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

WAVESEER OF OREGON, LLC,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 2020-038

FINAL OPINION AND ORDER

Appeal from Deschutes County.

Corinne S. Celko, Portland, filed the petition for review and reply brief and argued on behalf of petitioner. With her on the briefs was Emerge Law Group.

D. Adam Smith, Bend, filed the response brief and argued on behalf of respondent.

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

REVERSED 08/10/2020

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 appeals a decision by the board of county commissioners denying petitioner's application to develop a marijuana production facility on property zoned for exclusive farm use (EFU).

BACKGROUND

This is the second time that this land use dispute has been before LUBA. In *Waveseer of Oregon, LLC v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2019-036, Oct 17, 2019) (*Waveseer I*), we remanded the county's decision denying petitioner's application for marijuana production. We reiterate the facts from our prior decision.

The subject property is zoned EFU and is developed with a dwelling and a barn. The property south of the subject property, known as the Rhinestone Ranch, is zoned EFU and used as both a family residence and a working ranch that hosts youth-oriented equestrian activities, such as horseback riding classes and camps, birthday parties, and other celebratory events. The property to the east of the subject property, which we refer to as the Dodds Road Residence, is developed with a residence and outbuildings and hosts youth-oriented 4-H agricultural activities.

Petitioner applied to the county for administrative approval to develop an indoor marijuana production facility that would consist of three structures. The primary structure is a 36,000-square-foot structure that is planned to include areas

for growing, drying, processing, and storing marijuana. One smaller structure is planned to house electrical power systems, and another smaller structure is planned to house a water treatment system and secure waste management. No outdoor production or greenhouses were proposed as part of the application.

Oregon land use law preserves land for agricultural uses by restricting uses allowed in EFU zones to farm uses and certain enumerated non-farm uses. *See* ORS 215.203(2)(a) (defining "farm use"); ORS 215.283 (providing non-farm uses permitted in EFU zones in nonmarginal lands counties); ORS 215.213 (providing nonfarm uses permitted in EFU zones in counties that adopted marginal lands system prior to 1993). Marijuana is a crop for the purposes of "farm use" as defined in ORS 215.203. ORS 475B.526(1)(a).[1] Marijuana production involves "the manufacture, planting, cultivation, growing or harvesting of marijuana." ORS 475B.015(32)(a).

A county may impose reasonable regulations on marijuana production facilities. ORS 475B.486. The county adopted supplemental regulations that

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[1] ORS 475B.526 provides, in part:

"(1) Marijuana is:

"(a) A crop for the purposes of 'farm use' as defined in ORS 215.203;

"(b) A crop for purposes of a 'farm' and 'farming practice,' both as defined in ORS 30.930[.]"

impose restrictions on marijuana production and processing. As pertinent here, the applicable Deschutes County Code (DCC) 18.116.330(B)(7) provides, in part, that marijuana production and processing uses must be located a minimum of 1,000 feet from "[a] youth activity center," "measured from the lot line of the affected properties listed in DCC 18.116.330(B)(7)(a) to the closest point of the buildings and land area occupied by the marijuana producer or marijuana processor."[2] We refer to that requirement in this decision as the "separation

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[2] DCC 18.1 16.330(B)(7)(a) provides:

> "7. Separation Distances. Minimum separation distances shall apply as follows:
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> "a. The use shall be located a minimum of 1000 feet from:
>
> "i. A public elementary or secondary school for which attendance is compulsory under Oregon Revised Statutes 339.010, *et seq.*, including any parking lot appurtenant thereto and any property used by the school;
>
> "ii. A private or parochial elementary or secondary school, teaching children as described in ORS 339.030(1)(a), including any parking lot appurtenant thereto and any property used by the school;
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> "iii. A licensed child care center or licensed preschool, including any parking lot appurtenant thereto and any property used by the child care center or preschool. This does not include

distance" or the "separation buffer." That limitation applies to marijuana production in the EFU, Multiple Use Agriculture (MUA-10), and Rural Industrial (RI) zones. DCC 18.116.330(A)(1). The DCC does not define "youth activity center" and that phrase is not used anywhere else in the DCC.

The county planning department administratively approved the application. Opponents, who were intervenors-respondents in *Waveseer I* and are not parties in this appeal, appealed that decision to the board of county commissioners, which denied the application based solely on its determination that the youth-related activities at the Rhinestone Ranch and the Dodds Road Residence meant that those properties each contained a "youth activity center" and, thus, the application did not comply with the separation buffer. Petitioner appealed that decision in *Waveseer I*.

