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

HOLLANDER HOSPITALITY,
Petitioner,

vs.

CITY OF ASTORIA,
Respondent.

LUBA No. 2020-088

FINAL OPINION
AND ORDER

Appeal from City of Astoria.

Steven Hultberg filed the petition for review and reply brief and argued on behalf of petitioner. With them on the brief were Zoee Lynn Powers and Radler White Parks & Alexander LLP.

Blair Henningsgaard filed the response brief and argued on behalf of respondent.

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

ZAMUDIO, Board Member, did not participate in the decision.

REMANDED 01/15/2021

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

Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a city council denial of a one-year extension of land use approvals.

FACTS

The subject property is located between Marine Drive and the Astoria Riverfront Trolley tracks and is zoned General Commercial (C-3). In 2018, petitioner applied to develop a four-story, 29,782-square-foot hotel on the subject property. Because the subject property is within the Bridge Vista Overlay (BVO) zone, hotel development required a design review permit from the Design Review Commission (DRC). Because the subject property is adjacent to a designated historic site, hotel development required a historic new construction permit from the Historic Landmarks Commission (HLC). Petitioner applied for both.

On June 25, 2018, the DRC and HLC held public hearings on the applications and, on July 10, 2018, denied the permits. Petitioner appealed those decisions to the city council. On December 20, 2018, the city council approved petitioner's applications with a revised building design. In 2019, the city adopted changes to the BVO zone standards.

Pursuant to Astoria Development Code (ADC) 9.100(A)(1), a permit expires two years from the date of the final decision unless substantial construction has taken place, the use has begun, or the city grants an extension. Petitioner's use has not begun and construction has not commenced. The permits

were therefore scheduled to expire on December 20, 2020. On April 22, 2020, petitioner applied for one-year extensions. On June 18, 2020, the community development director denied the extension requests. On July 2, 2020, petitioner appealed the community development director's denial to the city council. On August 6, 2020, the city council held a public hearing on the appeal. The city council denied the extension requests. This appeal followed.

STANDARD OF REVIEW

The parties dispute whether the decision is a land use or limited land use decision. Because the answer determines our standard of review, we address this question first.

Petitioner maintains that the decision is a land use decision. The city argues that it is a limited land use decision. "Land use decision," as defined in ORS 197.015(10)(a)(A), includes:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
>
> "(i) The goals;
>
> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

Under ORS 197.015(10)(b)(C), the definition of "land use decision" does not include "a limited land use decision." ORS 197.015(12) provides:

> "'Limited land use decision':

> "(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
>
> "(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040(1).
>
> "(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.
>
> "(b) Does not mean a final decision made by a local government pertaining to a site within an urban growth boundary that concerns approval or denial of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan."

The city council's extension decision required the application of ADC 9.100(B)—a land use regulation that does not regulate the physical characteristics of development—and therefore appears to be a land use decision. The city argues, however, that the initial decisions were limited land use decisions and, as a result, the extension decision is a limited land use decision. We disagree.

The extension decision is not the approval of a subdivision or partition plan and therefore is not a limited land division under ORS 197.015(12)(a)(A) or (b). The decision may still be a limited land use decision if it involves application approval or denial based on discretionary standards regulating the physical characteristics of a use permitted outright. ORS 197.015(12)(B). Under ADC 9.100(B)(2)(c) and (d), extension decisions require an inquiry into whether

progress has been made on the project or economic conditions exist in the market that advise against proceeding. We explained in *Bard v. Lane County*, 63 Or LUBA 1, 9 *aff'd*, 243 Or App 245, 256 P3d 205 (2011), that a standard requiring the decision maker "to determine whether 'the applicant was unable to begin or continue development during the approval period for reasons for which the applicant was not responsible'" was "an extremely discretionary inquiry." The extension approval standards do not, however, concern the discretionary standards designed to regulate physical characteristics of a use permitted outright and therefore is not a limited land use decision under ORS 197.015(12)(a)(B).

The city council's extension decision is a land use decision, and our review is governed by ORS 197.835(9)(a).[1]

FIRST ASSIGNMENT OF ERROR

ADC 9.100(B)(2) provides:

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[1] ORS 197.835(9)(a) provides that we will reverse or remand a *land use decision* under review if we find that the local government

> "(A) Exceeded its jurisdiction;
>
> "(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;
>
> "(C) Made a decision not supported by substantial evidence in the whole record;
>
> "(D) Improperly construed the applicable law; or
>
> "(E) Made an unconstitutional decision[.]"

