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

NICHOLAS KAMPS-HUGHES,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2019-028

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

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

Emily N. Jerome, Deputy City Attorney, Eugene, filed a response brief and argued on behalf of respondent.

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

RUDD, Board Member, concurred in the decision.

REMANDED 06/06/2019

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

Petitioner challenges a zoning verification decision by a city planner advising petitioner that a proposed second residential structure is not a permitted use on property zoned Low-Density Residential (R-1).

FACTS

Petitioner owns the subject property and resides in another state. The subject property is comprised of approximately 5,663 square feet, zoned R-1, and accessed only via an alleyway. Record 35, 51. The subject property is developed with a 1,680-square-foot, two-story, four-bedroom, two-bathroom, single-family dwelling that is currently used as a residential rental (existing dwelling). Record 35, 50.

This case is petitioner's second attempt to obtain confirmation that direct application of state law entitles him to build an additional, detached dwelling on his property. In a prior appeal, petitioner challenged the city's zoning verification decision in which the city decided that an accessory dwelling unit (ADU) was not a permitted use of the subject property based on a city code provision that prohibits ADUs on alley-access lots such as the subject property. *Kamps-Hughes v. City of Eugene*, ___ Or LUBA ___ (LUBA No 2018-091, Nov 29, 2018). We remanded the zoning verification decision because we agreed with petitioner that the city had erred by not directly applying ORS 197.312(5), discussed below.

Petitioner then filed a second request for zone verification to develop an 800-square-foot, single-story, one-bedroom, dwelling on the subject property intended for use as a residential rental (second dwelling).[1] Record 33, 35. For reasons explained below, the city planner determined that the proposed second dwelling is not a permitted use in the R-1 zone. This appeal followed.

ASSIGNMENT OF ERROR

This appeal requires us to decide whether the second dwelling is an "accessory dwelling unit" that is permitted in the R-1 zone under ORS 197.312(5), which provides:

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[1] Eugene Code (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 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."

> "(5)(a) A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas within the urban growth boundary that are zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.
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> "(b) As used in this subsection, 'accessory dwelling unit' means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling."

The city planner determined that the second dwelling is not an "accessory dwelling unit" as defined in ORS 197.312(5). The city planner reasoned:

> "ORS 197.312(5) does not pertain to every residential structure that would be placed on the same lot as another single-family dwelling. It is more specific. By its own terms, the statute pertains to a residential structure that is '*used in connection with*' *or* '*accessory to*' another single-family dwelling. Your proposed use does not appear to be a residential structure of that nature. Your application materials do not specify any way in which the proposed detached residential structure would be '*used in connection with*' *or* '*accessory to*' *another single-family dwelling*. With respect to its relationship with/to another single-family dwelling, you assert only that the new structure would be located on the same lot as another single-family dwelling. This is an insufficient 'connection' or 'accessory' relationship to give the words in ORS 197.312(5)(b) any real meaning. Further, you take issue with City standards that may demonstrate such a 'connection' or 'accessory' relationship between the proposed structure and the existing single-family dwelling; you assert that the lot has insufficient area for a shared open space and that there would be no owner/renter relationship between the two dwellings. There is nothing in your request that explains why the provisions of ORS 197.312 would apply to your proposed use. With that in mind, no further analysis under ORS 197.312(5) is needed."

Record 3 (emphasis in original).[2]

This appeal requires us to interpret ORS 197.312(5), specifically the phrases "used in connection with or * * * accessory to a single-family dwelling." In interpreting a land use regulation, we examine text, context, and legislative history with the goal of discerning the intent of the governing body that enacted the law. *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We are required to correctly interpret the legislature's intent, independently of the parties' arguments. *See* ORS 197.805 (providing legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review"); *Weldon v. Bd. of Lic. Pro. Counselors and Therapists*, 353 Or 85, 91, 293 P3d 1023 (2012) (court has the obligation to correctly construe statutes, regardless of parties' arguments); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.").

In 2017, the Oregon legislature enacted Senate Bill 1051 (SB 1051). Or Laws 2017, ch 745. The legislative policy underlying SB 1051 is to increase

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[2] The city planner also concluded that the second dwelling is not a "secondary dwelling unit" as defined in the city code because petitioner, the owner, does not occupy either dwelling. Record 3. Petitioner does not challenge that determination. The city does not argue that the city planner's code interpretation provides an independent basis to affirm the decision. We conclude that it does not and do not discuss that issue any further in this decision.