In *Waveseer I*, we remanded the board's decision. We agreed with petitioner that DCC 18.116.330(B)(7)(a)(iv) implements and must adhere to ORS 475B.486.[3] Petitioner argued, and we agreed, that the county's interpretation of

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licensed or unlicensed child care which occurs at or in residential structures;

"iv. A youth activity center; and

"v. National monuments and state parks."

[3] ORS 475B.486 provides, in pertinent part:

"(1) For purposes of this section, 'reasonable regulations' includes:

the youth activity center separation buffer—that farm uses and residential uses that "center around youth on a regular basis" constitute "youth activity center(s)"—was unreasonable. In so concluding, we relied on ORS 215.416(8)(a), discussed further below, which requires that permit approval standards and criteria set out in local regulations inform interested parties of the basis on which an application will be approved or denied.[4] We refer to that requirement in this decision as the codification requirement. We reasoned:

> "We agree with petitioner that the county's broad interpretation of 'youth activity center' is unreasonable because there is no way for an applicant to determine if a particular EFU-zoned property could be used for marijuana production. Instead, the county interpretation would allow the county to deny a marijuana production application when any neighboring property owner testified that youth-oriented activities regularly occur on a neighboring property within the separation buffer. Those youth-oriented activities may occur outdoors, or in a farm structure, as part of an existing farm use, or

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> "* * * * *
>
> "(g) Reasonable limitations on where a premises for which a license or certificate may be issued under ORS 475B.010 to 475B.545 may be located."

[4] ORS 215.416(8)(a) provides:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

> may occur in and around a residence as accessory to a residential use. In any event, a property owner or applicant would not have any practical way of identifying whether those youth-oriented activities are occurring within the separation buffer surrounding any particular EFU-zoned property. As applied in this case, the county's interpretation of youth activity center is so amorphous and uncertain that we conclude it is unreasonable.
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> "In so concluding, we emphasize the fact that the term 'youth activity center' is undefined and not used elsewhere in the DCC. In addition, while we doubt whether a youth-oriented farm use or residential use could limit a farm use on property that is zoned EFU, it may be that, under different facts and circumstances, the county could interpret the undefined phrase 'youth activity center' in a manner that would not violate ORS 215.416(8)(a) or ORS 475B.486. However, as applied in this case, the county's interpretation of 'youth activity center' is contrary to ORS 215.416(8)(a) and ORS 475B.486." *Waveseer I*, ___ Or LUBA at ___ (slip op at 18–19).

In *Waveseer I*, petitioner did not argue that it was impossible for the county to interpret DCC 18.116.330(B)(7)(a)(iv) in a manner that is consistent with ORS 215.416(8)(a) and ORS 475B.486. Thus, we remanded instead of reversing because petitioner had not demonstrated that the county's denial was "prohibited as a matter of law." OAR 661-010-0071(1)(c); *Waveseer I*, ___ Or LUBA at ___ (slip op at 21). In concluding that remand was the proper disposition, we observed that the county had not decided whether the application satisfied odor control standards for indoor marijuana production, which could have provided an independent basis for denial if not satisfied. Under those circumstances, we remanded the decision to the county for further proceedings. *Waveseer I*, ___ Or LUBA at ___ (slip op at 21).

On remand, the board concluded that the application satisfied the noise and odor standards for marijuana production. Record 26. However, the board again denied the application, based solely on the county's determination that the Rhinestone Ranch and Dodds Road Residence constitute youth activity centers and, thus, the application failed to comply with the separation buffer requirement. The board again interpreted "youth activity center." In its interpretation, the board incorporated by reference its decision in a separate quasi-judicial proceeding that we refer to in this opinion as *Nehmzow*.[5] Record 11.

In its decision in *Nehmzow*, the board referred to the phrase "youth activity center," generally, as "gathering places for children" and explained that "Deschutes County intentionally separated youths from marijuana production and processing, particularly concentrations of youths engaging in organized activities." Record 33. The board observed that, while applicable state law allows marijuana production as an outright permitted use in EFU zones, state law also allows local governments to place reasonable time, place, and manner restrictions on marijuana production. The board explained that the county "intentionally restricted the 'place' where marijuana could be grown in the EFU zone with the intent of protecting the County's youths engaging in activities." *Id.* The board reasoned that marijuana is a unique crop because it is an intoxicant that is "grown

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[5] That decision was appealed in *Nehmzow v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2019-110, Aug 10, 2020).

in a mostly consumable state" and requires "simply drying to be consumed." *Id.* The board also reasoned that Deschutes County has a unique zoning pattern that mixes EFU-zoned property with lands developed with non-agricultural uses, which "creates a greater likelihood for conflicting uses, such as development featuring youth activities near EFU land suitable for marijuana production." *Id.* The board explained that the county's "checkerboard" zoning pattern resulted from development on agricultural lands prior to adoption of state land use law that preserves agricultural land for agricultural uses and protects agricultural uses from conflicting uses.

