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

HOME BUILDERS ASSOCIATION OF
LANE COUNTY,
Petitioner,

and

ELIZA KASHINSKY, SETH SADOFSKY,
SUE WOLLING, SUSAN BLIVEN, JOATHAM BONILLA,
TODD BOYLE, ANYA DOBROWOLSKI, JOHN FISCHER,
PATRICIA SUE HINE, JOHN HOOPS, DANIEL IVY,
MARCUS KAUFFMAN, DYLAN LAMAR,
BRYNA LIVINGSTON, JOHN LIVINGSTON,
ANGIE R. MARZANO, ELI NAFZIGER,
CECILIA O'SULLIVAN, CARLEEN REILLY,
TONYA SPEARS, JEAN TATE,
BRETT WEBBER, ELLEN WEBBER,
RICHIE WEINMAN, and DAVID O. WILSON,
Intervenors-Petitioners,

vs.

CITY OF EUGENE
Respondent,

and

PAUL T. CONTE, CAROLYN I. JACOBS,
MARGARET E. JAMES, ADOLPH H. ASPEGREN,
RONALD K. BEVIRT, and JANET A. BEVIRT,
Intervenors-Respondents.

LUBA No. 2020-015

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review and a reply brief and argued on behalf of petitioner.

Eliza Kashinsky, Seth Sadofsky, Sue Wolling, Susan Bliven, Joatham Bonilla, Todd Boyle, Anya Dobrowolski, John Fischer, Patricia Sue Hine, John Hoops, Daniel Ivy, Marcus Kauffman, Dylan Lamar, Bryna Livingston, John Livingston, Angie R. Marzano, Eli Nafziger, Cecilia O'Sullivan, Carleen Reilly, Tonya Spears, Jean Tate, Brett Webber, Ellen Webber, Richie Weinman, and David O. Wilson, Eugene, filed a petition for review. Eliza Kashinsky argued on behalf of herself.

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

Paul T. Conte, Carolyn I. Jacobs, Margaret E. James, Adolph H. Aspegren, Ronald K. Bevirt, and Janet A. Bevirt, Eugene, filed a cross petition for review and a response brief. Paul T. Conte argued on behalf of himself.

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

REMANDED 11/24/2020

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals Ordinance No. 20625 (the Ordinance), which amends the Eugene Code to implement ORS 197.312(5).

BACKGROUND

The challenged decision is the city's decision on remand from *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018) (*Home Builders I*). In *Home Builders I*, petitioner Home Builders Association of Lane County (HBA) appealed two ordinances that the city enacted to partially implement ORS 197.312(5) (2017).[1] ORS 197.312(5) (2019) provides:

> "(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.
>
> "(b) As used in this subsection:
>
> "(A) '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.

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[1] Amendments to ORS 197.312(5) enacted in 2019 added subsection (b)(B), which excludes from "reasonable local regulations relating to siting and design" owner-occupancy and off-street parking requirements for accessory dwellings allowed under that statute.

> "(B) 'Reasonable local regulations relating to siting and design' does not include owner-occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking."

In *Home Builders I*, we remanded the city's decision in part for the city to determine in the first instance which provisions of the Eugene Code (EC) that regulate accessory dwellings are "reasonable local regulations relating to siting and design."

The city proceeded on remand. On January 21, 2020, the city council adopted the Ordinance and petitioner appealed the city's decision to LUBA. While this appeal was pending, LUBA issued its decision in *Kamps-Hughes v. City of Eugene*, ___ Or LUBA ___ (LUBA 2019-115, Feb 26, 2020) (*Kamps-Hughes I*). In *Kamps-Hughes I*, we concluded that the word "siting" in ORS 197.312(5) relates to an accessory dwelling's location or placement on a property that includes a single-family dwelling. *Id.* at ___ (slip op at 14-15). That decision was appealed to the Court of Appeals, and we granted the city's motion to suspend this appeal while the appeal of *Kamps-Hughes I* was pending. On July 1, 2020, the court issued a decision affirming LUBA's decision. *Kamps-Hughes v. City of Eugene*, 305 Or App 224, 470 P3d 429 (2020) (*Kamps-Hughes II*). This appeal then proceeded to briefing.