available housing. *Warren v. Washington County*, ___ Or LUBA ___, ___ (LUBA No 2018-089, Nov 14, 2018) (slip op at 9, 15, 19), *aff'd*, 296 Or App 595, 439 P3d 581, *appeal pending* (S066721) (observing that SB 1051 was intended to increase housing supply); *Warren*, 296 Or App at 600 (observing that SB 1051 was enacted with the goal of promoting housing development). As relevant here, SB 1051, section 6, amended ORS 197.312 to add subsection (5). House Bill 4031 amended subsection (5) to clarify that its application is limited to areas within the urban growth boundaries. Or Laws 2018, ch 15, § 7. In *Kamps-Hughes*, ___ Or LUBA at ___ (LUBA No 2018-091, Nov 29, 2018) (slip op at 7) we held that subsection (5) "requires the city to 'allow' accessory dwellings in all zones in the city in which a detached single family dwelling is allowed, including the R-1 zone. The city may limit accessory dwellings in those zones only pursuant to 'reasonable local regulations relating to siting and design.'" It is undisputed that ORS 197.312(5) applies directly to the city's land use decisions.[3]

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[3] 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). In January 2018, the city began a process to amend the city's code to implement SB 1051. In June 2018, the city adopted two ordinances: Ordinances 20595 and 20594 (the Ordinances) to implement in part SB 1051. We remanded the Ordinances in *Home Builders Ass'n of Lane County v. City of Eugene*, __ Or LUBA __ (LUBA Nos 2018-063/064, Nov 29, 2018).

A. Accessory To

Petitioner argues that the second dwelling is "accessory to" the existing dwelling because the second dwelling will have a smaller footprint, less square footage, and fewer bedrooms than the existing dwelling and the two structures will share the same lot. Petition for Review 17.

The term "accessory," as used in ORS 197.312, is not defined by statute or administrative rule. Accordingly, we resort to dictionary definitions to determine the ordinary meaning of that term. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193, 202, *aff'd*, 260 Or App 562, 318 P3d 1146 (2013). We are mindful, however, that dictionary definitions are limited in their helpfulness. *See State v. Cloutier*, 351 Or 68, 96, 261 P3d 1234 (2011) ("Dictionaries, after all, do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used." (Emphasis in original.)). "Accessory" is used as an adjective in ORS 197.312(5)(b) and describes a second dwelling in relation to a detached single-family dwelling. When used as an adjective, "accessory" is defined as "**1** *of a thing* **a :** aiding or contributing in a secondary or subordinate way * * * **:** supplementary or secondary to something of greater or primary importance * * *." *Webster's Third New Int'l Dictionary* 11 (unabridged ed 2002).

The record and petitioner's arguments do not support a determination that the second dwelling would supplement, aid, or contribute to the use of the existing dwelling or be "secondary or subordinate" to the existing dwelling in

any manner other than size. While comparative size might be one factor in defining an accessory use, comparative size alone is insufficient to establish an accessory relationship between two dwellings. We conclude that the proposed residential dwelling is not "accessory to" the existing dwelling. Our analysis does not end there, however.

B. Used in Connection With

ORS 197.312(5) defines "accessory dwelling unit" as an "attached or detached residential structure that is used in connection with *or* that is accessory to a single-family dwelling." (Emphasis added.) The "or" in ORS 197.312(5)(b) is used in an inclusive sense. *See Burke v. DLCD*, 352 Or 428, 435, 290 P3d 790 (2012) (explaining that the disjunctive connector "or" "can have either an 'inclusive' or an 'exclusive' sense"). The second dwelling that must be allowed can be accessory to the existing dwelling, can be used in connection with the existing dwelling, or can be both accessory to and used in connection with the existing dwelling. We have concluded that the proposed secondary dwelling is not accessory to the existing dwelling. The next question is whether the second dwelling is used in connection with the existing dwelling.

The term "connection," as used in ORS 197.312, is not defined by statute or administrative rule. Accordingly, we again resort to dictionary definitions to determine the ordinary meaning of that term. "Connection" is defined as "**1 a :** the act of connecting **:** a coming into or being put in contact * * * **2 :** the state of being connected or linked." *Webster's* at 481. "Connect" "**1 :** to join, fasten, or

link together usu. by means of something intervening * * * **2 :** to place or establish in any of various intangible relationships (* * * a relationship of things similar in purpose * * *"). *Id.* at 480.

Petitioner argues that the requirement that the proposed residential structure be "used in connection with" the existing dwelling creates a low threshold. Petitioner argues that the second dwelling is used in connection with the existing dwelling because all occupants of the dwelling share the same lot.

The city responds that the second dwelling is proposed to be detached from the existing dwelling "without any point of physical contact between the two structures." Brief of Respondent 13; Record 65 (petitioner's drawing of the second dwelling in relation to the existing dwelling). The city observes that that the existing dwelling is used as a residential rental and the second dwelling is proposed to be used as a residential rental as well. The city argues that, while the owner may have a financial connection to both dwellings, the second dwelling will not be used in connection with the existing dwelling. The city argues that petitioner's broad interpretation of ORS 197.312(5) would simply allow a second single-family dwelling on every lot that is zoned for detached single-family dwellings and that if the legislature intended that result, it could have simply enacted language allowing a second single-family dwelling on the same lot, instead of a specifically defining "accessory dwelling unit" as a "residential structure that is used in connection with or that is accessory to a single-family dwelling."

