

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

PENNY SUESS,  
*Petitioner,*

vs.

CITY OF PORT ORFORD,  
*Respondent,*

and

ELK RIVER PROPERTY DEVELOPMENT, LLC,  
*Intervenor-Respondent.*

LUBA No. 2020-076

FINAL OPINION  
AND ORDER

Appeal from City of Port Orford.

Sean Malone filed the petition for review and reply brief and argued on behalf of petitioner.

Shala M. Kudlac filed a response brief. Also on the brief was Carleton Law Office.

Bill Kloos filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED

01/22/2021

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

**NATURE OF THE DECISION**

Petitioner appeals a city council decision approving one-year extensions of two conditional use permits (CUPs).

**FACTS**

On April 11, 2017, the city council approved intervenor's request for CUPs authorizing pipelines to transport recycled water from the city's wastewater treatment plant to a planned golf course. The city approved one-year extensions of the two CUPs in 2018 and then again in 2019. In 2020, intervenor submitted its third request for one-year extensions. The planning commission approved intervenor's request for the third extensions. Petitioner appealed the extension approvals to the city council. The city council approved the third extensions and this appeal followed.

**ASSIGNMENT OF ERROR**

Port Orford Municipal Code (POMC) 17.32.060 provides:

"Authorization of a conditional use shall be void after one year or such lesser time as the authorization may specify unless substantial construction has taken place. However, the Planning Commission may extend authorization for an additional period not to exceed one year, upon written application to the Planning Commission."

The city council interpreted POMC 17.32.060 to provide the city with

"the authority to grant extensions for the period of one year per extension. There is no limitation on the number of extensions which may be granted so long as the duration of each does not exceed one year." Record 7.

1 Petitioner’s sole assignment of error is that the city council misconstrued POMC  
2 17.32.060. Petition for Review 4. For the reasons set forth below, we affirm the  
3 city council’s decision.

4 We review the city council’s interpretation of its own land use regulations  
5 under ORS 197.829(1) and are required to affirm that interpretation so long as  
6 that it is not inconsistent with the express language of the regulation or its  
7 underlying purposes or policies.<sup>1</sup> We agree with the city that the city council’s  
8 interpretation of POMC 17.32.060 is not inconsistent with the express language  
9 of that provision.<sup>2</sup>

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<sup>1</sup> ORS 197.829(1) requires that we

“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.”

<sup>2</sup> As we explained in *Keep Keizer Livable v. City of Keizer*,

1       According to petitioner, POMC 17.32.060 unambiguously allows only a  
2   single extension:

3       “POMC 17.32.060 uses an indefinite article followed by a singular  
4   noun, ‘an additional period.’ \* \* \* That means, unequivocally, that  
5   ‘one additional period’ is permitted. The City’s finding that ‘[t]here  
6   is no limitation on the number of extensions which may be granted  
7   so long as the duration of each does not exceed one year’ ignores  
8   the code’s use of the indefinite article ‘an’ and the singular  
9   ‘period.’” Petition for Review 9.

10   Intervenor responds that the code is in fact ambiguous because the word “an”  
11   does not automatically mean “one” or “a single period.” We have concluded that  
12   the use of the singular, along with legislative history, can be significant evidence  
13   of intent in the construction of a state statute.<sup>3</sup> *Landwatch Lane County v. Lane*  
14   *County*, 79 Or LUBA 96, 109-10 (2019) (holding that a local code provision,  
15   which implemented a state statute, authorizing “an” extension of a permit for  
16   residential development on resource land was correctly interpreted to allow one

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“[w]hether the city’s interpretation \* \* \* is inconsistent with the  
‘express language’ of a local provision, within the meaning of ORS  
197.829(1)(a), ‘depends on whether the interpretation is plausible,  
given the interpretive principles that ordinarily apply to the  
construction of ordinances under the rules of *PGE* [*v. Bureau of*  
*Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993)].” 64 Or  
LUBA 53, 58, *aff’d*, 246 Or App 788, 268 P3d 162 (2011) (quoting  
*Foland v. Jackson County*, 215 Or App 157, 164, 168 P3d 1238, *rev*  
*den*, 343 Or 690, 174 P3d 1016 (2007) (brackets in *Keep Keizer*  
*Livable*)) (citing *Siporen v. City of Medford*, 349 Or 247, 243 P3d  
776 (2010)).

<sup>3</sup> Neither party provided legislative history in this case.

1 permit extension). As discussed above, however, we afford substantial deference  
2 to a local government's interpretation of its own code.

3 "[T]he plausibility determination under ORS 197.829(1) is not  
4 whether a local government's code interpretation best comports with  
5 principles of statutory construction. Rather, the issue is whether the  
6 local government's interpretation is plausible because it is not  
7 expressly *inconsistent* with the text of the code provision or with  
8 related policies that 'provide the basis for' or that are 'implemented'  
9 by the code provision, including any ordained statement of the  
10 specific purpose of the code provision at issue." *Kaplowitz v Lane*  
11 *County*, 285 Or App 764, 775, 398 P3d 478 (2017) (emphasis in  
12 original).

13 Petitioner's interpretation requires us to conclude that language authorizing "an"  
14 extension necessarily means only one extension. The code does not expressly  
15 prohibit multiple one-year extensions.

16 Petitioner argues further that the provision in POMC 17.32.060 that a  
17 conditional use authorization shall not be void if "substantial construction has  
18 taken place" provides context supporting their assertion that only one extension  
19 is allowed. According to petitioner, under the city's interpretation,

20 "the requirement that an applicant engage in 'substantial  
21 construction' is superfluous because an applicant could always  
22 foreclose the possibility of authorization becoming void by simply  
23 requesting extension after extension, *ad infinitum*. 'Substantial  
24 construction' serves no purpose in light of unending extension, and,  
25 therefore, the City's and the intervenor's position does not give  
26 effect to all provisions by making some language superfluous."  
27 Petition for Review 13.

28 Petitioner is incorrect; the language is not superfluous. As the city council  
29 explained, the code provides that an extension is not required if substantial

1 construction has occurred. Said differently, if substantial construction has  
2 occurred, the conditional use has been initiated and, therefore, the time allowed  
3 for initiating the use need not be extended. ORS 174.010 provides that, “where  
4 there are several provisions or particulars[,] such construction is, if possible, to  
5 be adopted as will give effect to all.” The city’s interpretation gives effect to all  
6 provisions and is consistent with the text and context of POMC 17.32.060.

7 The city’s decision is affirmed.