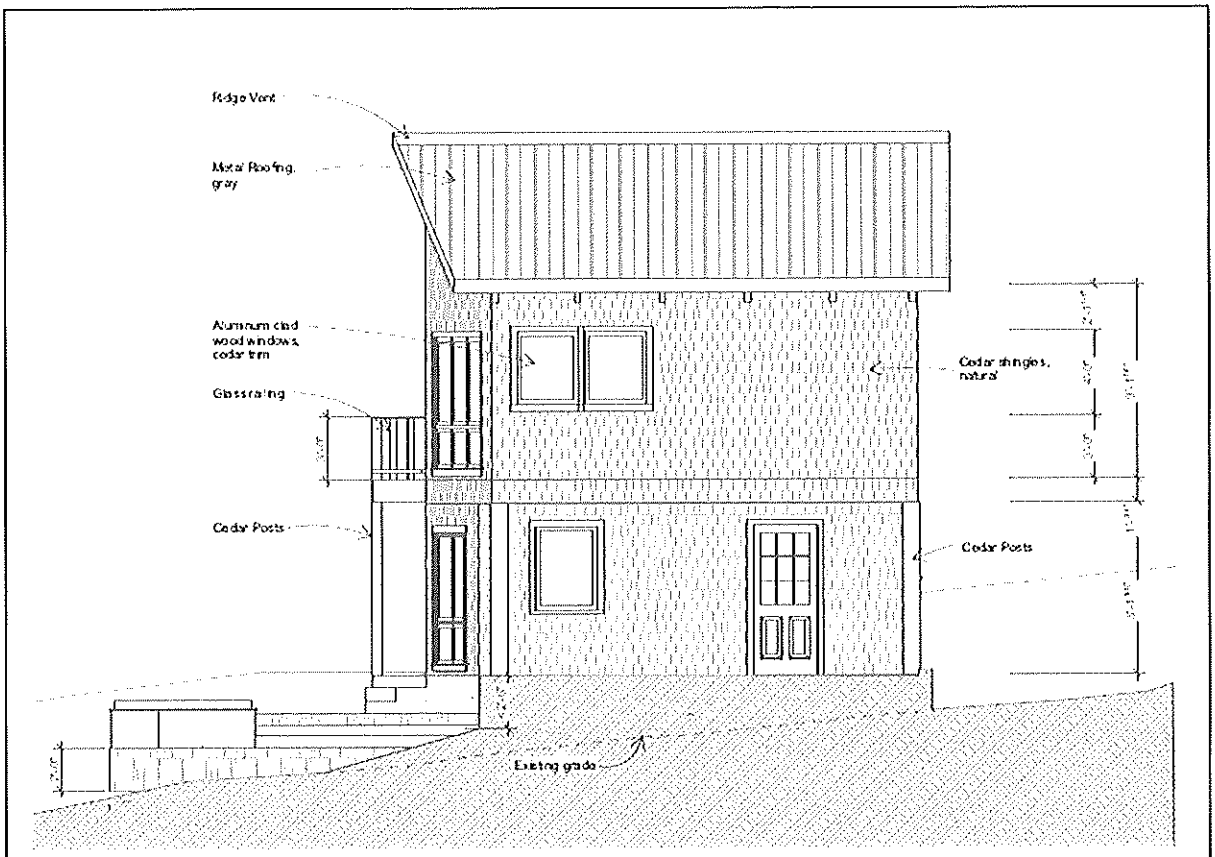
A portion of the raised element on the west side of the parking area is within petitioners' lot, and west, and within the oceanfront setback. The city found that the raised element is a "structure" that is not allowed in the ocean yard. Petitioners argued to the city council that the portion of the raised element in petitioners' lot is a "retaining wall" that is not a "structure" that is prohibited in the ocean yard. The city rejected that argument and reasoned that only fences, decks, and beach access stairs are allowed within the oceanfront setback under CBMC 17.42.060(A)(9). The city council interpreted "that provision to prohibit all other non-identified structures within the oceanfront setback." Record 7. Quoting the CBMC 17.04.540 definition of "structure," the city determined that

the raised elements are "'man-made assemblage[s] of materials extending above the surface of the ground,' both on the lot as well as within the Nenana right-of-way." Record 7 (brackets in original). The city found that the raised element on petitioners' property "is at least 2 ½ feet above the finished grade, and over four feet above the existing grade of the property." *Id.* The city noted that the CBMC does not prescribe the starting point for measuring the height of a retaining wall for purposes of determining whether the retaining wall is a "structure." The city interpreted the four-foot standard to be measured using the same starting point as "building height" is measured in CBMC 17.04.090, which is "the vertical distance measured from the average elevation of existing grade to the highest point of the [structure]." Record 8. In support of its height finding, the city cited the west elevation on the revised site plan dated July 17, 2023. Record 7-8; Record 846.



Record 846. The city found that the raised element is not a landscape improvement such as a retaining wall less than four feet. CBMC 17.04.540.

Petitioners contend that the city's height finding is inadequate and not supported by substantial evidence. Petition for Review 24-26. Petitioners assert that the city should have referred to the south elevation drawing, depicted on the same revised site plan, which petitioners assert shows that the raised element is two feet six inches above the finished grade, with the existing grade shown slightly below the finished grade.



SOUTH ELEVATION

Record 846. As we understand it, petitioners argue that the west elevation depicts the raised element of the parking area located east and further upslope, behind a section of raised deck. That is, the "existing grade" depicted on the west elevation is significantly downslope from the subject raised element and the "existing grade" at the location of the raised element is actually upslope, as shown on the south elevation. Thus, the height of the raised element as measured from the "existing grade" *at the raised element* is less than four feet.

The city responds that it correctly relied on the west elevation and points to additional images in the record that the city argues show that the parking area

raised element extends well above the existing grade. Respondent's Brief 17 (reproducing "View from West," set out above, from Record 652 and 37). The city also argues that the height measurement starting point is not simply the existing grade at the western edge of the raised element but, instead, "the average elevation of existing grade" based on CBMC 17.04.090. Respondent's Brief 17-18.

For purposes of this decision, we assume without deciding that the city's interpretation of the term "structure" is plausible and that a reasonable person reviewing the record could conclude that the portion of the raised element on the west side of the parking area exceeds four feet. At a minimum, when viewing the record as a whole, the south elevation that petitioners point to does not conclusively establish that raised element is less than four feet and therefore a "landscape improvement" or "other similar minor improvement." However, we agree with petitioners that the term "structure" as defined in CBMC 17.04.540 is unclear as applied to petitioners' application for approval for the development of housing as required by *former* ORS 197.307(4) (2022). *Former* ORS 197.307(4) (2022) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures *regulating the development of housing*, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

"(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

"When an ordinance establishing approval standards is required under [*former* ORS 197.307 (2022)] to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance." ORS 227.173(2). "A city may not deny an application for a housing development located within the urban growth boundary if the development complies with clear and objective standards, including clear and objective design standards contained in the city comprehensive plan or land use regulations." ORS 227.175(4)(b)(A).[10]

Approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). We have explained that the term "clear" means "easily understood" and "without

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[10] Petitioners also argue that the city's decision violates ORS 197.831, which places the burden on the city to demonstrate that standards and conditions imposed on "needed housing" "are capable of being imposed only in a clear and objective manner." Later in this decision, we conclude that petitioners' development is not for "needed housing." However, a violation of *former* ORS 197.307(4) (2022) provides a sufficient basis for remand. *See Legacy Development Group v. City of the Dalles*, ___ Or LUBA ___ (LUBA No 2020-099, Feb 24, 2021) (slip op at 9) (so stating and refraining from opining on whether ORS 197.831 is limited to appeals concerning applications for needed housing).

obscurity or ambiguity," and that the term "objective" means "existing independent of mind." *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6).

Regardless of how the term "structure" in CBMC 17.04.540 is correctly interpreted, the city was afforded and exercised an impermissible degree of discretion in determining whether and how it applies to petitioners' proposed development, which means that standard is unclear.

First, under the city's interpretation it is unclear what "extending above the surface of the ground" means. CBMC 17.04.540. The definition of "structure" does not prescribe measuring from the "existing grade" or any grade. Petitioners argue that the height of the retaining wall should be measured from the finished grade to the top of the wall, which petitioners assert is two feet, six inches. The city determined that the height of a structure must be determined by the "average elevation of existing grade," importing the method prescribed for measuring building height in CBMC 17.04.090. Record 8. Under the city's interpretation, the correct measurement starting point is not the existing grade at the elevated element but is the "average" elevation of the existing grade. It is also unclear how that average should be determined. As applied here, the city's interpretation creates ambiguity around how and where the raised elements should be measured for height, rendering the standard unclear. *Cf. Rudell v. City of Bandon*, 64 Or LUBA 201, 208 (2011), *aff'd*, 249 Or App 309, 275 P3d 1010 (2012) (concluding that the city's interpretation of the definition of "foredune" was sufficiently clear

and objective where the slope of a property is an objectively determinable fact (citing *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 410-11 (2002) (rejecting an argument that a standard prohibiting development on land that meets or exceeds 20 percent slope is not clear and objective))); *Roberts I*, ___ Or LUBA ___ at ___ (concluding that the city's standard for measuring the oceanfront setback measured from the Oregon Coordinate Line is clear and objective) (slip op at 22-24).