"The granting authority may grant a permit extension upon written findings that the request complies with the following:

"a. The project proposal has not been modified in such a manner as to conflict with the original findings of fact for approval; and

"b. the proposed project does not conflict with any changes to the Comprehensive Plan or Development Code which were adopted since the last permit extension date; and

"c. The applicant has demonstrated that progress has been made on the project since the original decision on the permit with regard to items such as, but not limited to:

"1) Submittal of permit applications to City, State and federal agencies;

"2) Contracts for geologic or other site specific reports have been signed and are in effect;

"3) Project site and/or building engineering, architectural design, or construction has begun.

"d. In lieu of compliance with Section 2.c above, the applicant may demonstrate that poor economic conditions exist in the market that would advise against proceeding with the project."

The city council concluded that ADC 9.100(B)(2)(a) was met because the hotel proposal had not been modified since the initial permit decisions. Record 7. The city council found that ADC 9.100(B)(2)(b) was met because that criterion requires an evaluation of the hotel proposal's consistency with changes to the Comprehensive Plan or ADC "since the last permit expiration date" and because petitioner's permits had not yet expired at the time of the extension decision. Record 7. Those conclusions are not at issue in this appeal.

The city council found, however, that ADC 9.100(B)(2)(c) *and* (d) were not met. Record 9-10. The city council also concluded that the use of the term "may" throughout ADC 9.100(B)(2) provides the city council with discretionary authority to deny extension requests even if the criteria in ADC 9.100(B)(2) are met. Record 11. As noted, the city council denied the extension requests.

Petitioner's first assignment of error is that the city council misconstrued ADC 9.100(B)(2)(c) and (d) and the decision should be reversed or remanded pursuant to ORS 197.835(9)(a)(D). We review the city's interpretation of its own land use regulations under ORS 197.829(1), which 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."

We are required to affirm the city's interpretation of its development code so long as that interpretation is not inconsistent with the express language or the underlying purposes and policies of the regulation and is not contrary to state law. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). In construing

the law, we will consider the text, context and legislative history of the law at issue in order to determine the intent of the enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

ADC 9.100.B.2.c and 2.d provide that the city council may find that:

> "(c) The applicant has demonstrated that progress has been made on the project since the original decision on the permit with regard to items such as, but not limited to:
>
> > "1) Submittal of permit applications to City, State and federal agencies;
> >
> > "2) Contracts for geologic or other site specific reports have been signed and are in effect;
> >
> > "3) Project site and/or building engineering, architectural design, or construction has begun."
>
> "(d) In lieu of compliance with Section 2.c above, the applicant may demonstrate that poor economic conditions exist in the market that would advise against proceeding with the project."

With respect to ADC 9.100(B)(2)(c), the city council found:

> "[Petitioner] has not submitted an application for a building permit, grading permit, geologic reports any other permit applications indicating that progress has been made on this project. This criteria has not been met." Record 10.

Regarding ADC 9.100(B)(2)(d), the city council explained:

> "The issue of 'poor economic conditions' could be interpreted either way. [Petitioner] provided documentation, dated 8-6-20, concerning the pandemic impact on the hotel industry. However the Council finds [petitioner] has not demonstrated that the provisions of Section

9.100.B.2.d excuse compliance with Section 9.100.B.2.c." *Id.*

The city council concluded that ADC 9.100(B)(2)(d) was not met because

> "[petitioner] could have proceeded with the project within the first year and a half of the permit and did not show progress during that time. The COVID-19 hotel closure in Astoria was only from March 22, 2020 to June 5, 2020 and [petitioner] had time to proceed with the project in a timely manner." *Id.*

Petitioner argues, and we agree, that the city misconstrued its code when, in evaluating compliance with ADC 9.100(B)(2)(d), the city council applied subparagraph (2)(c) and denied the extension based on its conclusion that petitioner could have begun the project before economic conditions changed. ADC 9.100(B)(2)(d) expressly states that it applies "[*i*]*n lieu of* compliance with Section 2.c above." (Emphasis added.) "In lieu of" means "[i]nstead of or in place of; in exchange or return for" *Black's Law Dictionary* 858 (9th ed 2009). ADC 9.100(B)(2) requires *either* progress related to construction *or* negative economic conditions. Petitioner did not argue that "progress has been made" under (2)(c). Rather, petitioner argued that poor economic conditions exist in the market that would advise against proceeding with the project under (2)(d).

The first assignment of error is sustained.

SECOND ASSIGNMENT OR ERROR

Petitioner's second assignment of error is that the city's decision is not supported by substantial evidence—that is, evidence a reasonable person would rely upon to reach a decision—as required by ORS 197.835(9)(a)(C). *Younger v.*

City of Portland, 305 Or 346, 358-60, 752 P2d 262 (1988). For the reasons set forth below, we sustain this assignment of error.