In *Kamps-Hughes II*, the court interpreted ORS 197.312(5) to require the city to allow at least one accessory dwelling per single-family dwelling in all zones in which single-family dwellings are allowed. The court also affirmed

LUBA's decision that certain EC standards that applied to accessory dwellings were not "regulations relating to siting and design." Relying on context provided by the "one-to-one allowance ratio" in ORS 197.312(5), the court affirmed LUBA's interpretation of the phrase "relating to siting" as encompassing regulations "relating to where [accessory dwellings] are sited on a lot, not where they are sited within areas zoned for detached single-family dwellings." *Id.* at 232-33, 237. As we discuss in more detail below, the court's decision in *Kamps-Hughes II* informs the city's response to the assignments of error in the petitions for review.

STANDARD OF REVIEW

The present appeal involves a facial challenge to a legislative decision by the city to amend the EC. In such a context, a petitioner must demonstrate that the EC provisions it challenges are categorically incapable of being applied consistently with the relevant state statute. *See Rogue Valley Assoc. of Realtors v. City of Ashland*, 158 Or App 1, 4, 970 P2d 685, *rev den*, 328 Or 594 (1999).

Additionally, the EC is the city's zoning ordinance and therefore a land use regulation as defined in ORS 197.015(11).[2] ORS 197.835(7) requires LUBA to reverse or remand a decision that amends a land use regulation if "(a) the

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[2] ORS 197.015(11) defines "land use regulation" as "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

regulation is not in compliance with the comprehensive plan; or "(b) the comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals."[3] In addition, LUBA must reverse or remand a decision that "[i]mproperly construe[s] the applicable law." ORS 197.835(9)(a)(D).

HBA'S AND INTERVENORS-PETITIONERS' ASSIGNMENTS OF ERROR

These assignments of error include overlapping arguments and we address them together.

In its first assignment of error, HBA argues that several EC provisions in the Ordinance are not "regulations relating to siting and design" within the meaning of ORS 197.312(5). In its second assignment of error, HBA argues that some EC standards that may, for argument's sake, be related to siting and design are in any event not "reasonable."

In their first and second assignments of error, intervenors-petitioners identify two regulations that they argue are not "regulations relating to siting and design." In their third assignment of error, intervenors-petitioners argue that EC

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[3] None of the petitioners argue that the Ordinance is not in compliance with the comprehensive plan.

9.3625(7)(a) is facially inconsistent with ORS 197.312(5)(b)(B)'s prohibition on "requirements to construct additional off-street parking" for accessory dwellings.

A. EC Provisions That Are Not Regulations Relating to Siting and Design

In response to the petitions for review, the city agrees that several of the provisions identified in the petitions for review are facially inconsistent with ORS 197.312(5). Accordingly, the city concedes, those EC provisions may not be applied to an application for an accessory dwelling. Intervenors-respondents, however, maintain that the challenged provisions are "reasonable local regulations relating to siting and design" and that the city may therefore apply them to an application for an accessory dwelling.

We agree with the city's concession that, for the reasons explained in the petitions for review, and consistent with the Court of Appeals' decision in *Kamps-Hughes II*, the following EC provisions are inconsistent with ORS 197.312(5) because they are not "regulations relating to siting and design:" EC 9.2751(17)(a)(1) (minimum lot size), EC 9.2775(4)(b) (minimum lot size), EC 9.2751(17)(c)(1) (minimum lot size), EC 9.3065(2)(a) (minimum lot size), EC Table 9.3625 (minimum lot size and alley access lot prohibition), EC 9.2751(17)(c)(2) (minimum lot dimensions), EC Table 9.2740 (maximum density), EC Table 9.3115 (maximum density), EC 9.3811(1)(d) (maximum density), EC 9.3911(2) (maximum density), EC 9.2741(2) (alley access lot prohibition), EC 9.2751(18)(a)(2) (alley access lot prohibition), EC 9.2775(5)(e)

(minimum lot dimensions and flag lot pole access restrictions), EC 9.2751(17)(c)(7) (occupancy limit), and EC 9.3811(1)(b) (off-street parking requirement).