The board explained that, to assist the county in determining whether a specific use is a "youth activity center,"

> "this Board has compiled a list of ten factors that it collectively has found persuasive when previously called to interpret the otherwise undefined term. It should be noted that the Board's intention in setting forth the aforementioned ten factors is simply to consolidate and clarify our previous interpretations. The Board intends that these ten factors are to be applied as a checklist of considerations, but not all such consideration are required elements for a use to rise to the level of a 'youth activity center.' A use may satisfy only some of the factors, and still qualify as a 'youth activity center.'" Record 34.

The board set out ten factors in its *Nehmzow* decision (the *Nehmzow* factors):

> (1) Separate building, facility, or area for use
>
> (2) Youth recreation activity accommodated regularly
>
> (3) Adult supervision provided
>
> (4) Specific toys, games, or equipment available for activity

(5) Permitted or licensed activities

(6) Organized group activities

(7) School related activities

(8) Usage (frequency/ regularity/ intensity/ number of participants) exceeds usual EFU use by 50% or more

(9) Use observable from neighboring properties

(10) Youth activities marketed to the public (e.g., website, social media, published or publicized). Record 34.

The board explained that whether a use is a "youth activity center" would be determined on a case-by-case basis. In addition to the above ten factors, the board interpreted our decision in *Waveseer I* as imposing an additional "foreseeability" constraint. That is, in considering whether a specific use is youth activity center, the decision maker should determine whether it is foreseeable that the county would consider that land use to qualify as a "youth activity center" that requires a separation buffer. *Id.* Finally, the board noted that a person who is interested in purchasing property for marijuana production or processing "should perform the customary 'due diligence' on par with any other commercial property acquisition to verify that the intended use is reasonably likely to be permitted on the considered tract." Record 35.

As noted, the board determined that the application satisfied the noise and odor limitations in the DCC. However, the board applied the *Nehmzow* factors and determined that the youth-oriented activities at the Dodds Road Residence and the Rhinestone Ranch make those properties "youth activity centers." The

board determined that due diligence would have revealed the youth activities on the two properties and that it was foreseeable that the county could conclude that those activities qualify those properties as youth activity centers. The board again denied the application for failure to satisfy the separation buffer requirement. This appeal followed.

FIRST ASSIGNMENT OF ERROR

A. Supplemental Local Regulation of Marijuana Production

As noted, state law defines marijuana as an agricultural "crop" for the purposes of "farm use," as defined in ORS 215.203. ORS 475B.526(1)(a). ORS 215.203 reserves EFU land "exclusively for farm use," except as otherwise provided in ORS 215.283. In the first assignment of error, first subassignment, petitioner argues that the board's decision violates state law, and is prohibited as a matter of law, because the county's decision impermissibly prohibits an outright permitted farm use, marijuana production, on EFU land. Petition for Review 13–16. We address this issue first because, if petitioner is correct that statutes that protect and promote agricultural uses prohibit the decision as a matter of law, then we would not need to address petitioner's other arguments. For the reasons explained, we conclude that the board's decision is not prohibited as a matter of law by statutes that protect and promote agricultural uses.

The county contends that marijuana is unlike any other farm crop and that "ORS 475B.486(2) demonstrates that the legislature intended to prioritize local

governments' authority to adopt 'reasonable regulations' over other pre-existing statutory protections for agricultural uses." Response Brief 23.

The parties' arguments require us to interpret the scope of the statutory protections of marijuana production as a farm crop in light of the local time, place, and manner regulation of marijuana production that is allowed by ORS 475B.486. The primary question posed by the parties' positions is whether the legislature intended to treat marijuana differently from other agricultural crops and allow local regulations that limit marijuana production on EFU land.

In interpreting a statute, 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.").

