

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

3  
4                   NICHOLAS KAMPS-HUGHES,  
5                                   *Petitioner,*

6  
7                                   vs.

8  
9                                   CITY OF EUGENE,  
10                                   *Respondent.*

11/29/18 PM 1:41 LUBA

12                                   LUBA No. 2018-091

13  
14                                   FINAL OPINION  
15                                   AND ORDER

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17                   Appeal from City of Eugene.

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19                   Bill Kloos, Eugene, filed the petition for review and argued on behalf of  
20 petitioner. With him on the brief was the Law Office of Bill Kloos PC.

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22                   Lauren A. Sommers, Assistant City Attorney, Eugene, filed the response  
23 brief and argued on behalf of respondent.

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25                   RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board  
26 Member, participated in the decision.

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28                                   REMANDED                                   11/29/2018

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

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**NATURE OF THE DECISION**

Petitioner appeals a zone verification decision issued to petitioner by a city planner.

**FACTS**

Petitioner owns property that is zoned R-1 and is accessed only by an alley. In July 2018, petitioner submitted a zone verification request to the city, requesting a determination whether an 800 square-foot detached accessory dwelling is a permitted use on his property. A city planner issued a zone verification decision that concluded that a detached accessory dwelling is not a permitted use on petitioner’s property because Eugene Code (EC) 9.2741(2) prohibits an accessory dwelling on alley access lots. This appeal followed.

**ASSIGNMENT OF ERROR**

In his assignment of error, petitioner argues that the city’s decision improperly failed to consider ORS 197.312(5) in evaluating his zoning verification request, and that ORS 197.312(5) requires the city to allow a detached accessory dwelling on petitioner’s property, notwithstanding the prohibition in EC 9.2741(2) on accessory dwellings on alley access lots.<sup>1</sup> We

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<sup>1</sup> EC 9.1080 provides:

“Zone Verification. Zone verification is used by the city to evaluate whether a proposed building or land use activity would be a permitted use or be subject to land use application approval or special standards applicable to the category of use and the zone of

1 briefly summarize ORS 197.312(5) and related legislation before we turn to the  
2 assignment of error.

3 In 2017, the Oregon legislature enacted Senate Bill 1051 (SB 1051), at  
4 Oregon Laws 2017 Chapter 745, sections 1-14. As relevant here, SB 1051,  
5 Section 6 amended ORS 197.312 to add subsection (5), which now provides, in  
6 part:

7 “(a) A city with a population greater than 2,500 or a county with  
8 a population greater than 15,000 shall allow in areas zoned  
9 for detached single-family dwellings the development of at  
10 least one accessory dwelling unit for each detached single-  
11 family dwelling, subject to reasonable local regulations  
12 relating to siting and design[.]”

13 SB 1051, Section 12 provided for a delayed operative date for the amendments  
14 to ORS 197.312(5): July 1, 2018. SB 1051, Section 13(3) provided that the  
15 provisions of ORS 197.312(5) apply to “permit applications for accessory

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the subject property. The city may use zone verification as part of the review for a land use application or development permit, or where required by this land use code. As part of the zone verification, the planning and development director shall determine whether uses not specifically identified on the allowed use list for that zone are permitted, permitted subject to an approved conditional use permit or other land use permit, or prohibited, or whether a land use review is required due to the characteristics of the development site or the proposed site. This determination shall be based on the requirements applicable to the zone, applicable standards, and on the operating characteristics of the proposed use, building bulk and size, parking demand, and traffic generation. Requests for zone verification shall be submitted on a form approved by the city manager and be accompanied by a fee pursuant to EC Chapter 2.”

1 dwelling units submitted for review on or after July 1, 2018.”<sup>2</sup> As noted,  
2 petitioner submitted his zone verification request after the operative date of SB  
3 1051.<sup>3</sup>

4 The crux of petitioner’s assignment of error is that the city was required to  
5 consider ORS 197.312(5) in evaluating his zone verification request, and  
6 pursuant to ORS 197.312(5), the city may not prohibit an accessory dwelling on  
7 petitioner’s property because ORS 197.312(5)(a) provides that the city “shall  
8 allow” accessory dwellings in all zones in the city in which a detached single  
9 family dwelling is allowed. Accordingly, we understand petitioner to argue,  
10 while the city’s conclusion that EC 9.2741(2) prohibits an accessory dwelling on  
11 petitioner’s alley access lot is correct under the EC, that conclusion is not correct  
12 when considering ORS 197.312(5)(a).

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<sup>2</sup> In January 2018, the city began a process to amend the EC to implement SB 1051. In June 2018, the city adopted two ordinances, Ordinance 20595 and Ordinance 20594 (the Ordinances) to implement in part SB 1051. In an opinion issued this date, we remanded the Ordinances. *Home Builders Ass’n of Lane County v. City of Eugene*, \_\_ Or LUBA \_\_ (LUBA Nos. 2018-063/064, November 29, 2018).

<sup>3</sup> ORS 197.646(1) requires local governments to amend their land use regulations to implement “new requirement[s]” in a goal, statute or administrative rule, and unless and until a local government does so, the new requirement applies directly to the local government’s land use decisions, pursuant to ORS 197.646(3).