The city does not agree that other EC provisions challenged by HBA and intervenors-petitioners are not "reasonable local regulations relating to siting and design," and we address the standards that remain in dispute below.

B. Maximum Lot Coverage Standard

1. Regulation Relating to Siting and Design

EC Table 9.2750 sets a maximum lot coverage of 50 percent for lots in the R-1 and R-2 zones. In *Kamps-Hughes II*, the court affirmed LUBA's interpretation of the requirement in ORS 197.312(5) that the city must allow at least one accessory dwelling per single-family dwelling in all zones that allow detached single-family dwellings. 305 Or App at 234. The court also affirmed LUBA's interpretation of the term "siting" as "relating to an [accessory dwelling's] location or placement on a property that includes a single-family dwelling." *Id.* at 231, 237.

HBA argues that the maximum lot coverage standard in EC Table 2750 is not a "regulation[] relating to siting and design" because it does not relate to the location or placement of an accessory dwelling on a property that already includes a single-family dwelling. Rather, HBA argues, the maximum lot coverage standard has the effect of precluding a detached or attached accessory dwelling if the lot is small and contains too large a single-family dwelling or

accessory buildings. HBA's Petition for Review 24. HBA argues that a maximum lot coverage standard is analogous to a minimum lot size requirement and to density limitations, which the city has already conceded are not reasonable regulations relating to siting and design. HBA argues that, in order for LUBA to find the maximum lot coverage standard to be a "regulation[] relating to siting," the city must demonstrate that either every lot in the city that contains an existing single-family dwelling either has room for a detached or an attached accessory dwelling or that an interior accessory dwelling is possible on that lot.[4] HBA's Reply Brief 2.

The city responds that the maximum lot coverage standard is a regulation relating to siting because it relates to where, or, more to the point, how, an accessory dwelling can be sited on a lot—*i.e.*, to the *type* of accessory dwelling that it is possible to site on a lot. As the city sees it, the maximum lot coverage standard may mean that a property owner will not be able to develop its preferred detached or attached structure on the lot if the lot coverage is already at or close to 50 percent, but could still develop an interior accessory dwelling in an already-existing structure on the lot. The city points out that ORS 197.312(5) does not require the city to allow all three types of accessory dwellings on every lot that includes a single-family dwelling. Rather, ORS 197.312(5) requires the city to

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[4] EC 9.0500 mimics ORS 197.312(5)(b)(A) and defines "Dwelling, Accessory" as "[a]n interior, attached or detached residential structure."

allow "at least one accessory dwelling unit for each detached single-family dwelling," meaning the city is required to allow an "interior, attached *or* detached residential structure." ORS 197.312(5)(a), (5)(b)(A) (emphasis added). Accordingly, the city argues, HBA has not established that the maximum lot coverage standard is incapable of being applied consistently with ORS 197.312(5)'s mandate to allow at least one accessory dwelling on every lot that includes a single-family dwelling, subject to local regulations relating to siting and design.[5]

Although it is a close question, we agree with the city that the maximum lot coverage regulation relates to siting. The maximum lot coverage standard regulates how an accessory dwelling can be sited on a lot, and not whether one can be sited at all. Although the maximum lot coverage standard could preclude development of a particular type of accessory dwelling on a lot in the same way that a setback requirement or height limitation could, we think the fact that the maximum lot coverage standard may have the effect of precluding a certain type of accessory dwelling does not mean that it is not a regulation relating to siting, or otherwise inconsistent with the statute.[6] In this way, maximum lot coverage

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[5] The city analogizes the maximum lot coverage regulation to an EC provision that limits the percentage of a lot that can be a vehicle use area to 20 percent, which we found in *Kamps-Hughes I* was a regulation related to siting. Respondent's Response Brief 23.