Second, the express exclusions to the definition of "structure" are not clear under the city's interpretation. The definition of "structure" excludes "landscape improvements *such as* rock walls, retaining walls less than four feet in height, flag poles, *and other minor incidental improvements similar to those described above*." CBMC 17.04.540 (emphases added). The city council interpreted the phrase "retaining walls less than four feet in height" as part of a list of "landscape improvements" and not as a separate category, and interpreted the phrase "other minor incidental improvements similar to those described above" to exclude "structural retaining walls that support driving or parking surfaces." *Id.*; Record 8. Based on those interpretations, the city reasoned that the raised element "is not a landscape improvement, nor is it a minor incidental improvement, but a structural support for the required driveway and parking and, therefore, is not subject to the four-foot limitation in any event." Record 8.

On appeal, the city attempts to bolster that interpretation by pointing to the Building Code standard for when a retaining wall requires a building permit:

> "'Retaining walls. Statewide, retaining walls that provide safeguards for the users of the buildings, support a regulated building or retain material that, if not restrained, could impact a regulated building shall require a building permit. A municipality may adopt an ordinance to regulate other retaining walls, provided that the threshold established for requiring a permit does not include retaining walls 4 feet (1219 mm) or less in height, when measured from the bottom of the footing to the top of the wall, except where the retaining wall * * * supports a nonsoil surcharge.'" Respondent's Brief 20 (quoting Building Code R101.2.2.2) (italics omitted).

The city argues that, while the CBMC and the decision do not refer to the Building Code, the Building Code supports the distinction that the city made that

> "generally, retaining walls less than four feet in height do not require a building permit, unless the retaining wall provides structural support, or what the building code calls 'nonsoil surcharge.' In this case, because cars will be driving and parking on the area supported by the retaining wall, it does support a nonsoil surcharge and, therefore, a building permit will be required, and it is a 'structure' under the City's code." Respondent's Brief 20-21.

As petitioners point out, it is not clear *from the language* of the CBMC 17.04.540 standard what distinguishes a "retaining wall" that is a "landscape improvement" from a retaining wall that is a "structural support."[11] Retaining walls are designed to hold in place volumes of earth. *Webster's Third New Int'l Dictionary* 1938 (unabridged ed 2022) (defining "retaining wall" as "a wall built

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[11] We note that the Building Code prescribes measuring a retaining wall "from the bottom of the footing to the top of the wall," which conflicts with the city's interpretation that a "structure," as defined in CBMC 17.04.540, should be measured from "the average elevation of existing grade to the highest point of the [structure]." CBMC 17.04.090; Record 7-8.

to * * * prevent an earth slide"). Where a retaining wall is developed on the same property as a dwelling, at some point, the retained earth likely will also support a man-made assemblage of materials, whether it is a building or something else situated upslope of the retaining wall. The city's interpretation leaves the city with significant discretion to decide whether a retaining wall is a landscape improvement or a structural support, rendering the standard unclear.

The city erred in denying petitioners' application for housing as violating the ocean yard restrictions based on the city's determination that the raised elements are "structure[s]" as defined in CBMC 17.04.540, which is not a clear standard.

In its brief, the city argues for the first time that, even if the disputed raised elements are not "structures," then they are "obstructions" that are prohibited in the ocean yard based on the CBMC 17.04.570 definition of "yard" as "an open space on a lot which is unobstructed from the ground upward except as otherwise provided in this title." Respondent's Brief 15-16. There are a number of problems with the city's argument. First, the argument does not appear in the challenged city council decision, and the city may not advance a new interpretation of CBMC 17.04.570 for the first time in its brief. *Bauer v. City of Portland*, 47 Or LUBA 459, 463 (2004); *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46, 60-61 (1995), *aff'd*, 139 Or App 39, 911 P2d 350, *rev den*, 323 Or 136 (1996). Second, even if the city council had applied the definition of "yard" to deny the application, that definition is unclear regarding (1) what constitutes an

"obstruction," and (2) where the "ground" starts and stops—*e.g.*, does the "ground" include a paved surface or raised areas supported by a retaining wall? Accordingly, the city's argument does not provide a basis for affirming the city's denial.

The first assignment of error is sustained, in part.

We will affirm a denial if the city adopted at least one valid basis for denial. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004), *rev den*, 338 Or 17 (2005). Accordingly, we proceed to resolve petitioners' second assignment of error with respect to the clear-vision area standard.

SECOND ASSIGNMENT OF ERROR

The city determined that petitioners had not met their burden to establish that the proposed vehicular access satisfied the clear-vision area criterion in CBMC 17.90.040, which provides, in part:

> "A. Requirement. A clear-vision area shall be maintained on the corners of all property adjacent to the intersection of two streets. A clear-vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction exceeding three feet in height, measured from the top of the curb or, where no curb exists, from the established street center line grade, except that trees exceeding this height may be located in this area, provided all branches and foliage are removed to a height of eight feet above the grade.
>
> "B. Measurement. A clear-vision area is that area enclosed by the lines formed by the center lines of intersecting pavements or driving surfaces and a straight line drawn diagonally, across the corner, connecting those lines at the various distances specified by the chart

> below. The measured distance along the uncontrolled driving surface is 'vision clearance distance -a-.' The measured distance along the controlled driving surface is 'vision clearance distance -b-.' Measurement of the vision clearance distance -a- shall be from the point of intersection of the center lines of the two travel surfaces. Measurement of the vision clearance distance -b- shall be from the adjacent stop sign."

Petitioners must demonstrate that there will be a clear-vision area on the corners where the Nenana Avenue right-of-way meets South Hemlock Street. *Id.* The city found:

> "The Council expressed several concerns and find that [petitioners] do not meet all of the clear vision criteria regarding egress on onto [*sic*] Hemlock by the S-Curves and how this does not create a greater danger for pedestrians, cars, wildlife/elk, etc. This area can also become an attractive nuisance because people stop in the road to view elk and park on this narrow section of Hemlock to view Haystack Rock which also leads to potential pedestrian/wildlife conflict with vehicles traveling along Hemlock. There are also safety concerns regarding the turnaround in the Nenana right-of-way and whether adequate emergency services can be provided. Engineered plans reviewing the exact street and/or driveway to be constructed are necessary in order to determine if such a street/driveway can be constructed in a safe manner with regards to grades, clear vision, etc." Record 16.

Petitioners argue that the city's conclusion that the proposal does not satisfy the clear-vision area standard misconstrues CBMC 17.90.040 and is not supported by adequate findings or substantial evidence. Petitioners argue that the evidence in the record demonstrates compliance with the clear-vision area standard as a matter of law.

We are required to affirm the city's interpretation of the clear-vision area standard so long as it is not inconsistent with the regulation's express language, purpose, or underlying policies—that is, if it is plausible. ORS 197.829(1); *Siporen*, 349 Or at 259. Generally, findings must (1) address the applicable standards, (2) set out the facts relied upon, and (3) explain how those facts lead to the conclusion that the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). A finding of fact is supported by substantial evidence if the record, viewed as a whole, would permit a reasonable person to make that finding. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988).

In order to reverse a denial of an application on evidentiary grounds, we must conclude that "the proponent of change sustained [their] burden of proof as a matter of law." *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *see also Garre v. Clackamas County*, 18 Or LUBA 877, 880-81, *aff'd*, 102 Or App 123, 792 P2d 117 (1990). "It is not enough for the proponent to introduce evidence supporting affirmative findings of fact and conclusions on all applicable legal criteria. The evidence must be such that a reasonable trier of fact could only say [that] the [proponent's] evidence should be believed." *Weyerhaeuser v. Lane County*, 7 Or LUBA 42, 46 (1982). In other words, in order for LUBA to sustain petitioners' second assignment of error on

evidentiary grounds, petitioners must establish that the evidence in the record demonstrates compliance with CBMC 17.90.040 as a matter of law.

Petitioners argue that detailed sight distance and traffic safety analyses submitted by petitioners demonstrate, and the city public works director and traffic engineer confirmed, that the proposed vehicular access intersection with South Hemlock Street complies with the clear-vision area standard. As explained above, the application included two options for vehicular access development for the city to choose from: (1) a driving surface that would be constructed to city road standards on an elevated bridge-like structure that would be supported by columns (columnar access), or (2) a driving surface that would be raised but not be supported by columns (graded access).[12] Petitioners point to extensive evidence in the record that demonstrates that views from vehicles exiting the site are not blocked by any obstacles within the required clear-vision area. Petition for Review 33-40. Petitioners argue that the city's findings of noncompliance failed to address that evidence, and there is no contrary evidence to support a conclusion that the proposal does not meet the clear-vision standard.