We agree with the city that ORS 197.312(5) is not an outright entitlement to build two single-family dwellings on any property within an urban growth boundary that is zoned for detached single-family dwellings. That position, which petitioner advocates, is unsupported by the limiting language of the statute. Such an interpretation renders meaningless the use of the term "accessory dwelling" and the definition provided in subsection (5)(b). *See Cloutier*, 351 Or at 98 ("[A]t the least, an interpretation that renders a statutory provision meaningless should give us pause, both as a matter of respect for a coordinate branch of government that took the trouble to enact the provision into law and as a matter of complying with the interpretive principle that, if possible, we give a statute with multiple parts a construction that 'will give effect to all' of those parts."). The phrase "in connection with * * * a single-family dwelling" must be construed to have some limiting purpose.

We observe that, unlike land zoned for agricultural and forest resource uses, land zoned for low density residential development within the urban growth boundary is not a specially protected class of land use under state law. We are also mindful that the scant legislative history for SB 1051 demonstrates that in enacting SB 1051 the legislature intended to increase available housing within residential areas within urban growth boundaries. With that legislative purpose in mind, we conclude that "used in connection with" creates a very low threshold for establishing a connection.

Petitioner's proposed use of the secondary dwelling as a residential rental unit on the same lot as the existing single-family dwelling is sufficient to establish that the second dwelling will be used in connection with the existing dwelling. For purposes of ORS 197.312(5), residential use does not depend upon the identity of the residents or the residents' legal estate with respect to the residential dwelling structure. That is, neither residence must be occupied by the owner in order for the residential use of the two structures to be in connection with each other. Further, the relationship between the connected residential uses is not necessarily primary and secondary. The phrase "used in connection with" does not include any requirement that the use of the second dwelling be incidental or subordinate to the use of the existing dwelling.[4]

We have reviewed the challenged zoning verification to determine whether the city properly concluded that the proposed second dwelling is allowed in the R-1 zone. We conclude that the city planner misconstrued ORS 197.312(5), because petitioner's proposed second dwelling is proposed in connection with the existing dwelling and therefore must be allowed in the R-1 zone, "subject to reasonable local regulations relating to siting and design." ORS 197.312(5)(a). We do not express any opinion on petitioner's arguments that certain Eugene

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[4] We observe that the second dwelling will be smaller in square footage, footprint, and bedrooms and, thus, able to house fewer residents than the existing dwelling. However, we express no opinion on whether an "accessory dwelling unit" allowed under ORS 197.312(5) must be smaller in square footage or footprint or house fewer occupants than the predicate single-family dwelling.

Code criteria are not "reasonable local regulations relating to siting and design." The city has not yet been presented with an application that requires it to apply the challenged criteria. Accordingly, any opinion on those matters would be advisory.

The assignment of error is sustained.

The city's decision is remanded.

Rudd, Board Member, concurring.

I agree with the majority decision sustaining the assignment of error but write separately because I do not agree with the majority's interpretation of ORS 197.312(5)(b).

ORS 197.312(5)(b) provides that "[a]s used in this subsection, 'accessory dwelling unit' means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling." Unlike the majority, I conclude that the proposed dwelling is not "used in connection with" the existing dwelling but is in fact "accessory to" the existing dwelling.

The majority concludes that the proposed structure is an accessory dwelling unit because it will be "used in connection with" the existing residence. The majority reaches this conclusion because both units will be rented out by their common owner. *Kamps-Hughes*, ___ Or LUBA at ___ (LUBA No 2019-028, June 7, 2019) (slip op at 11). Traditionally, zoning does not consider whether a structure is occupied by a renter or an owner when describing a use category. A single-family residence is a single-family residence whether occupied by a

renter or a homeowner. A multi-family unit is a multi-family unit whether or not the occupant owns or rents the unit. A single-family residence owned for investment purposes remains a single-family residence. The ownership structure is irrelevant to the nature of the use. Accordingly, I believe the better reading of the "used in connection with" language in ORS 197.312(5)(b) is that it requires some coordination of the use of the two structures.

In interpreting the statute, we examine the statute's text, context and legislative history. *Gaines*, 346 Or at 171–72. As the majority notes, the dictionary assists us in evaluating the statute's text. *Kamps-Hughes*, ___ Or LUBA at ___ (LUBA No 2019-028, June 7, 2019) (slip op at 7). The definition of connection includes "to * * * link together". *Id.* (slip op at 9) (quoting *Webster's* at 480). One example of a linkage between a primary and new residential structure is occupancy of the new structure by a caregiver assisting the resident of the primary dwelling. This type of connection is consistent with the more limited, traditional view of accessory uses.