[6] HBA does not cite to any evidence in the record that the maximum lot coverage standard has the effect of discouraging or precluding the development

standards are less like minimum lot size standards and density limitations and more like typical siting and design regulations such as setbacks. Minimum lot size standards and density limitations that only allow an accessory dwelling at all if the lot is a certain size or built below a certain density have the effect of precluding the development of any of the three types of accessory dwellings on a lot. Differently, maximum lot coverage standards might have the effect of foreclosing a detached or attached accessory dwelling, while still allowing an interior accessory dwelling. As we noted in *Kamps-Hughes I*, the legislature left cities with some measure of regulatory authority over accessory dwellings, which to us suggests that the legislature intended, or at least understood, that not all lots with existing single-family dwellings would qualify for an accessory dwelling if they failed to satisfy "reasonable local regulations relating to siting and design." The definition of "accessory dwelling" also suggests that the legislature understood that not all lots would be able to construct the preferred type of accessory dwelling.

2. Reasonableness

In its second assignment of error and in its reply brief, HBA argues that the 50 percent maximum lot coverage standard is not "reasonable." That is so, HBA argues, because the city's justification for the standard, set out in the findings, discusses livability and traffic concerns, thereby demonstrating that the

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of any type of accessory dwelling on lots that already contain large existing structures.

standard is "contrary to the statutory policy." HBA's Petition for Review 28; *see* ___ Or LUBA ___ n 7 (slip op at 13 n 7).

The city responds, and we agree, that petitioner has failed to demonstrate that the 50 percent maximum lot coverage standard is not "reasonable" within the meaning of the statute. Because the statute does not define the term "reasonable," we rely on the plain meaning of the word. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). The meaning of "reasonable" is:

> "**1 a:** being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous <a ~ conviction> <a ~ theory> **b:** being or remaining within the bounds of reason: not extreme: not excessive * * * **c**: moderate * * *." *Webster's Third New Int'l Dictionary* 1892 (unabridged ed 2002) (boldface in original).

See State v. Goodall, 219 Or App 325, 333, 183 P3d 199 (2008) (examining the word "reasonable" as used in the phrase "reasonably necessary"). We conclude that, absent any evidence in the record or argument from HBA that a regulation that prohibits the area of a lot that may be covered by a building or structure from exceeding 50 percent of the lot is not "within the bounds of reason," or is "extreme," "excessive," or not "moderate," HBA has not established that the regulation is unreasonable. In other words, HBA has not really developed any argument that the regulation is unreasonable, but rather challenges the city's

justifications for it.[7] HBA has not demonstrated that the regulation is incapable of being applied consistently with the statute.

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[7] The city's findings conclude that the maximum lot coverage standard is "reasonable" because it is

> "an effective way to ensure that the added density will not overtake residents' need for yard/open space and parking. It is also reasonable because it helps ensure that increased densities do not create unnecessary 'livability' concerns that residential neighborhoods are becoming overcrowded. This standard is also reasonable because the City must carefully manage the creation of impermeable surface area in the City based on the effect it has on the stormwater system." Record 41-42.

The only possible argument that we can see in HBA's challenge is that the city's justification is not "in agreement with right thinking or right judgment," in the words of the dictionary definition. However, while HBA may disagree with the policies that the city council articulated in concluding that the maximum lot coverage standard is reasonable, HBA has not demonstrated that those policies are inconsistent with the plain language of the term "reasonable." A reasonable city council could rely on those policies to adopt a maximum lot coverage standard.

However, we note that it seems fairly obvious that, at some point, a numeric maximum lot coverage standard could be so low as to be unreasonable; for example, if it effectively disallowed accessory dwellings on lots encumbered by the regulation and the evidence in the record demonstrated that adding interior accessory dwellings to existing single-family dwellings on most lots was infeasible or too expensive. The record does not include any evidence to support that inference here, and we express no opinion on the number that would be unreasonable.

3. Calculation of Maximum Lot Coverage in Special Areas

In all areas of the city except three areas near the University of Oregon, the EC defines "Lot Coverage" in a way that excludes roof eaves, and excludes carports, porches, and balconies that are open at least 50 percent of their perimeter. EC 9.0500. For the three specially-identified areas, however, all roofed areas are included in the calculation of lot coverage, thereby reducing the available lot area for an accessory dwelling and possibly reducing the size of the accessory dwelling. EC 9.2751(17)(c)(3). In another portion of the second assignment of error, HBA argues that the maximum lot coverage calculation in those three areas of the city, as set forth in EC 9.2751(17)(c)(3), is not "reasonable" because it reduces the available lot area in only those three areas of the city.