Farm crop production is an outright permitted farm use in EFU zones. Uses that are permitted outright on EFU land under state law are generally not subject

to local regulation, unless (1) farm impacts extend into and interfere with the lands within an adopted urban growth boundary or (2) a statute allows supplementary local standards. *See* ORS 215.253; *see also Brentmar v. Jackson County*, 321 Or 481, 496–97, 900 P2d 1030 (1995) (nonfarm uses in EFU zones permitted by ORS 215.283(1) are not subject to county regulations that go beyond those set forth in the statutes); *Shadrin v. Clackamas County*, 34 Or LUBA 154, 158–61 (1998) ("[A county may] apply supplementary conditions to what is otherwise a use of right, where the statutory text or context creates such an exception.").[6] This case does not involve farm impacts that extend into an adopted urban growth boundary. The county argues that ORS 475B.486(2) allows supplementary local standards for marijuana production on EFU land.

ORS 475B.486(2) provides:

"*Notwithstanding* ORS 30.935, 215.253(1) or 633.738, the

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[6] ORS 215.253(1) provides:

> "No state agency, city, county or political subdivision of this state may exercise any of its powers to enact local laws or ordinances or impose restrictions or regulations affecting any farm use land situated within an exclusive farm use zone established under ORS 215.203 or within an area designated as marginal land under ORS 197.247 (1991 Edition) in a manner that would restrict or regulate farm structures or that would restrict or regulate farming practices if conditions from such practices do not extend into an adopted urban growth boundary in such manner as to interfere with the lands within the urban growth boundary. 'Farming practice' as used in this subsection shall have the meaning set out in ORS 30.930."

governing body of a city or county may adopt ordinances that impose reasonable regulations on the operation of businesses located at premises for which a license or certificate has been issued under ORS 475B.010 to 475B.545 if the premises are located in the area subject to the jurisdiction of the city or county, except that the governing body of a city or *county may not*:

"* * * * *

"(b) Adopt an ordinance that imposes a setback requirement for an agricultural building used to produce marijuana located on a premises for which a license has been issued under ORS 475B.070 [(marijuana production license)] if the agricultural building:

"(A) Was constructed on or before July 1, 2015, in compliance with all applicable land use and building code requirements at the time of construction;

"(B) Is located at an address where a marijuana grow site first registered with the Oregon Health Authority under ORS 475B.810 on or before January 1, 2015;

"(C) Was used to produce marijuana pursuant to the provisions of ORS 475B.785 to 475B.949 on or before January 1, 2015; and

"(D) Has four opaque walls and a roof." (Emphases added.)

The county asserts that ORS 475B.486 allows it to apply supplementary conditions to marijuana production, a use that is otherwise an outright permitted farm use, because the "notwithstanding" phrase at the outset of ORS 475B.486(2) creates an exception to the general rule prohibiting local regulation of outright permitted farm uses. We agree. While ORS 215.253(1) generally prohibits local regulations "that would restrict or regulate farm structures or that would restrict or regulate farming practices" within an EFU zone, ORS 475B.486(2) provides

local governments limited discretion to adopt reasonable regulations that may restrict marijuana production on EFU land.[7]

ORS 475B.486(2)(b) also supports that conclusion. That subsection provides that a county *may not* impose setback requirements for an agricultural building that was lawfully used to produce marijuana on or before July 1, 2015. By negative inference, ORS 475B.486(2) authorizes a county to impose setback requirements for agricultural buildings proposed to be used for marijuana production after July 1, 2015, such as the structures proposed by petitioner.

We agree with the county that marijuana is a unique farm crop because applicable statutes permit local regulation of the place and manner of production, including setback requirements for agricultural buildings proposed to be used for marijuana production, even if such agricultural building is situated on EFU-zoned land. We conclude that the county is not prohibited as a matter law from adopting and applying local regulations that would restrict or regulate farm structures used for marijuana production or that would restrict or regulate marijuana production farming practices within an EFU zone.

The first assignment of error, first subassignment, is denied.

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[7] ORS 475B.486(2) also provides exceptions to ORS 30.935, which invalidates local laws that make farm practices a nuisance or trespass, and ORS 633.738, which prohibits a local government from "inhibit[ing] or prevent[ing] the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed."

B. Deschutes County Comprehensive Plan

In the first assignment of error, second subassignment, petitioner argues that the board's decision is unreasonable because the challenged decision is inconsistent with Deschutes County Comprehensive Plan (DCCP) policies. Petition for Review 16–18. Petitioner cites Policy 2.2.5, which requires uses allowed in the EFU zone comply with state law; Policy 2.2.9, which is to "[e]ncourage farming by promoting the raising and selling of crops"; and Policy 2.2.11, which is to "encourage small farming enterprises, including, but not limited to niche markets."