1           **A. Waiver**

2           The city responds initially that petitioner is precluded from raising the  
3 issues regarding ORS 197.312(5) because the issue was not raised during the  
4 proceedings before the city. ORS 197.835(3) provides in relevant part that  
5 “[i]ssues [raised at LUBA] shall be limited to those raised by any participant  
6 before the local hearings body as provided by ORS 197.195[.]” The city cites  
7 ORS 227.175(11)(b), which provides that zone verification decisions such as the  
8 challenged decision shall “[b]e subject to the jurisdiction of the Land Use Board  
9 of Appeals in the same manner as a limited land use decision,” and argues that  
10 pursuant to ORS 197.835(3), LUBA’s review of limited land use decisions is  
11 limited to issues raised before the city.

12           ORS 197.195(3)(c)(A) provides that the notice and procedures used by a  
13 local government must state that issues which may provide the basis for an appeal  
14 to LUBA must be raised in writing prior to the expiration of the 14-day comment  
15 period prior to a decision. In *ONRC v. City of Oregon City*, 28 Or LUBA 263,  
16 267 (1994), we held that our review of limited land use decisions is limited to  
17 issues raised below, unless the local government did not satisfy the procedural  
18 requirements of ORS 197.195. Here, the city did not follow or satisfy the  
19 procedural requirements of ORS 197.195 and the city does not take the position  
20 that it did. Accordingly, our review of the challenged decision is not limited to  
21 the issues raised below.

1           **B.    ORS 197.312(5) Is Not Limited to Only Applications for a**  
2           **Statutory Permit**

3           The city next responds that SB 1051, Section 13(3) limits application of  
4    ORS 197.312(5) only to applications for a “permit,” as defined in ORS  
5    227.160(2).<sup>4</sup> SB 1051, Section 13 provides that “the amendments to ORS  
6    197.312 by Section 6 of this 2017 Act apply to permit applications for accessory  
7    dwelling units submitted for review on or after July 1, 2018.” According to the  
8    city, because a zone verification decision is, by definition in ORS 227.160(2)(b),  
9    not a statutory permit, ORS 197.312(5) does not apply, and the city planner  
10   correctly concluded that EC 9.2741(2) prohibits an accessory dwelling on  
11   petitioner’s property.

12           We disagree with the city. First, SB 1051, Section 13(3) does not cross  
13   reference or otherwise cite the definition of “permit” in ORS Chapter 227.160(2),  
14   and similarly the definition of “permit” in ORS 227.160(2) limits its use “[a]s

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<sup>4</sup> ORS 227.160 provides:

“(2) ‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. ‘Permit’ does not include:

“(a) A limited land use decision as defined in ORS 197.015;

“(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

1 used in ORS 227.160 to 227.186.” Absent any reference to the definition at ORS  
2 227.160(2), or other definition included in SB 1051, it is not clear that the  
3 legislature intended the word “permit” or the phrase “permit application” to be  
4 limited to statutory permits.

5 Second, we understand SB 1051, Section 13(3) to have provided for a  
6 grace period for application of the new law, before which the provisions of ORS  
7 197.312(5) did not apply, and after which the provisions applied.<sup>5</sup> We do not  
8 understand SB 1051, Section 13(3) to have limited the application of ORS  
9 197.312(5) only to statutory permits.

10 Third, as petitioner points out in his reply brief, ORS 197.312(5)(a) is a  
11 separate provision of SB 1051 from Section 13(3), and it requires the city to  
12 “allow” accessory dwellings in all zones in the city in which a detached single  
13 family dwelling is allowed, including the R-1 zone. The city may limit accessory  
14 dwellings in those zones only pursuant to “reasonable local regulations relating  
15 to siting and design.”

16 **C. “Reasonable \* \* \* Regulations Relating to Siting and Design”**

17 Petitioner next argues that EC 9.2741(2) is not a “reasonable local  
18 regulation relating to siting and design,” and explains why petitioner believes his  
19 interpretation is the correct interpretation of the phrase as used in ORS

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<sup>5</sup> We note that SB 1051, Section 13(3) is not included in the codified version of ORS 197.312(5).

1 197.312(5). The city responds that EC 9.2741(2) is a “reasonable local regulation  
2 relating to siting and design,” and explains why that is so.

3 Petitioner asks LUBA to “order[] [the City] to reissue the decision and  
4 confirm the validity of the development proposal as requested.” Petition for  
5 Review 12. The city requests that if LUBA concludes that the city should have  
6 considered ORS 197.312(5) in evaluating petitioner’s zone verification request,  
7 that LUBA remand the decision to the city in order for the city to evaluate  
8 whether EC 9.2741(2) is a “reasonable local regulation relating to siting and  
9 design” in the first instance.

10 We agree with the city that the proper remedy is to remand the decision to  
11 the city in order for the city to consider in the first instance whether EC 9.2741(2)  
12 is a “reasonable local regulation relating to siting and design” within the meaning  
13 of ORS 197.312(5). OAR 661-010-0073(2)(d).

14 The assignment of error is sustained.

15 The city’s decision is remanded.