The city responds that the city properly concluded that the clear-vision standard was not met because petitioners had not provided sufficient information to sustain their burden of proof. The city points out that much of the submitted

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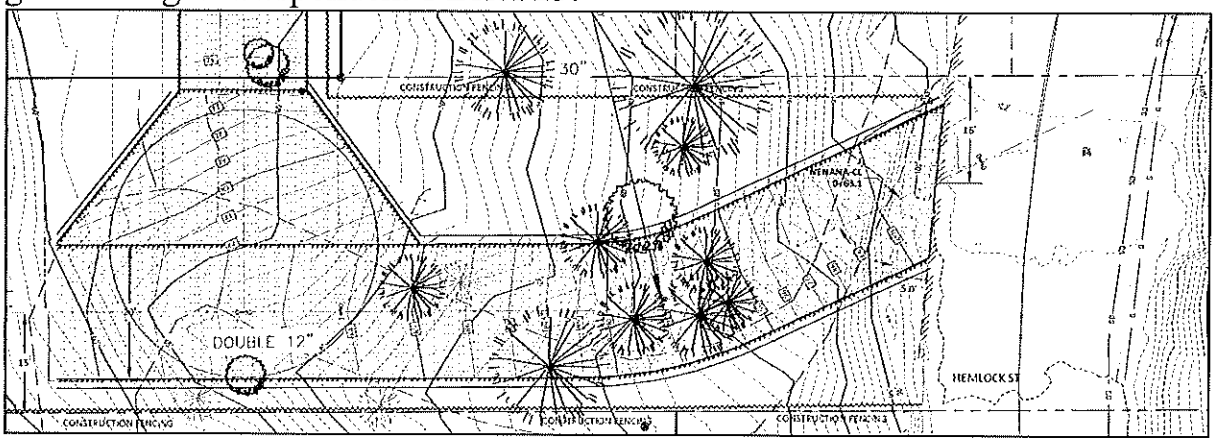
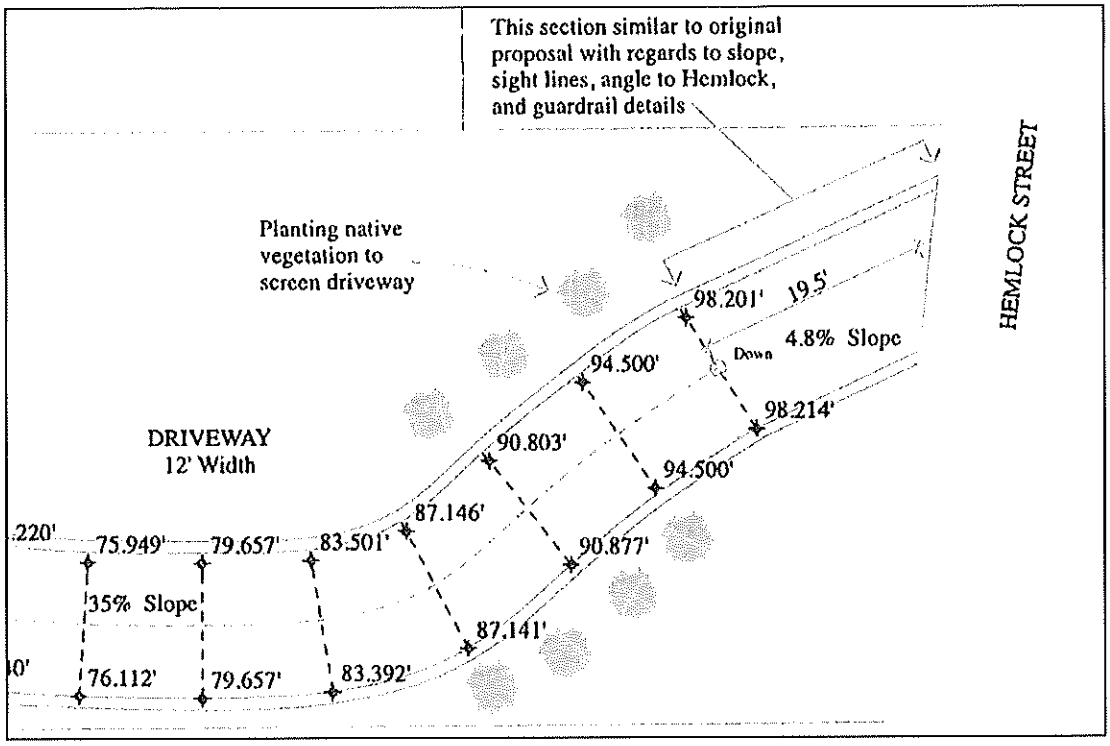
[12] Petitioners' engineers refer to the columnar access as "public access" and the graded access as "private access." Record 789.

material refers to the columnar access and not the graded access and petitioners did not provide full engineering drawings for either of the proposed access designs. The city argues that the record shows that the sight line is not the same for both proposed versions of vehicular access. The city argues that the drawings reproduced below show different angles and slopes for the columnar access and graded access. The city emphasizes that a notation on the drawing for the graded access states that the sight lines are "similar to the original proposal." Record 29. The city argues that "given the location of the driveway at the entrance to the S-Curves, as well as the steepness of the site and other constraints, 'similar' is not good enough." Respondent's Brief 23.



Record 219 (columnar access).



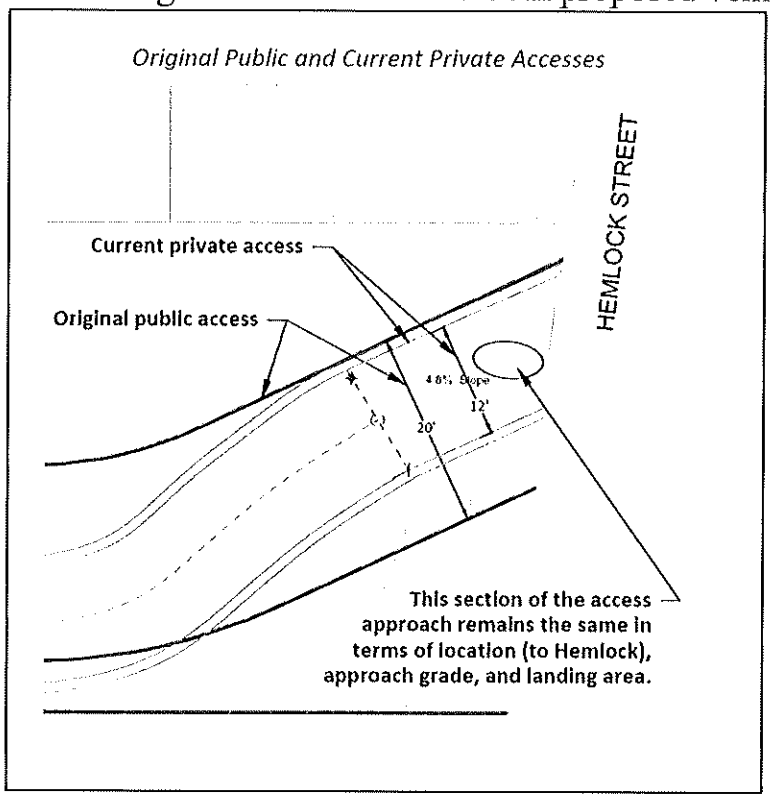
Record 29 (graded access).

Petitioners reply, and we agree, that the only specific evidence in the record with respect to sight lines is petitioners' expert's testimony that the sight lines are the same for both designs. Petitioners' transportation engineer explained:

> "The currently proposed [graded] access remains the same as the previously proposed [columnar] access contemplated in the sight distance analyses – in terms of access location (to Hemlock) and approach grade, and all findings contained in those analyses remain the same. More specifically, *the [graded] access approach/landing area is the same as the [columnar] access and will remain the same*, regardless of the specific roadway design closer to the proposed residence." Record 789 (emphasis added).

> "[A]ll issues identified in the original sight distance analyses remain the same and all findings contained in those analyses remain the same. Further, [petitioners'] sight distance analyses fully evaluated all sight distance issues based on * * * guidelines (which incorporate 'sight triangles')." Record 1132.

The transportation engineer provided the following graphic to demonstrate that the landing area is the same for both proposed vehicular access ways:



Record 1132.

We agree with petitioners that the city's finding that petitioners failed to provide sufficient evidence to demonstrate that the clear-vision standard is satisfied is not supported by the record. Viewing the record as a whole, a reasonable trier of fact could only say that petitioners' evidence should be believed and it demonstrates that the clear-vision area criterion is satisfied.