Petitioner does not explain how the DCCP policies are applicable to the board's decision or LUBA's review. It is not clear to us that the DCCP policies are applicable criteria or how the DCCP policies are material to the analysis of reasonableness under ORS 475B.486(1). In the absence of a more developed argument, any conflict between the challenged decision and the DCCP policies provides no basis for reversal or remand.

The first assignment of error, second subassignment, is denied.

Petitioner's third and fourth subassignments of error argue that the board's interpretation of the term "youth activity center" is overly broad and indefinite, making essentially the same arguments in the second assignment of error. We address those issues within the second assignment of error, which we sustain for the reasons explained below.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the board's decision violates the codification requirement of ORS 215.416(8)(a) and ORS 215.427(3)(a), known as the "goal-post rule," which requires that approval or denial of an application be based on the standards and criteria that were applicable when the application was submitted.[8]

A. Waiver

The county first responds that petitioner waived the argument that the board could not apply the *Nehmzow* factors to determine whether activities on adjacent properties constitute youth activity centers. During the remand proceeding, the board expressed its intention to apply the *Nehmzow* factors to determine whether the Dodds Road Residence and the Rhinestone Ranch are youth activity centers. The county attaches to its response brief a partial transcript of testimony at the remand hearing setting out an exchange between the board and petitioner's attorney, where petitioner's attorney argued that consideration of

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[8] ORS 215.427(3)(a) provides:

> "If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county 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."

some of the *Nehmzow* factors did not support the conclusion that adjacent properties constituted youth activity centers. Response Brief App 5–6 (partial transcript of remand hearing Jan 29, 2020).

In the petition for review and the reply brief, petitioner cites to petitioner's written submission to the board that cited ORS 215.416(8)(a), ORS 215.427(3), and *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483, 486–87 (1993), a case applying ORS 227.178(3), the city analog to ORS 215.427(3)(a), the "goal-post rule."[9] Record 100. Petitioner replies that the county's partial transcript omits petitioner's argument to the board that it must apply only codified criteria. Reply Brief App 1.[10] We agree that petitioner preserved for our review the issues in the second assignment of error.

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[9] 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."

[10] Petitioner's attorney argued:

> "LUBA has also stated in a different case that the standards and criteria for permit approval must already exist in your code, and you can't manufacture standards to apply to deny this application. In another case, LUBA has also stated that a local government's decision violates the law where a local government relies on factors

B. Codification Requirement and Goal-Post Rule

The codification requirement and goal-post rule work together "to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings." *Davenport*, 121 Or App at 141.[11] Petitioner argues that the board's interpretation and application of the youth activity center separation distance criterion violates the codification requirement and goal-post rule. We agree.

Two cases that the county cites to support the board's decision are instructive, *Zirker v. City of Bend*, 233 Or App 601, 227 P3d 1174 (2010) and *BCT Partnership v. City of Portland*, 130 Or App 271, 881 P2d 176 (1994). In

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> or considerations unconnected to approval standards in the code to deny an application. So, I just caution you that as you're thinking about applying certain factors now, right, and you've already indicated that your definition of 'youth activity center' has morphed throughout this process, this is also a notice issue. The applicant needs to be on notice on the day that their application is complete about what the standards and criteria are, and those must be written in your code. There's no definition of 'youth activity center,' and that term is not used anywhere else in the code." Reply Brief App 1 (partial transcript of remand hearing Jan 29, 2020).

[11] The county argues that *Davenport* was superseded by statute and is inapplicable to this case. Response Brief 33. The holding in *Davenport* that the county argues was superseded by statute relates to the effective date of amendments to or adoption of local land use regulations. The discussion in *Davenport* of the purpose of the codification requirement and goal-post rule is unaffected by statutory amendments and remains binding precedent.

Zirker, the court explained the purpose and function of the codification requirement:

> "As we held in *Lee* [*v. City of Portland*, 57 Or App 798, 646 P2d 662 (1982)], the requirement that a discretionary permit decision be 'based on standards and criteria' necessarily means that the standards must operate to guide official discretion in deciding whether to issue the permit, so that those standards, and not some other predilection of the decision-maker, provide 'the sole basis for determining whether a discretionary permit application is approved.' [*Id.*] at 801. To provide that guidance, the standards must be sufficiently definite to give the parties and the decision-maker an understanding of what proof and arguments are necessary to show that the application complies with those criteria and to make the outcome capable of prediction by the decision-maker. * * * Finally, the standards must be 'set forth in the development ordinance,' requiring that the standards be adopted and published exclusively in the development ordinance prior to the decision. *See BCT Partnership v. City of Portland*, 130 Or App 271, 276 n 2, 881 P2d 176 (1994) (ORS 227.173(1) 'seems to have the purpose of assuring that permit decisions will be based on pre-existing legislation').[12]
>
> "In *BCT Partnership*, we explained that a discretionary permit approval standard could be gleaned from various parts of the development code. 130 Or App at 277, 881 P2d 176. In that case, an applicant for a parking garage conditional use permit was required to prove that the application was consistent with the city's 'short term parking strategy,' a strategy that was not explicitly announced in the city's development code. *Id.* at 273–74, 881 P2d 176. We concluded that the standard was 'set forth' under ORS 227.173(1) in related general provisions of the development code. We concluded:

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[12] ORS 227.173(1) is the codification requirement that applies to cities and is substantially similar to ORS 215.416(8)(a).

> "'ORS 227.173 allows cities to identify the standards and criteria that apply to particular permits by interpreting more general provisions that are 'set forth' in their land use legislation, and from which the specific applications reasonably follow. We also conclude that the city satisfied the statute here. The city's legislation includes sufficient general provisions to establish and identify the short term parking strategy that the city interpreted them as embodying; the issues to be addressed in the proceeding were sufficiently discernible from those provisions; and the city's order provided the necessary explanation under ORS 227.173(2) of what standards it was applying and how they applied.'" *Zirker*, 233 Or App at 609–10.

In *Zirker*, the petitioner challenged a city code provision that allowed the city engineer to waive setback requirements "when in his/her judgment special circumstances dictate such change," arguing that that the "special circumstances" standard for an engineer waiver was too indefinite to constitute an applicable criterion for a land use decision. 233 Or App at 607. The court explained that "special circumstances" are a matter of judgment within the engineer's expertise, and that judgment was based on criteria in the development code for the determination of road pavement width, such as traffic volume, street length, and development patterns. 233 Or App 610–12. Similarly, in *BCT Partnership*, the city interpreted the "short term parking strategy" by reference to other general provisions within the city code.

In this appeal, we understand petitioner to argue: (1) the undefined term "youth activity center" is too indefinite to constitute criteria; (2) the *Nehmzow* factors are too indefinite to constitute criteria; (3) the *Nehmzow* factors cannot

constitute applicable criteria because those factors are not codified; and (4) the county's application of the *Nehmzow* factors violate the goal-post rule because those factors are not applicable criteria that applied at the time that the application was deemed complete.

The county responds that petitioner is precluded from arguing that the "youth activity center criterion itself" violates ORS 215.416(8)(a) as too indefinite, because petitioner did not raise that issue in *Waveseer I*.

Under a principle announced in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), a party at LUBA fails to preserve an issue for review if, in a prior stage of a single proceeding, that issue is decided adversely to the party or that issue could have been raised and was not raised. In *Waveseer I*, petitioner argued, and we agreed, that the county's interpretation of the youth activity center separation buffer was uncertain and not reasonable. We determined that petitioner's argument invoked ORS 215.416(8)(a) and we concluded that the county's interpretation of "youth activity center" was contrary to ORS 215.416(8)(a). Thus, that issue *was* raised and it was actually decided adversely to the county, *not* to petitioner.

On remand, the board again interpreted the term "youth activity center," this time with reference to the *Nehmzow* factors. Petitioner raises essentially the same issues that it raised in *Waveseer I*, with some refinement. The law of the case principle does not preclude petitioner from arguing that the board's new

interpretation demonstrates that standard itself is too indefinite and violates ORS 215.416(8)(a).

On the merits, the county acknowledges that the facts and analyses in *Zirker* and *BCT Partnership* are distinguishable from the county's action in this case because the cities identified the disputed criteria in those cases by reference to codified criteria that were contained in other parts of the cities' codes. Differently, here, the county did not and cannot point to any other codified criteria that provide context for or help define the parameters of what constitutes a "youth activity center." As we emphasized in *Waveseer I*, the term "youth activity center" is undefined and not used elsewhere in the DCC. The county argues that the *Nehmzow* factors can reasonably be "gleaned" from other county quasi-judicial decisions regarding the term "youth activity center." Response Brief 38.