The city does not really respond to this argument.[8] However, HBA has not explained why, in the abstract, adopting different standards in different areas is

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[8] Intervenors-respondents respond that HBA has not established that the different lot coverage calculation in those three areas is unreasonable because accessory dwellings are not required to include roof eaves. Thus, intervenors-respondents argue, HBA's premise that that EC provision will require a detached or attached accessory dwelling to be smaller in order to comply with lot coverage standards is simply incorrect. Intervenors-Respondents' Response Brief 39. However, intervenors-respondents' argument fails to acknowledge that the amount of existing lot coverage will be greater, and thus the amount of remaining lot coverage smaller, due to the *existing* detached single-family dwelling and accessory structures' roofed areas being included in the calculation in these three areas of the city.

not "reasonable." Absent any attempt to explain why such an approach is unreasonable, HBA's argument provides no basis for reversal or remand.

C. Attached/Interior Accessory Dwelling Standards

EC 9.2751(17)(a)(2) and (17)(b)(1) limit the size of an accessory dwelling in all of the city's zones except R-1 to "10 percent of the total lot area or 800 square feet, whichever is smaller," with additional area allowed for garages and storage. Differently, accessory dwellings on lots in the R-1 zone are limited to 600 square feet on lots between 7,500 and 9,000 square feet, and 800 square feet on lots at least 9,000 square feet. EC 9.2751(17)(c)(4).

HBA first argues that the EC standards are not reasonable because they could make conversion of an existing single-family dwelling difficult, and operate to discourage conversion. HBA puts forth an example of an existing dwelling with a 900-square-foot first floor potentially being unable to convert the entirety of the first floor to an interior accessory dwelling due to the limitation in EC 9.2751(17)(a)(2). HBA also argues that limiting the size of an accessory dwelling to 10 percent of the lot size is unreasonable because, according to HBA, lot size is not related to the size of a primary dwelling.[9] Finally, HBA argues that

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[9] The city found that the accessory dwelling size limitations were reasonable based on their contribution to the "accessory" relationship to the primary dwelling. Record 42-43.The city also explained that the accessory dwelling size limitations in the three areas near the university were adopted as interim protection measures for these areas because these areas "have in recent years experienced a substantial increase in unforeseen housing development associated

it is unreasonable for the city to allow potentially larger accessory dwellings on smaller lots in zones other than R-1, but to limit the size of accessory dwellings on the larger lots in the R-1 zone. HBA's Petition for Review 33-34.

The city responds, and we agree, that HBA has not established that the EC provisions that regulate the size of accessory dwellings differently in different areas of the city are unreasonable, or that they are incapable of being applied consistently with ORS 197.312(5). In the words of the definition of "reasonable," HBA has not established that the difference in size limitations "conflict[] with reason" or is "absurd," "ridiculous," or "extreme."

D. Interior Yard Setbacks/Height Standards

Prior to the Ordinance, EC 9.2751(17)(a)(3) imposed a sloped setback and building height requirement for attached accessory dwellings. The Ordinance reduced the sloped setback requirement slightly and created separate standards for accessory dwellings located above garages and on sloped lots.[10] The city

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with skyrocketing demand for private student housing in the proximity of the university." Record 44.

[10] As enacted, EC 9.2751(17)(a)(3) provides:

> "a. For any portion of an attached accessory dwelling located within 60 feet of a front lot line, interior yard setbacks shall be at least 5 feet, and maximum building height shall be limited to that of the main building as per Table 9.2750
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> "b. For any portion of an attached accessory dwelling located greater than 60 feet [from] a front lot line, the following standards apply:

explains that the purpose of these amendments is to enable more above-garage accessory dwellings and to address difficulties and remove barriers related to placing accessory dwellings on sloped lots. Respondent's Response Brief 28