Petitioners also argue, and we agree, that the city's findings regarding the clear-vision standard include considerations that are not contained in the standard itself. The city misconstrued CBMC 17.90.040(A) by imposing general safety

concerns for the safety of pedestrians, cars, and wildlife. Those concerns are not contained in CBMC 17.90.040(A). Thus, the city interpreted CBMC 17.90.040(A) in a manner that is inconsistent with the text of that provision.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city committed procedural error prejudicing their substantial rights by failing to allow them an opportunity to offer amendments or propose conditions of approval that would make the application consistent with applicable regulations, as required by ORS 197.522(3). Petitioners also argue that the findings fail to provide a reasonably definite, clear, and objective pathway for petitioners to obtain approval for a dwelling on their residentially zoned property. A local government's denial decision must be sufficiently detailed to give an applicant fair notice of what must be done to secure approval or give the applicant fair notice that it is unlikely the application can be approved. *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA No 2022-002, May 11, 2022) (citing *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994), and *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978)) (slip op at 10).

A. ORS 197.522(3) does not apply.

ORS 197.522(2) requires the city to approve an application for a permit on "any land for needed housing that is consistent with the comprehensive plan and applicable land use regulations." ORS 197.522(3) provides, in part:

> "If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to making a final decision on the application, shall allow the applicant to offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations."

The city responds that ORS 197.522(3) does not apply because petitioners' application is not for "needed housing." The city has not designated petitioners' land as land for needed housing. As used in ORS 197.522, "needed housing" means

> "all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes[.]" *Former* ORS 197.303(1) (2022), *amended by* Or Laws 2023, ch 13, §27, ch 233 §18, ch 326 §14, *renumbered as* ORS 197A.348(1) (2023).

As the city explains, *former* ORS 197.303(5) (2022), *renumbered as* ORS 197A.348(5) (2023), exempts small cities with populations under 2,500, such as the city, from the needed housing statutes (the small-city exemption). The small-city exemption applies unless a small city opts *into* the needed housing statutes, including ORS 197.522, by identifying single-family housing as needed housing in the city's comprehensive plan (the *Montgomery* exception). *Montgomery v. City of Dunes City*, 236 Or App 194, 204-05, 236 P3d 750 (2010). In *Montgomery*, it was undisputed that the Dunes City Comprehensive Plan identified single-family housing as needed housing within the then-applicable

meaning of ORS 197.303(1), housing types "determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels."[13]

Petitioners argue that this case falls squarely under the *Montgomery* exception. Petitioners argue that the Cannon Beach Comprehensive Plan (CBCP) identifies single-family dwellings as needed housing because the Tolovana Park Policies, which apply to the subject property, provide that the area "shall remain primarily residential" and "shall continue to develop with single-family dwellings" on small lots. CBCP 16. CBCP Housing Policy 1 is "In order to maintain the city's village character and its diverse population, the city will encourage the development of housing which meets the needs of a variety of age and income groups, as well as groups with special needs." CBCP 18. The city council found that

> "those policies simply state that the Tolovana Park area of the City shall remain residential, but do not identify any specific need identified in ORS 197.303 that must be met, much less a need 'at price ranges and rent levels that are affordable to households within the county with a variety of incomes.' Contrary to the Comprehensive Plan at issue in *Montgomery*, the City's Comprehensive Plan simply does not identify any such need." Record 2.

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[13] Neither our decision nor the court's decision in *Montgomery* set out the relevant Dunes City Comprehensive Plan language.

Petitioners argue that interpretation is inconsistent with the quoted CBCP text and is not entitled to deference. Petitioners assert that the CBCP Housing Policy 1 closely tracks the *former* ORS 197.303 (2022) definition of "needed housing" to meet the needs of households with a variety of incomes.

The city responds that the quoted CBCP policies do not identify a need for any particular type of housing. Rather, those policies provide that the Tolovana Park area will remain residential and developable for single-family homes on small lots. The city argues that the policy that "the city will *encourage* the development of housing which meets the needs of a variety of age and income groups" is not a needed housing determination. CBCP 18 (emphasis added). The city argues, and we agree, that interpretation is plausible and, thus, entitled to deference.

Petitioners contend, in the alternative, that Clatsop County's Comprehensive Plan identifies a need for 140 single-family homes for the City of Cannon Beach and the county's determination of need is binding on the city. That is so, petitioners argue, because *former* ORS 197.303(1) (2022) provides that

> "'needed housing' means *all housing on land zoned for residential use* or mixed residential and commercial use *that is determined to meet the need shown for housing* within an urban growth boundary at price ranges and rent levels that are affordable to households *within the county* with a variety of incomes[.]" (Emphases added.)

Essentially, petitioners argue that, by amending *former* ORS 197.303(1) (2022), the legislature nullified the small-city exemption in *former* ORS 197.303(5) (2022) and extended the *Montgomery* exception to apply where a *county* has identified a particular housing need for a *city* within the county. Petitioners assert that the legislature thereby removed individual small city discretion to determine its own housing needs and whether to opt into the needed housing statutes. Petition for Review 52.

The city responds, and we agree, that petitioners' position is not supported by the needed housing statutes, which require small cities to (1) determine their estimated housing needs on a 20-year planning horizon, (2) inventory the supply of buildable lands within the city's urban growth boundary, and (3) adopt measures to accommodate the city's estimated housing needs. *Former* ORS 197.296 (2022), *amended by* Or Laws 2023, ch 13, § 25, ch 326, § 13, *renumbered as* ORS 197A.350 (2023); OAR chap 660, div 8 (LCDC rules on buildable lands). The city emphasizes that scheme requires *cities* to determine their housing needs and does not authorize *counties* to determine a city's housing needs within a city's urban growth boundary. The city argues, and we agree, that the reference to the "price ranges and rent levels that are affordable to households *within the county* with a variety of incomes" in *former* ORS 197.303(1) (2022) identifies what households must be considered in determining housing affordability but does not evidence a legislative intention to delegate to counties the authority to determine housing needs for cities or otherwise circumvent the

small-city exemption in *former* ORS 197.303(5) (2022). Thus, contrary to petitioners' argument, the county's housing analysis does not circumvent the small city exemption nor establish that petitioners' proposal is for needed housing.

The city did not err in concluding that petitioners' application is not for the development of "needed housing" and, therefore, the city was not obligated to provide petitioners with an opportunity "to offer an amendment or propose conditions of approval that would make the application consistent with the plan and applicable regulations" prior to making a final decision on the application. ORS 197.522(3).

B. The city's decision does not deny petitioners fair notice.

Petitioners argue that the city's decision fails to inform them of what petitioners must do to secure approval. The city responds that the decision makes clear that petitioners must submit an application that meets the ocean yard setback and clear-vision area standards. We agree that the city's denial is sufficiently clear. However, as explained above, the city may not apply the unclear and subjective standards that it applied to deny the application and the city's conclusion that the clear-vision area standard is unmet is not supported by the record.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In a "precautionary" fourth assignment of error, petitioners argue that the city correctly concluded that the city may not apply the geologic hazard areas standards in CBMC 17.50.040 because those standards are not clear and objective. This argument is not an assignment of error and provides no basis for reversal or remand. We address this same issue in resolving intervenor's sixth contingent cross-assignment of error.

The fourth assignment of error is denied.

CROSS PETITION FOR REVIEW

Intervenor filed a cross petition for review containing six contingent cross-assignments of error. OAR 661-010-0030(7); see n 5; *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495, 501-02 (2018) (explaining that a contingent cross-assignment of error is appropriate where it raises "issues that might provide additional bases for remanding the decision, in order to correct other alleged errors on remand"). We have concluded that the city's two bases for denying the consolidated applications are invalid. Accordingly, we proceed to analyze intervenor's contingent cross-assignments of error, which we understand to assert additional bases for remand in the event we reverse or remand the decision based on one or more of petitioners' assignments of error in the petition for review.

FIRST AND SECOND CONTINGENT CROSS-ASSIGNMENTS OF ERROR

Intervenor argues that the application does not satisfy the requirement for vehicular access to the property and, thus, also fails to satisfy the on-site parking requirement.

A. The subject property is a lot abutting a street.

CBMC 17.90.020 is a general access requirement that provides:

> "Every lot shall abut a street, other than an alley, for at least twenty-five feet. Lots which were created prior to adoption of the zoning ordinance which do not meet this provision may be accessed via an irrevocable recorded easement of a minimum of ten feet in width."

The city found:

> "The lot at issue abuts a public right-of-way in the dedicated Nenana Avenue, but that right-of-way is not accessible by vehicular or pedestrian traffic. The Council finds that [petitioners'] lot does abut the Nenana Avenue right-of-way for twenty-five feet and meets this criterion." Record 15.

Intervenor argues that the city misconstrued the term "street" by concluding that the unimproved Nenana Avenue right-of-way satisfies CBMC 17.90.020. Intervenor argues that the city did not expressly or impliedly conclude that the unimproved Nenana Avenue right-of-way is a "street." The city responds, and we agree, that interpretation is inherent in the way that the city applied the standard. "An implicit interpretation of an ordinance provision that is eligible for ORS 197.829(1) deference is one where '[t]he practical effect of the findings is to give definition to the term' and where the '[local government's] understanding

of [the term] is inherent in the way that it applied the standard.'" *Green v. Douglas County*, 245 Or App 430, 439, 263 P3d 355 (2011) (quoting *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 267, 942 P2d 836 (1997), *rev dismissed as improvidently allowed*, 327 Or 555 (1998) (first and third brackets in *Green*, second brackets added)). The city's implicit interpretation is entitled to deference if it is plausible, and we conclude that it is.