There are at least two problems with that argument. First, it ignores the central holdings in *Zirker* and *BCT Partnership* that otherwise indefinite codified criteria may be made sufficiently definite by reference to other *codified* standards and criteria. Second, it ignores the fact that quasi-judicial decisions are not codified and do not constitute applicable decision criteria. Even if prior land use decisions are published and available for review, they are of limited value to a land use applicant or opponent because a local government is not bound to interpret a local code provision in the manner that it has been interpreted in prior

quasi-judicial proceedings on different applications. *Greenhalgh v. Columbia County*, 54 Or LUBA 626, *aff'd*, 215 Or App 702, 170 P3d 1137 (2007).

The purpose of the codification requirement is to identify the standards and criteria that the county will apply to an application "to give the parties and the decision-maker an understanding of what proof and arguments are necessary to show that the application complies with those criteria and to make the outcome capable of prediction." *Zirker*, 233 Or App at 609. Those statutes require that the criteria that form the basis for a land use decision be embodied in land use regulations.

Under the current DCC, an applicant or opponent cannot know or predict whether activities on a property within the separation buffer constitute a youth activity center with reference to the DCC. The codified phrase "youth activity center" itself does not reasonably inform an applicant or opponent what evidence and argument address that criterion. As we pointed out in *Waveseer I*, the phrase "youth activity center" is not defined in the DCC, is not listed as a permitted use in any zone, and is not defined or used in any state statute or administrative rule. The board's interpretation and application of the *Nehmzow* factors demonstrates that the code itself fails to sufficiently inform interested parties of the basis on which an application may be approved or denied. That interpretation allows the county to deny a marijuana production application if the county finds that activities taking place on a neighboring property satisfy one or more of the uncodified *Nehmzow* factors. No applicant or opponent could reasonably predict

whether and when the county would determine that youth-oriented activities constitute a youth activity center because the relevant criteria do not appear in the DCC.

We agree with petitioner that the county's decision in this case demonstrates that term "youth activity center" is too indefinite to constitute a criterion and, thus, violates ORS 215.416(8)(a) and cannot be applied. We agree with petitioner that the county's interpretation, relying on a list of factors derived from quasi-judicial decisions that are not contained in the DCC, does not save the youth activity center separation distance criterion from being impermissibly indefinite. Thus, the county erred in denying the application based on that criterion. We also conclude that the county erred in applying the *Nehmzow* factors, because those factors constitute uncodified criteria in violation of ORS 215.416(8)(a) and ORS 215.427(3)(a).

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioner argues that the board's interpretation of "youth activity center" is inconsistent with the express language and context of that provision and, hence, not affirmable under the deferential standard of review that LUBA must apply to a governing body's interpretation of a local code provision under ORS 197.829(1) and *Siporen v. City of Medford*,

349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)).[13] When an interpretation is directed at a single term or statement, we analyze whether the interpretation accounts for the text and context of the disputed term or statement. *Siporen*, 349 Or at 262.

We determined above that the "youth activity center" separation distance criterion in DCC 18.116.330(B)(7)(a)(iv) is too indefinite and, thus, violates the codification requirement in ORS 215.416(8)(a). Accordingly, that criterion itself cannot be applied; thus, the board's decision cannot be upheld, even if the board's interpretation is consistent with the language of that provision. However, given the apparent likelihood that this issue could arise again, we reach and resolve the

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[13] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(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."

interpretive issue in this appeal. *See* ORS 197.835(11)(a).[14] For the reasons explained below, we agree with petitioner that the county's interpretation of "youth activity center" is inconsistent with the text and context of the DCC.

The word "center" is not defined in the DCC. The board interpreted youth activity center as "gathering places for children." Record 33. In the phrase "youth activity center, the word "center," is used as a noun modified by the adjective "youth activity." The word "center," used as a noun, means "1h: a concentration of requisite facilities for an activity, pursuit or interest along with various likely adjunct conveniences: (shopping center), (medical center), (amusement center)." *Webster's Third New Int'l Dictionary* 362 (unabridged ed 2002). Included in the meaning of the word "center" is the term "facilit[y]," which is defined as "5b: something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Id.* at 812–13. According to the plain, ordinary meaning of "center," a "youth activity center" is a place "built, constructed, installed, or established" to serve or facilitate "youth activit[ies]."

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[14] ORS 197.835(11)(a) provides:

> "Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830(14), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (9) of this section or limited land use decision described in ORS 197.828 and 197.195."

That meaning is also supported by context, which includes other DCC provisions that use the term "center." For example, the DCC defines "community center" as "a community meeting, retreat and activity facility serving the social or recreational needs of community residents or visitors." DCC 18.04.030 (emphasis added). The DCC similarly defines "child care center" as "a childcare facility that was not constructed as a single family home that is certified to care for 12 or fewer children." *Id.* (emphasis added).