In *Jaqua v. City of Springfield*, 193 Or App 573, 587, 91 P3d 817 (2004), the court relied upon *Webster's Third New International Dictionary* as an aid in defining the term "auxilliary" and also cited Norman Williams, Jr. and John M. Taylor's, 4 *American Land Planning Law*, sections 79.8–15, for its discussion of accessory uses. The treatise observes that "courts have tended to insist that an appropriate accessory use must be related to the principal use." Williams, 4 *American Land Planning Law* at 79.13. The treatise goes on to cite a variety of

cases indicating "that, if an allegedly accessory use involves activity by a different person, not involved in the principal use, the use will probably be regarded as not related to the principal use, and so, not accessory." *Id.* This view of accessory uses is consistent with the provision in ORS 197.312(5)(b) providing that the use be in connection with the existing dwelling.

The treatise also observes that generally "[a]n accessory use must not only be related to the principal use; it must clearly be subordinate and incidental thereto. Relative size is often relevant here." Williams, 4 *American Land Planning Law* at 79.14. By adopting the "accessory to" language as well as the "in connection with" language, and providing that the structure may meet either prong, the legislature provided for broad applicability of the accessory dwelling law. This furthers the underlying goal of increasing housing production.

The dictionary defines accessory to include a thing "aiding or contributing in a secondary or subordinate way * * * : supplementary or *secondary to something of greater or primary importance.*" *Kamps-Hughes*, ___ Or LUBA at ___ (LUBA No 2019-028, June 7, 2019) (slip op at 7) (quoting *Webster's* at 11) (emphasis added). The proposed dwelling is accessory because it is secondary to the primary dwelling. It is smaller in both size (it has a smaller footprint and smaller square footage than the primary dwelling) and impact (it has fewer bedrooms).

When interpreting a statute, we consider context as well as text. Context includes other laws. *Stull*, 326 Or at 79–80; *see also State v. Stallcup*, 341 Or 93,

102–103, 138 P3d 9 (2006) (court relied in part on administrative rule treatment of appraisals in the context of regulation of appraisers in interpreting the term 'appraisal' in earlier enacted condemnation statute.) OAR 150-308-0200, "Rezoned Property-Calculating Maximum Assessed Value (MAV)," governs the calculation of "maximum assessed value when a property is rezoned and used consistently with the rezoning." OAR 150-308-0200(2). Adopted in 2016, this rule provides that zone changes adopted by a government body that increase the number of accessory dwelling units are not considered zone changes for purposes of the rule. OAR 150-309-0200(1)(f)(C)(i). For purposes of determining MAV under OAR 308.142 to 308.166, an:

> "'[a]ccessory use' means a use or activity that is incidental and subordinate to the primary use of the property. A use designated as 'accessory' or 'auxiliary' by an applicable zoning code is presumed to be accessory unless that designation is clearly inconsistent with the ordinary legal meaning of 'accessory,' as determined by *relevant criteria such as the relative size of the area used and the impact of the use on the surrounding neighborhood.* Accessory uses may include, but are not limited to:
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> "* * * * *
>
> > "(F) Accessory structures such as accessory dwelling units limited in size * * *." OAR 150-308-0200(1)(b)(F) (emphasis added).

The rule provides the following example:

> "The ordinances governing single-family residential zones are amended to allow a single accessory structure, designated as an 'accessory dwelling unit.' The accessory dwelling unit is limited in size either to a maximum square footage or in proportion to the

> primary dwelling. The zoning amendment changes the allowed accessory uses of the property. Property has not been rezoned." OAR 150-308-0200(1)(f)(D)(iv).

As the majority explains, our goal is to discern the intent of the enacting body. *Kamps-Hughes*, ___ Or LUBA ___ (LUBA No 2019-028, June 7, 2019) (slip op at 6). OAR 150-308-0200 decreases the cost of and promotes development of accessory dwelling units by establishing that provisions governing calculation of maximum accessed value "when property is rezoned and used consistently with the rezoning" do not apply to accessory dwelling units limited in size. OAR 150-308-0200(2). A year after adoption of OAR 150-308-0200 by the Department of Revenue, the legislature enacted ORS 197.312, another provision supporting the development of accessory dwelling units. Given that it supports the same underlying policy of increasing housing production through zoning for accessory dwelling units, OAR 150-308-0200 provides context supporting interpreting ORS 197.312(5)(b)'s "accessory to" a primary use language to allow those units smaller in size and impact than the primary dwelling.

This interpretation does not result in an unrestricted right to construct two single-family dwellings on any lot. The new dwelling must be linked to the existing dwelling in some manner or subordinate in size and impact and in either case, remains subject to reasonable local regulations restricting siting and design.