> "(1) Except as provided in subsection (2) below, interior yard setbacks shall be at least 5 feet. In addition, at a point that is 10 feet above finished grade, the setback shall slope at the rate of 10 inches vertically for every 12 inches horizontally away from the property line to a maximum building height of 18 feet. * * *
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> "(2) For an accessory dwelling located above a garage or located where there is a grade change of 5 feet or more when measured from lowest finished grade to highest finished grade at points within a 5-foot horizontal distance of the exterior walls of the accessory dwelling * * *, the following standards apply:
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> "(A) For an interior lot line that is not addressed in (2)(B) below or an interior lot line that abuts an alley, the minimum interior yard setback from that lot line is 5 feet and the maximum building height is 25 feet.
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> "(B) Where an interior lot line abuts property that is zoned R-1, R-1.5, S-C/R-1 or S-RN/LDR, the interior yard setbacks shall be at least 5 feet. In addition, at a point that is 18 feet above finished grade, the setback shall slope at the rate of 10 inches vertically for every 12 inches horizontally away from the property line to a maximum building height of 25 feet. If the building is setback a minimum of 20 feet from an interior property line, the sloped portion of the setback does not apply along that property line."

(citing Record 3, 69-71, 83, 157). HBA argues that the sloped setback and building height regulation is unreasonable because it "dramatically stunt[s] the prospect for modifications to existing dwellings to convert an existing floor area into an attached [accessory dwelling.]" HBA's Petition for Review 32. However, HBA also concedes that its main argument is that the provision may make it more expensive to convert an existing floor area into an attached accessory dwelling. HBA has failed to establish that, even assuming that its assertion is correct, such a consequence makes the provision unreasonable.

E. Common Wall/Ceiling Requirement for an Attached Accessory Dwelling

EC 9.2751(17)(a)(4) requires that attached accessory dwellings "share a common wall or ceiling for a minimum length of 8 feet to be considered attached." In its second assignment of error, we understand HBA to argue that this provision is inconsistent with "state law." HBA's Petition for Review 36. However, HBA does not identify the provision of state law with which EC 9.2751(17)(a)(4) is allegedly inconsistent. Rather, HBA argues that "some attached [accessory dwellings] may be considered detached because the minimum 8 feet of attachment length is not present." HBA's Petition for Review 37. Absent any developed argument that EC 9.2751(17)(a)(4) is on its face incapable of being applied consistently with state law, HBA's argument provides no basis for reversal or remand of the decision.

F. Parking Regulations (EC 9.3625(7)(a))

EC 9.3625(7) includes parking standards for the Jefferson-Westside area of the city:

> "(a) Except as provided in * * * (7)(b) below, each dwelling shall have one on-street or on-site vehicle parking space for every three bedrooms, rounded up to the next whole number (i.e. a four-bedroom dwelling must have at least two parking spaces). For purposes of this subsection, each uninterrupted twenty feet of lot line that abuts a street right-of-away where parking is legal within the entirety of that twenty feet shall count as one on-street parking space. The twenty feet may not include any portion of a curb cut.
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> "(b) When there are two or more dwellings and there is no on-street parking space, as defined in subsection (7)(a) above, the parking space requirement shall be waived for one dwelling that has primary vehicle access from the street and no more than three bedrooms.
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> "(c) No portion of a vehicle parking area may be located in the area defined by the Street Setback minimum standard (i.e., from which structures, other than permitted intrusions, are excluded) or between the street and the residential building facade that faces, and is closest to, the street."

The Ordinance added subsection (b), allowing a waiver of the parking requirement where there is no on-street parking space. In their third assignment of error, intervenors-petitioners argue that EC 9.3625(7) is facially inconsistent with ORS 197.312(5)(b)(B)'s prohibition on requiring the construction of off-street parking for accessory dwellings.

The city concedes that the parking standards are partially inconsistent with the statutory prohibition on requiring off-site parking to the extent that the

standards do not allow a waiver for alley-access lots. However, the city disputes that the provision is facially inconsistent with ORS 197.312(5)(b)(B) and that it is incapable of being applied consistently with that provision.