CBMC 17.04.535 provides:

> "'Street' means the entire width between the right-of-way lines of every way for vehicular and pedestrian traffic and includes the terms 'road,' 'highway,' 'lane,' 'place,' 'avenue,' 'alley' and other similar designations."

The 1908 Tolovana Park subdivision plat includes a dedication of the Nenana Avenue right-of-way to the city "for its use as thoroughfares forever, the streets and avenues therein." Record 639. A street means "the entire width between the right-of-way lines." CBMC 17.04.535. An unimproved right-of-way fits squarely within the CBMC 17.04.535 definition of "street." Nothing in CBMC 17.04.535 or CBMC 17.90.020 requires that a dedicated right-of-way be improved or passable by foot or vehicle in order to be a "street." As the city explains, the CBMC 17.90.020 general access requirement that a lot abut a street is also a requirement for the creation of a lot. At the time a lot is created by land division, the subject lot and rights-of-way may be unimproved. An applicant might be required to improve a right-of-way in order to gain actual access to develop a lot. However, that does not mean that an existing, unimproved right-

of-way is not a "street." We agree with the city that the city's interpretation is consistent with the language and purpose of CBMC 17.90.020.

B. On-site Parking

Intervenor argues that, without actual vehicular access, the city erred in finding that the application satisfies the on-site parking requirement. As explained above, single-family dwellings must have two on-site parking spaces. CBMC 17.10.040, 17.78.010, 17.78.020, 17.78.030. The city found:

> "As the application seeks approval for a single-family dwelling, the application is required to provide two parking spaces that are 9' x 18'. The site plan provided by the applicants demonstrates that this standard is met, although it appears that a portion of the parking structure is located in the ocean yard setback." Record 14.

CBMC 17.78.030(A)(9) provides:

> "The number of access points from the adjacent public street(s) to the parking area shall be limited to the minimum that will allow the property to accommodate the anticipated traffic. Access points shall be located on side streets or existing driveways wherever possible so as to avoid congestion of arterial or collector streets. The width of the access point(s) to the parking area shall comply with the standards of Municipal Code Section 12.08.040."

Intervenor argues that the city erred in finding that the on-site parking standard is satisfied because, at the time of the application and decision, vehicular access to the proposed parking area is blocked by a guardrail, steep slope, and vegetation. We understand intervenor to thereby argue that the city misconstrued and made inadequate findings regarding CBMC 17.78.030(A)(9) and that the city's conclusion is not supported by substantial evidence.

The city responds, and we agree, that CBMC 17.78.030(A)(9) limits the number of access points to the parking area and petitioners propose only one access point. The city did not misconstrue that standard. The city agrees with intervenor that the parking area must be accessible by vehicles in order to satisfy the on-site parking requirements. The city responds, and we again agree, that petitioners proposed vehicular access by submitting an application and plans for vehicular access in the consolidated applications that led to the challenged decision. The fact that the city denied the vehicular access application does not undermine the city's conclusion that the site plan and proposed vehicular access satisfy the parking area standard. The city's finding regarding on-site parking is supported by substantial evidence.

The first and second contingent cross-assignments of error are denied.

THIRD CONTINGENT CROSS-ASSIGNMENT OF ERROR

Intervenor argues that the raised elements of the proposed vehicular access violate the 15-foot front-yard setback requirement in CBMC 17.10.040(B)(3).[14] Intervenor argues that the raised elements are structures that are prohibited in the

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[14] CBMC 17.04.575 provides:

> "'Front yard' means a yard between side lot lines and measured horizontally at right angles to the front lot line to the nearest point of the building. For all lots abutting the ocean shore, the required yard shall be measured from the most easterly of either the lot line, or the vegetation line as established and described according to the Oregon Coordinate System."

front yard and, accordingly, the city should have denied the application on the additional grounds that it fails to comply with CBMC 17.10.040(B)(3).

The city responds, initially, that intervenor failed to raise the issue below and thus waived it. ORS 197.835(3) limits LUBA's scope of review to those issues "raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable." ORS 197.797(1) requires that, to be preserved for LUBA review, an issue must "be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." We refer to that rule as "raise-it-or-waive-it" or statutory waiver.

Intervenor was required to demonstrate preservation in the cross-petition for review. OAR 661-010-0030(7); OAR 661-010-0030(4)(d). Intervenor cites record pages 2349 to 2351. Intervenor does not point to any particular passage on those pages. The city responds that those pages do not raise the issue that the proposed raised elements on the west end of the parking area violate the front-yard setback. Intervenor does not respond to the waiver challenge in its reply brief. We have reviewed the cited pages and it is not obvious to us whether and where the issue raised on appeal was raised to the city. Thus, we agree with the city that the issue is waived.

The third contingent cross-assignment of error is denied.

FOURTH CONTINGENT CROSS-ASSIGNMENT OF ERROR

CBMC 17.42.040(C) prohibits in the OM overlay zone "[r]emoval of stabilizing vegetation, except as part of a foredune grading plan provided for by Section 17.42.060(A)(3), or a nonstructural shoreline stabilization program provided for by Section 17.42.060(A)(5), or as provided for by Section 17.52.030." It is undisputed that the property is in the OM overlay zone and that the application proposes removing existing trees to construct the dwelling and vehicular access. The city identified CBMC 17.42 (Oceanfront Management Overlay Zone) as applicable criteria. Supplemental Record 16, 35. The city adopted findings regarding CBMC 17.42.030 (uses and activities permitted), 17.42.050 (general standards), and 17.42.060 (specific standards). Record 5-7, 9. The city did not adopt any findings regarding any provision of CBMC 17.42.040 (uses and activities prohibited), including CBMC 17.42.040(C). Intervenor argues that the city erred by failing to address CBMC 17.42.040(C) and that the "provision applies to the [a]pplication because it proposes extensive removal of trees from a steep oceanfront hillside that is part of an active landslide and within the OM overlay zone." Cross Petition for Review 31.

As we have explained, "not every assertion by a participant in a land use decision warrants a specific finding." *Faye Wright Neighborhood Planning Council v. Salem*, 1 Or LUBA 246, 252 (1980). Intervenor must demonstrate that the issue was adequately raised and "establish that the issue is relevant in some way (usually by showing that the issue raises a question regarding an applicable

approval standard)." *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402, 410-11 (2011). We will remand a decision where the local government has failed to adequately address criteria that are potentially applicable to the decision. *See Monogios and Co. v. City of Pendleton*, 184 Or App 571, 576, 56 P3d 960 (2002) (holding that LUBA erred in not remanding for the city to explain why a potentially applicable comprehensive plan policy "was satisfied or why that policy is not applicable"); *see also Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977) (meaningful review requires that the local decision-maker render adequate findings addressing relevant criteria).

The city identified CBMC 17.42 as applicable criteria. The city and petitioners do not dispute that intervenor raised the issue of the applicability of CBMC 17.42.040(C) below. Record 1678, 2263-64.[15] The city responds that

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[15] Intervenor argued below:

> "[Petitioners] now propose to remove approximately 17 trees (including roots) from the Property and Nenana [right-of-way] as shown in their vegetation removal plans. These trees are primarily Sitka spruce trees between 12- and 28-inch [diameter at breast height (DBH)]. [Petitioners'] arborist report describes the substantial structural root systems that support these larger spruce trees at the coast. All 17 of these trees are in the [OM] overlay, which prohibits removal of stabilizing vegetation. CBMC 17.42.040(C). [Petitioners'] proposal to remove these substantial trees violates this criterion. These types of large spruce trees are the primary type of oceanfront stabilizing vegetation protected by the [OM] overlay." Record 1678, 2263-64 (footnotes omitted).

"[i]ntervenor and others raised this criterion as an issue (Rec[ord] 1649, 1678, and elsewhere), but the City failed to respond or adopt any findings on this issue. Accordingly, if LUBA remands this decision, the remand should include an instruction to address this criterion." Respondent's Brief in Response to Cross-Petition for Review 15.

Petitioners do not dispute that the issue of the applicability and application of CBMC 17.42.040(C) was raised below and that the city failed to address that issue. Petitioners do not direct us to their argument below, if any, regarding CBMC 17.42.040(C). The application materials address the oceanfront setback standard in CBMC 17.42.050(6) and state: "The proposed home is not in a beach or a dune area. Therefore, no other CBMC 17.42 related standards apply." Second Supplemental Record 90. Petitioners respond that CBMC 17.42.040(C) is inapplicable and, thus, the city did not err in failing to address it. Petitioners do not argue that the city is prohibited from applying CBMC 17.42.040(C) or that the city impliedly interpreted that provision as inapplicable. Instead, petitioners request that we find, in the first instance, that CBMC 17.42.040(C) is inapplicable and, thus, the city's failure to adopt findings on that issue was not error.