The first *Nehmzow* factor considers whether there is a "[s]eparate building, facility, or area for use." The remaining nine factors focus on the type and nature of the activities. The board specifically stated that no one factor is dispositive, but that the determination would be made on a case-by-case basis. Thus, the interpretation does not *require* a youth activity center to include a "[s]eparate building, facility, or area for use," and thus does not require a "center" at all.

Moreover, the board's interpretation does not give any real meaning to the word "center." This case illustrates that point. The board determined that the existing Dodds Road Residence, dwelling, outbuilding, and pens—which undisputedly are primarily used for residential purposes and uses associated with the residential uses—"contains separate buildings, facilities, and areas that are utilized collectively for 4-H youth activities and therefore a youth activity center." Record 18. Similarly, the board determined that the residence and six farm buildings at the Rhinestone Ranch are used for "equine related activities" in which youth participate and therefore "collectively constitute a youth activity

center." Record 22. The evidence is that the Dodds Road Residence, including the dwelling and associated improvements, was "built, constructed, installed, or established" and is used to serve as a family residence. The evidence is that the Rhinestone Ranch was "built, constructed, installed, or established" and is used to serve as a horse ranch and family residence. The board's interpretation effectively ignores the term "center" as a place "built, constructed, installed, or established" to serve or facilitate "youth activit[ies]," and, instead, interprets the term as any place where youth activities occur.[15] That interpretation is inconsistent with the text and context of the DCC.

The third assignment of error is sustained.

DISPOSITION

Petitioner requests that LUBA reverse the challenged decision under ORS 197.835(10)(a)(A), which "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*

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[15] Petitioner argues that the Dodds Road Residence and Rhinestone Ranch cannot constitute youth activity centers because the Dodds Road Residence was constructed for residential purposes and the Rhinestone Ranch was constructed for use as an equine facility. We note that the purpose for which a facility was constructed is not dispositive. For example, a facility that was developed as a church or school could potentially be repurposed to serve as a facility for youth activities that are not church or school related. The use is determinative, not the purpose for which a structure was originally constructed.

v. City of Salem, 231 Or App 356, 375, 219 P3d 46 (2009), *rev den*, 348 Or 415 (2010).[16] The county does not respond to petitioner's requested disposition, other than to argue that petitioner's suggestion that it may be entitled to attorney fees is premature. Response Brief 42.

In *Parkview Terrace Dev. LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014), we reversed a city council decision denying site plan approval and variance for a needed housing development. The city council gave a total of ten reasons why it denied the applications. Seven of the site plan review criteria the city council relied on to support its denial could not be applied because the application was for development of "needed housing" and we determined that

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[16] ORS 197.835(10) provides:

> "(a) 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:
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> "(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; or
>
> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.
>
> "(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government."

those standards were not "clear and objective," as required by ORS 197.307(4). The city council also inappropriately relied on three inapplicable criteria: (1) an "adequate" parking standard that did not exist in the city's code, (2) an internal circulation standard that did not apply to the proposed residential use, and (3) a variance criterion that did not apply under the circumstances surrounding the development. We concluded that all ten of the reasons that the city council gave for denying petitioner's applications were "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Id.* at 57–58. Accordingly, we reversed the city council's decision and ordered the city to approve the petitioner's applications for a variance and site plan approval. *Id.* at 58.

In *Oster v. City of Silverton*, 79 Or LUBA 447 (2019), the city council denied a tentative subdivision plan based on a standard that we concluded that the city had not incorporated into its land use regulations with the level of specificity required by statute for standards applicable to limited land use decisions. Thus, we concluded that the only reason that the city council gave for denying petitioner's application is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Id.* at 457. Accordingly, we reversed the city council's decision and ordered the city to approve the petitioner's application. *Id.* at 458.

We conclude that this case is similar to *Oster* and *Parkview Terrace*. In those cases, the local government denied the applications by relying on standards

that either (1) were not applicable to the application; (2) could not be applied to the application; or (3) were not land use standards.

We conclude that the "youth activity center" criterion cannot be applied because it violates the codification requirement. We also conclude that the county erred in applying the *Nehmzow* factors, because those factors constitute uncodified criteria that violate the codification requirement and goal-post rule. Under the undisputed facts nothing could be changed by a remand and there is no basis in the DCC for the county to deny the application. The county therefore lacks discretion to deny the development application. We reverse the decision and order the county to approve the application pursuant to ORS 197.835(10)(a)(A).

The county's decision is reversed, and the county is ordered to approve the application.