EC 9.3625(7) requires at least one on-street or off-street parking space for each dwelling on a lot. The changes to EC 9.3625(7) add a waiver provision if there is no on-street parking. Intervenors-petitioners argue that "the application of this waiver is so narrow as to be unreasonable—it would be a rare exception for those developing an [accessory dwelling to] qualify for the waiver." Intervenors-Petitioners' Petition for Review 24. Intervenors-petitioners explain that that is because, as they understand the language, it applies only to lots with two or more dwellings and only when there is no on-street parking space.

Intervenors-petitioners' arguments and the city's responses are like two ships passing in the night with a point of mutual acknowledgement of each other from a distance. Because we are remanding the decision based on our sustaining several assignments of error, we sustain intervenors-petitioners' third assignment of error also. The city should amend EC 9.3525(7) to clarify what is intended by the provision.

HBA's first assignment of error and intervenors-petitioners' first and second assignments of error are sustained, in part.

HBA's second assignment of error is denied.

Intervenors-petitioners' third assignment of error is sustained.

CROSS PETITION FOR REVIEW

The Ordinance adopts a definition for "Dwelling, Accessory" that is identical to ORS 197.312(5)(b)(A), in which the legislature defines "[a]ccessory dwelling unit" as "an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling." EC 9.0500. In their cross petition for review, intervenors-respondents argue that "[t]he City erred by adopting an ordinance amending the local regulations governing the 'Accessory Dwelling' residential use without providing a clear and objective definition of 'Dwelling, Accessory.'" Intervenors-Respondents' Cross Petition for Review 22. Intervenors-respondents argue that the city's definition of "Dwelling, Accessory" fails to satisfy the requirement in ORS 197.307(4) that cities "*adopt* and apply only clear and objective standards, conditions and procedures regulating the development of housing." (Emphasis added.)[11]

The city responds that intervenors-respondents' arguments do not establish a basis for reversal or remand because nothing in this appeal of the Ordinance requires LUBA to interpret either the EC definition of "Dwelling, Accessory" or the statutory definition that it mimics. The city also responds that, when an opportunity for LUBA or the courts to interpret these definitions arises, LUBA

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[11] Intervenors-respondents also argue that the definition of "Dwelling, Accessory" adopted in the Ordinance is inconsistent with ORS 215.416(8)(b), which requires counties to adopt standards that are "clear and objective on the face of the ordinance." However, ORS 215.416(8)(b) does not apply to cities.

or the courts will, if necessary, apply the rule of construction that reads and harmonizes ORS 197.312(5)(b)(A) and ORS 197.307(4).

Intervenors-respondents' argument essentially boils down to an argument that *the legislature* failed to act consistently with ORS 197.307(4) when it adopted ORS 197.312(5)(b)(A), and that the city must now adopt a different, more clear, and more objective definition than the legislature did. However, intervenors-respondents point to nothing that requires the legislature to harmonize all prior legislation that is affected by newly enacted legislation. If a legislative enactment results in a conflict with other legislation, the courts will harmonize conflicting legislation to give effect to all parts. *State v. Guzek*, 322 Or 245, 266-68, 906 P2d 272 (1995). Moreover, the express language of ORS 197.307(4) does not require *the legislature* to adopt only clear and objective standards regulating needed housing.

Where a city adopts a statutory definition into its land use regulations, the local definition cannot on its face violate the statute from which it is taken, or any other statute. Rather, in an as-applied challenge, LUBA and the courts will interpret the local definition that implements the statute according to the rules of statutory construction set out in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)) (in interpreting a statute, LUBA and the courts examine text, context, and legislative history with the goal of discerning the intent of the governing body that enacted the law). The context for a statute includes "other

statutes on the same subject." *Southern Pacific Trans. Co. v. Dept. of Rev.*, 316 Or 495, 498, 852 P2d 197 (1993). Accordingly, intervenors-respondents have not established that the definition of "Dwelling, Accessory" adopted in the Ordinance is facially inconsistent with ORS 197.307(4) or incapable of being applied consistently with that statute, and the cross petition for review does not establish a basis for remand of the decision.[12]

Intervenors-respondents' assignment of error is denied.

The city's decision is remanded.

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[12] ORS 197.040(1)(b) gives the Land Conservation and Development Commission authority to "adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197." Defining by rule the operative but undefined terms in ORS 197.312(5) seems to fit squarely within that authority.