CBMC 17.42.040(C) prohibits removing "stabilizing vegetation" "except as part of a foredune grading plan * * * or a nonstructural shoreline stabilization

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Oregon Coast Alliance also argued below that the application violates CBMC 17.42.040(C) and that petitioners had failed to demonstrate that criterion is satisfied. Record 1649.

program * * *." Petitioners argue that the reference to "foredunes" and "shoreline stabilization" indicates that CBMC 17.42.040(C) applies only to dune and shoreline areas, of which the subject property is not a part. The city found, and intervenor does not dispute, that "[t]he application does not propose any development in a beach and dune area, or on beaches, active dunes or other foredunes." Record 9.

Petitioners also argue that the context demonstrates that CBMC 17.42.040(C) applies only to beaches and dunes. Petitioners emphasize that CBMC 17.42.040(A) prohibits residential development "on beaches, active dunes, or other foredunes which are conditionally stable and that are subject to wave overtopping or ocean undercutting, or interdune areas that are subject to ocean flooding." It is undisputed that petitioners do not propose any development prohibited by CBMC 17.42.040(A). CBMC 17.42.040(B) addresses removal of sand from beach, active dunes, or conditionally stable dunes. It is undisputed that petitioners do not propose any development prohibited by CBMC 17.42.040(B). Petitioners argue that context provided by CBMC 17.42.040(A) and (B) supports their position that CBMC 17.42.040(C) does not apply to their proposed development, which does not involve any development in a beach or dune area.

Petitioners also argue that, even if CBMC 17.42.040(C) applies, it does not prohibit petitioners' development because the record does not demonstrate that petitioners' development activity would remove any "stabilizing vegetation." Petitioners point to the following CBMC 17.04.533 definition:

> "'Stabilizing vegetation' means plants that are able to withstand accretion of sand typically occurring in an active or conditionally stable dune area. Examples are: European beachgrass (Ammophila arenaria), American dunegrass/Sea lyme grass (elymus mollis), American beachgrass (Ammophila breviligulata), and Coast willow (Salix hookeriana)."

Petitioners argue that the protection of "stabilizing vegetation" as used in the code is meant to protect active or conditionally stable dune areas, which do not include the subject property or the Nenana Avenue right-of-way. Petitioners also argue that intervenor has not demonstrated that petitioners' development would result in removal of any "stabilizing vegetation." Petitioners argue that trees are not "stabilizing vegetation" as defined in CBMC 17.04.533.

While petitioners' interpretations are plausible, we cannot say that CBMC 17.42.040(C) does not apply as a matter of law. At a minimum, CBMC 17.42.040(C) is part of the code chapter, CBMC 17.42, that the city identified as applicable and CBMC 17.42.040(C) is potentially applicable to the proposed development. Intervenor's fourth contingent cross-assignment of error is a findings challenge. Petitioners do not cite ORS 197.829(2) or request that we exercise our discretion under ORS 197.829(2) to interpret CBMC 17.42.040(C) in the first instance in order to determine whether the city erred in failing to apply that criterion. ORS 197.829(2) provides: "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, [LUBA] may make its own determination of whether the local government decision is correct." Under ORS 197.829(2),

"LUBA *may* make an independent determination concerning the correctness of the local decision in circumstances where the local government has failed to interpret local legislation—at all or adequately for review—that is pertinent to the decision." *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768, *rev den*, 327 Or 620 (1998) (emphasis in original); *Green*, 245 Or App at 441. That authority is discretionary. We may, instead, remand the decision to the local government. *Id.* Given that the cross-assignment of error is a findings challenge, the issue was undisputedly raised below, and the disputed criterion is a local code criterion, we remand the decision for the city to address CBMC 17.42.040(C) in the first instance. On remand, the city must make findings addressing CBMC 17.42.040(C) explaining whether that criterion is applicable and, if it is, whether it is satisfied.

The fourth contingent cross-assignment of error is sustained.

FIFTH CONTINGENT CROSS-ASSIGNMENT OF ERROR

Intervenor argues that the city incorrectly found that the application complies with tree-removal standards. The CBMC allows for tree removal for construction of approved development, including dwellings and required vehicular access. CBMC 17.70.020(D). The developer must obtain a tree removal permit, submitted under the direction of a certified arborist including a site plan showing the location of the development and the location of trees on the subject property, "or off site (in the adjoining right-of-way or on an adjacent property)

whose root structure might be impacted by excavation associated with the proposed structure[.]" CBMC 17.70.030(Q).

The city found:

> "The subject property is located in the RL zone and a single-family dwelling is an outright allowed use; therefore, the applicants are authorized to remove trees in order to construct a structure such as a single-family home, including the vehicle access. The applicants have submitted the required site plan for the proposed house as well as two potential accesses. To the extent the City approves the application for development, it would have been subject to conditions to ensure the other provisions of this chapter are met." Record 13.

Intervenor argues that the city erred in finding that petitioners satisfied the tree removal standards because petitioners did not seek and the city did not approve removal of two mature spruce trees that straddle the northern property line shared with intervenor's property. Record 843. Intervenor argues that petitioners' dwelling foundation excavation will effectively terminate those trees' roots in that direction and intervenor submitted expert evidence that those two trees would not survive. Record 2270. Causing the death of a tree within two years qualifies as "tree removal." CBMC 17.04.560. Petitioners did not seek or obtain a tree-removal permit for those two boundary trees. Intervenor argues that the city should have denied the applications based on unmet tree-removal standards.

The city responds, and we agree, that the city properly found that the proposed development would have complied with the tree removal criteria with respect to those trees for which petitioners sought a tree removal permit. The fact

that petitioners did not request a tree removal permit for the two disputed trees and that intervenor and petitioners disagree whether the development will kill those two trees does not mean that the city erred. The city considered and decided the requested tree removal. Tree removal without a permit is prohibited. CBMC 17.70.015. The challenged decision does not approve the removal of the two disputed trees.

The fifth contingent cross-assignment of error provides no basis for remand and is denied.

SIXTH CONTINGENT CROSS-ASSIGNMENT OF ERROR

Intervenor argues that the decision could not have approved any development on the Nenana Avenue right-of-way. Intervenor argues that (1) the application does not seek approval of development in the Nenana Avenue right-of-way; (2) the city cannot approve petitioners' use of the Nenana Avenue right-of-way without the prior grant of an easement from the city; (3) improvements in the right-of-way require a right-of-way permit, which is not included as part of the decision or consolidated application; (4) development in the right-of-way requires conditional use approval; (5) petitioners' vehicular access plan does not meet city road standards; and (6) petitioners' vehicular access plan does not satisfy the city geologic hazard criteria.

A. Petitioners applied for approval of development in the Nenana Avenue right-of-way.

Petitioners submitted an application for development of vehicular access in the Nenana Avenue right-of-way. Second Supplemental Record 72-86; Record 351. We reject intervenor's argument that the application did not seek approval for vehicular access.

B. City land use approval does not require a prior grant of an easement or right-of-way permit from the city.

The city responds, and we agree, that the Nenana Avenue right-of-way is dedicated and intended for access to petitioners' property. Intervenor has not cited any land use law that requires petitioners to obtain prior approval—be it an easement or a right-of-way permit—in order for the city to approve petitioners' land use application for development of vehicular access.[16]

C. The applicable CBMC does not require conditional use approval for petitioners' proposed development in the right-of-way.

The city responds, and we agree, that vehicular access on the Nenana Avenue right-of-way does not require a conditional use permit. Intervenor relies on CBMC 17.42.030(F)(3), which requires conditional use approval for new vehicular access in a right-of-way in the OM overlay zone. [17] The city concluded

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[16] The vehicular access application does not include a review of a right-of-way permit under CBMC 12.36.30.

[17] CBMC 17.42.030(F)(3) provides:

that it could not apply CBMC 17.42.030(F)(3) under ORS 227.178(3), the so-called "goal-post rule" because that CBMC subsection was added to the code after petitioners' application was submitted.[18] Record 6.

Intervenor argues that the goal-post rule does not apply because petitioners did not apply for approval of vehicular access and, even if they did, the application was incomplete when filed and it remains incomplete today. As

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> "For lots or right-of-way that do not consist of a beach, active dunes, or other foredunes which are conditionally stable and that are subject to wave overtopping or ocean undercutting, or interdune areas that are subject to ocean flooding: the following uses and activities are permitted subject to provision of Chapter 17.80, Conditional Uses:
>
> "* * * * *
>
> "3. A new road, driveway approach, or other access that has fifty feet or more of linear length in OM Zone right-of-way, or in right-of-way within one hundred feet of a stream, watercourse or wetland. Access is new if vehicular access did not previously exist at the location, it was blocked for a period of one year, or an unimproved right-of-way would be improved to provide vehicular access. Alteration of an existing access is not new access."

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

explained above, petitioners did apply for land use approval for vehicular access. Intervenor argues that the application is incomplete, but does not point to any evidence that the city requested additional information from petitioners or, if the city did, that petitioners failed to provide that information within 180 days, as required for ORS 227.178(3) to apply. Thus, intervenor has not established that the city erred by failing to apply CBMC 17.42.030(F)(3) and conditional use criteria to the vehicular access application.[19]

D. The city was not required to determine whether petitioners' vehicular access plan meets city road standards.

Intervenor argues that petitioners' vehicular access plan is required to and does not satisfy city road standards. The city responds, and we agree, that the issue before the city and us is whether the proposed vehicular access is consistent with the city's land use regulations. The city road standards are not land use regulations and the challenged decision did not apply or consider these standards. Accordingly, this argument provides no basis for remand.

E. The city did not err in concluding that it could not apply the city's geologic hazard criteria to petitioners' application for vehicular access.

Intervenor argues that the city should have denied the application because petitioners' vehicular access plan does not satisfy the city's geologic hazard

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[19] Intervenor argues that a 2021 right-of-way permit application is incomplete and requires an access easement. As we explained above, the application for land use approval for vehicular access is distinct from a right-of-way permit.

criteria. It is undisputed that the subject property and the Nenana Avenue right-of-way are in landslide hazard areas. As such, CBMC 17.50.040 requires a geological site investigation report. CBMC 17.50.040 provides, in part:

> "2. Where recommended by the geologic site investigation report, or required by the building official, an engineering report prepared by a registered civil engineer shall be prepared. The report shall discuss the engineering feasibility of the proposed development and include findings and conclusions for: the design and location of structures; the design and location of roads; the design and location of utilities; land grading practices, including excavation and filling; stormwater management; and vegetation removal and replanting.
>
> "3. The burden of proof shall be upon the applicant to show construction feasibility. A proposed use will be permitted only where:
>
> "a. The geologic site investigation report indicates that there is not a hazard to the use proposed on the site or to properties in the vicinity; or
>
> "b. The geologic site investigation report and engineering report specifies engineering and construction methods *which will eliminate the hazard, or will minimize the hazard to an acceptable level*." (Emphasis added.)

With respect to those standards, the city found that the proposed dwelling and vehicular access are in an area of active sliding, called the "S-Curves" slide. Record 10. Petitioners' geotechnical engineer concluded that "the slide is still moving fractions of an inch on deep shear surfaces in high intensity rainfall events," and that "it is not feasible to stop all future movements of the S-Curves slide." Record 159, 10. The city found that petitioners failed to specify

engineering and construction methods that will eliminate the hazard or will minimize the hazard to an acceptable level. With respect to the dwelling, the city found that petitioners' plans address the hazard of shallow land sliding but do not address "the deeper, underlying landslide." Record 11. With respect to vehicular access, the city found that petitioners did not provide a slope-stability analysis. *Id.*

However, the city concluded that it could not apply the geologic hazard criteria because CBMC "17.50.040(A)(3) requires the [city] to make a subjective decision in determining whether the engineering and construction methods specified in [petitioners'] expert reports 'will minimize the hazard to an acceptable level.'" Record 11.

Intervenor argues that the clear and objective standards requirement does not apply to vehicular access improvements in the public right-of-way. Intervenor argues that the access improvements are not "the development of housing" as that phrase is used in *former* ORS 197.307(4) (2022). Intervenor argues that development of access to a dwelling is not "the development of housing" and the fact that petitioners submitted their vehicular access application with their dwelling application does not convert the vehicular access application into an application for "the development of housing." Intervenor cites *GPA 1, LLC v. City of Corvallis*, in which we concluded that an application for public road improvement did not qualify as "needed housing" that was subject to the clear and objective requirement under an older version of ORS 197.307(4). 73 Or

LUBA 339, 350-51 (2016). That case does not assist intervenor, because that case concerned only an application to construct an arterial road that was identified in the city's comprehensive plan, and was not consolidated with other applications for residential development.

The city and petitioners respond that the proposed vehicular access is an essential part of petitioners' proposed "development of housing" and, thus, state law requires the city to apply only clear and objective standards to the vehicular access. *Former* ORS 197.307(4) (2022); ORS 227.173(2); ORS 227.175(4). The city and petitioners point out that we have previously applied the clear and objective requirement to local subdivision and planned unit development (PUD) criteria regulating development of vehicular access to a proposed housing development over public right-of-way. In *Group B, LLC v. City of Corvallis*, we concluded that a city cul-de-sac street design standard that the city had applied to deny the PUD application was unclear. 72 Or LUBA 74, 86-87, *aff'd*, 275 Or App 577, 366 P3d 847 (2015). In *Walter v. City of Eugene*, we concluded that a PUD standard which required "[t]he street layout of [a] proposed PUD shall disperse motor vehicle traffic onto more than one public local street" was not "clear and objective." 73 Or LUBA 356, 357, 360-64, *aff'd*, 281 Or App 461, 383 P3d 1009 (2016). In *Legacy Development Group*, we concluded that street traffic design standards that the city applied to the petitioner's subdivision application were not clear and objective and could not be applied to deny the petitioner's subdivision application. ___ Or LUBA at ___ (slip op at 10-14). In *Nieto*, we

concluded that a subdivision design standard for development of vehicular access and circulation was not clear and objective. ___ Or LUBA at ___ (slip op at 10-13). While all of those cases concerned residential development and vehicular access standards, none involved an application for or the regulation of actual physical development of off-site vehicular access for a proposed residential development. Instead, those cases concerned standards applied to deny the residential development itself under subdivision and PUD site design review standards.

It appears that the issue presented in this case is novel and requires us to construe the meaning of "the development of housing" in *former* ORS 197.307(4) (2022). Intervenor argues that "the development of housing" means the development of housing units—that is residential dwelling structures and their immediate appurtenances. Differently, the city and petitioners argue that "the development of housing" includes development of vehicular access necessary for the development and use of a dwelling structure. The interpretive issue is whether the phrase "the development of housing" is limited to dwelling development or includes a related vehicular access necessary to access the dwelling development.

In interpreting statutes, we examine the statutory text, context, and legislative history with the goal of discerning the enacting legislature's intent. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). We are independently responsible for correctly construing statutes. *See* ORS 197.805

(providing the legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review"); *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) ("In construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information that they supply to the court." (citing *Dept. of Human Services v. J. R. F.*, 351 Or 570, 579, 273 P3d 87 (2012); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997))).

1. Text

Starting with the text, the phrase "the development of housing" is not defined for the purposes of *former* ORS 197.307(4) (2022). The individual terms "development" and "housing" are also undefined in *former* ORS 197.286 (2022), *amended by* Oregon Laws 2023, chapter 283, section 1, chapter 326, section 8, *renumbered as* ORS 197A.015 (2023), which defined terms used in *former* ORS 197.307(4) (2022). "When the legislature has not provided an express definition for a particular term, we generally look to the term's plain and ordinary meaning." *State v. Kimble/Berkner*, 236 Or App 613, 618, 237 P3d 871 (2010). "The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage." *Pete's Mountain Homeowners v. Ore. Water Resources*, 236 Or App 507, 516-17, 238 P3d 395 (2010). In its the plain meaning, "development" means "the act, process, or result of developing," and to "develop," as a resource, means "to make available or usable." *Webster's* at 618. "Housing" means "shelter: lodging" "something that covers or protects"

"dwellings provided for numbers of people or for a community[.]" *Webster's* at 1097.[20]

The plain meaning of the phrase "development of housing" is the act or process of making shelter available or usable. Under the plain meaning, the act or process of making housing available or usable is broad and encompasses development of vehicular access necessary to develop and use a dwelling unit. On the whole, the text is broad and supports the city and petitioners' proffered interpretation. At a minimum, the text is ambiguous and broad enough to encompass that interpretation.

2. Context

Context includes other parts of the same statute. *Force v. Dept. of Rev.*, 350 Or 179, 188, 252 P3d 306 (2011). *Former* ORS 197.307(4) (2022) subsections (a) and (b) describe the "standards, conditions and procedures" regulating the development of housing, and, therefore, may be indicate legislative intent as to the meaning of "the development of housing." Subsection (a) provides that those standards, conditions, and procedures "[m]ay include, but are not limited to provisions regulating the density or height of a development." Density and height relate to the size, shape, and use of dwelling structures and not to development of access. This context can be read to support intervenor's proffered

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[20] "Housing development" means "a group of individual dwellings or of apartment houses commonly of similar design and built and leased under one management." *Webster's* at 1097.

interpretation. Subsection (b) provides that applicable standards, conditions, and procedures "[m]ay not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." This suggests that the legislature intended broad application of the clear and objective standard to regulations that have the ultimate effect of discouraging development of needed housing, including those regulations that do not directly regulate development of dwelling structures. This context supports the city and petitioners' proffered interpretation.[21]

Context includes other related statutes. *State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012). ORS 227.215 authorizes city regulation of the "development of land." At all pertinent times, ORS 227.215(1) defined "development" as

> "a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access."

"Development" as defined in ORS 227.215 is broad and supports the idea that "the development of housing" includes vehicular access to a dwelling.

Former ORS 197.307(4) (2022) is part of the needed housing statutes that include the housing needs analysis and buildable lands inventory processes.

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[21] We observe that (b) applies only to needed housing. Nevertheless, that subject provides context for the legislature's intended scope of the clear and objective standard vis-à-vis dwelling structures versus access to dwelling structures.

"'Buildable lands' means lands in urban and urbanizable areas that are suitable, available and necessary for residential uses. 'Buildable lands' includes both vacant land and developed land likely to be redeveloped." *Former* ORS 197.286(1) (2022); *see also* OAR 660-008-0005(2) (providing similar definition in the administrative rule implementing Statewide Planning Goal 10 (Housing) and the needed housing statutes). Those rules contemplate that vacant land may be inventoried and developed to meet a city's housing needs. Vacant land may not have established vehicular access for development and use of residential dwelling units. This scheme, and definition of "buildable lands," supports the city and petitioners' argument that the legislature intended the requirement for clear and objective standards to apply broadly to include vehicular access because the legislature's intent would be thwarted if a city could deny the development of housing based on unclear and subjective access standards. We do not believe that the legislature intended to limit the requirement for clear and objective standards to the development of dwelling units. Instead, we are convinced by the text and context that the city correctly concluded that the requirement for clear and objective standards applies to petitioners' application for vehicular access that is necessary to develop and use the dwelling on residentially zoned property within the city.

3. Legislative History

Legislative history may be useful in determining the legislature's intention. *Gaines*, 346 Or at 172; ORS 174.020. *Former* ORS 197.307 (2022) was enacted

in 1981 as part of the needed housing statutes that codified the St. Helens Housing Policy (the Policy), which LCDC had adopted in 1979. Or Laws 1981, ch 884, §§ 5-6; *see also Robert Randall Company v. City of Wilsonville*, 15 Or LUBA 26, 32 (1986) (so explaining). The initial purpose behind the Policy was to address local government attempts to exclude certain housing types that met lower-cost housing needs. *Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 148.

Intervenor argues that the Policy demonstrates that the legislature did not intend the clear and objective requirement to apply to proposals for developing a public right-of-way. Intervenor argues that the legislature intended the clear and objective requirement to apply only to "housing" because the Policy provides examples of clear and objective approval standards that a local government could apply, including "that all multifamily development have one and one-half parking spaces per unit and direct access to a paved city street"; "the project is served by paved city streets with sidewalks"; and a mobile home park "is located on either a collector or arterial street paved to city standards." Intervenor-Respondent's Brief 40 (quoting the Policy). Intervenor argues that this reference to what intervenor characterizes as "preexisting street access" demonstrates that LCDC and, thus, the legislature, did not consider access improvements to be a part of "the development of housing" that may only be subject to clear and objective standards.

We do not find that argument persuasive as to the legislature's intention. The purpose of those cited examples was not to define the scope of "the

development of housing." Instead, they are examples of clear and objective standards contrasted with discretionary standards. Under the Policy, a local government may make street access a standard of approval, but it must do so in a clear and objective manner. The quoted examples suggest that the legislature intended that access standards applied to "the development of housing" be only clear and objective.

The amendment history evidences the legislature's intention that the clear and objective requirement be broadly applied to facilitate the development of housing. *See State v. Partain*, 349 Or 10, 20, 239 P3d 232 (2010) ("The history of the amendment confirms that general sense of the legislature's intentions."). We explained in *Warren v. Washington County* that Senate Bill (SB) 1051 (2017) amended several statutes including *former* ORS 197.307(4) (2022). 78 Or LUBA 375, 379-80 (2018), *aff'd*, 296 Or App 595, 439 P3d 581, *rev den*, 365 Or 502 (2019). SB 1051 made two changes to the statute. First, SB 1051 expanded the clear and objective requirement from applying only to applications for "needed housing" to applications for "the development of housing, including needed housing." Second, SB 1051 deleted the phrase "on buildable land." As we explained in *Warren*, those changes expanded the applicability of the clear and objective requirement to all development of housing whether or not "needed

housing" on "buildable land."[22] *Id.* at 384-87. Those changes support a conclusion that the legislature intended that the clear and objective requirement be broadly applied.

Intervenor also argues that the city's home rule authority and police power allow the city to regulate rights-of-way for safety and *former* ORS 197.307(4) (2022) does not express a legislative intent to preempt that local authority. Petitioners respond, and we agree, that the city's application of *former* ORS 197.307(4) (2022) does not depend on a conclusion that the statute preempts local authority to regulate rights-of-way. Instead, with respect to the development of housing, the city may continue to regulate use of the right-of-way. However, those regulations must be clear and objective.

Based on the above, we conclude that the city did not misconstrue the meaning of "the development of housing" in *former* ORS 197.307(4) to encompass petitioners' application for vehicular access. Accordingly, the city did not err in refusing to apply the geologic hazard criteria to the applications and did not err in failing to deny the application based on noncompliance with those criteria.

The sixth contingent cross-assignment of error is denied.

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[22] The legislature has more recently clarified that the requirement for clear and objective standards applies only "on land within an urban growth boundary." ORS 197A.400(1); HB 3197 (2023).

DISPOSITION

We will reverse a decision and order the local government to grant approval if the decision "is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." ORS 197.835(10)(a)(A).[23] Petitioners argue that the city's denial "is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances" and request that we reverse the denial with an order to approve. ORS 197.835(10)(a)(A). ORS 197.835(10)(a) "requires reversal, and precludes remand, of a denial decision when LUBA determines on the basis of the record that the local government lacks the discretion to deny the development application." *Stewart v. City of Salem*, 231 Or App 356, 375, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010).

We sustained petitioners' first assignment of error because we concluded that the city is prohibited from applying the CBMC definition of "structure" to deny the application, because the term is not clear and objective, in contravention

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[23] ORS 197.835(10)(a), provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
>
> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

of *former* ORS 197.307(4) (2022). We also sustained petitioners' second assignment of error because we concluded that the city denied the application based on a misconstruction of the clear-vision area standard by relying on considerations that are not contained in the express language of that standard. We concluded that the city erred by deciding that the record does not provide sufficient evidence to satisfy the clear-vision area standard, and that petitioners have established that the evidence in the record demonstrates that criterion is satisfied as a matter of law. Our disposition under those assignments of error demonstrate that the city lacks the discretion to deny the development application based on those criteria.

However, we also sustain intervenor's fourth contingent cross-assignment of error that the city failed to make adequate findings on CBMC 17.42.040(C), which prohibits removal of stabilizing vegetation and is a criterion that requires further review and findings from the city. While petitioners' response explains in detail why they believe that CBMC 17.42.040(C) does not apply, we do not exercise our discretion to interpret that provision in the first instance and, instead remand to the city for further findings. In these circumstances, where the city has failed to address a potentially applicable criterion, and no party has demonstrated that the city is prohibited from applying that criterion, it would be premature for us to determine that the city lacks the discretion to determine whether the criterion applies and, if it does, apply that criterion. Accordingly, reversal is not appropriate. *Compare Oster v. City of Silverton*, 79 Or LUBA 447, 457-58 (2019)

(reversing the city decision with an order to approve after explaining that the city had not identified any applicable standards that would require any further review).

As explained above, ORS 197.835(10)(a)(A) requires reversal and precludes remand "if the board finds [that b]ased on the evidence in the record, that the local government decision *is outside the range of discretion* allowed the local government under its comprehensive plan and implementing ordinances[.]" (Emphasis added.) "A city may not deny an application for a housing development located within the urban growth boundary *if the development complies with clear and objective standards*, including clear and objective design standards contained in the city comprehensive plan or land use regulations." ORS 227.175(4)(b)(A) (emphasis added). Intervenor has identified CBMC 17.42.040(C) as a potentially applicable criterion that the city failed to address. The remedy for that error is remand, which may result in a modified city decision. Petitioners have not established that CBMC 17.42.040(C) is inapplicable, either under the city code or because it is unclear or subjective, or that the record establishes that the application complies with CBMC 17.42.040(C). Accordingly, petitioners have not established that the city's "range of discretion" is limited to approving the application as proposed. Accordingly, reversal with an order to approve is not appropriate.

The city's decision is remanded.

RYAN, Board Chair, concurring.

I write separately because while I agree with the disposition of remand, I wish to emphasize that the city's range of discretion on remand is very narrow, and limited to considering all of the parties' arguments on remand regarding whether CBMC 17.42.040(C) can be applied to petitioners' application. Further, in my view, if the city determines that it may apply the criterion to petitioners' application, it must give petitioners the opportunity to meet their burden of proof to demonstrate that the criterion is satisfied because the city council will be applying the criterion for the first time on remand.