As discussed above, an applicant for an extension may, "in lieu of" establishing that progress has been made on the development, demonstrate that "poor economic conditions exist in the market that would advise against proceeding with the project." ADC 9.100(B)(2)(d). During the local proceedings, petitioner submitted regional and national market data for the hotel industry showing severe declines in occupancy for 2020. Record 45-49. Petitioner also pointed to comments in the city's own 2021 budget which recognize the likelihood of a recession and a loss of funding, including from a decrease in transient lodging tax collections. Record 39. Petitioner's representative, Mark Hollander, testified that he was an experienced hotel developer and that "[h]e would continue to keep working on things behind the scenes and be ready to pull the trigger as quickly as he can get a loan lined up." Record 20-21. Petitioner submitted several letters from lenders as additional evidence of poor economic conditions. One lender stated:

> "With the profitability outlook as dire as it is right now, it is rare for a new project to make sense financially under these circumstances.
>
> "For these reasons, I believe a permit extension would be the best course of action for this proposed project." Record 41-42.

A second lender stated:

> "[G]iven the current decline in the hospitality industry related to the COVID-19 pandemic, Heritage Bank has temporarily implemented

> guidelines restricting our involvement in new hotel development projects. It is our understanding that restrictions such as these are now common throughout the banking industry." Record 43.

A third lender stated:

> "Due to the Covid [*sic*] pandemic and its negative impact on the PNW economy, we are not at this time encouraging new hospitality construction loans. For the record, I spoke with a large regional competitor bank that works throughout the PNW states. That bank also reports not approving any new hospitality construction loans at this time." Record 44.

The city council agreed that the COVID-19 pandemic had impacted tourism but concluded that the economic impacts of the pandemic are recent and temporary and

> "[t]he fact that one other hotel operator has obtained building permit in 2020 and one that is in building permit stage, provides evidence that economic conditions in the Astoria hotel market do not advise against proceeding with this project." Record 10.

During the local proceedings, petitioner speculated regarding the identity of the other referenced developments in order to rebut the city council's conclusions, and explained that one project is a renovation of an existing building that began before the onset of the pandemic, and that financing of a renovation project is different than that required for its new construction project. Record 20, 40. Petitioner also observed that no construction was underway for what it believed to be the second referenced hotel project, but if construction began, it could be due to the obtainment of irrevocable financing before the pandemic. Record 20, 40.

We agree with petitioner that the decision is not supported by substantial evidence.

> "A person might, considering supporting evidence in isolation, reasonably rely upon that evidence to reach a conclusion, but if the supporting evidence is sufficiently refuted by other evidence, then continued reliance upon the supporting evidence is unreasonable, no matter how substantial that evidence would appear in isolation." *Younger*, 305 Or at 359.

The city council failed to consider petitioner's relevant evidence, and petitioner adequately rebutted the evidence on which the city council did rely by noting the differences between its project and the two projects to which it speculated the city council was referring. At a minimum, the city council was required to explain why it chose not to rely on petitioner's evidence of poor market conditions and instead chose to rely on evidence of other hotels that petitioner explained are not similarly situated and may or may not have received financing. Accordingly, we agree with petitioner that the city's decision is not supported by substantial evidence.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner's third assignment of error is that the city's findings are inadequate because they fail to address the testimony that petitioner submitted to demonstrate that poor economic conditions exist in the market that would advise against proceeding with the project. The city was required to address testimony submitted by petitioner in its findings. *Space Age Fuel, Inc. v. Umatilla County*

72 Or LUBA 92, 97 (2015) (explaining that a decision maker's findings must address relevant issues adequately raised by evidence). We agree with petitioner that the city's findings are inadequate. The city council found:

> "The fact that one other hotel operator has obtained building permit in 2020 and one that is in building permit stage, provides evidence that economic conditions in the Astoria hotel market do not advise against proceeding with this project.
>
> "[Petitioner] has stated that the City did not provide 'evidentiary support' for the conclusion that economic conditions would not warrant delay of construction during the pandemic. The issue of 'poor economic conditions' could be interpreted either way. [Petitioner] provided documentation, dated 8-6-2020, concerning the impact on the hotel industry. However, the Council finds [petitioner] has not demonstrated that the provisions of Section 9.100.B.2.d excuse compliance with Section 9.100.B.2.c.
>
> "Council finds that [petitioner] could have proceeded with the project within the first year and a half of the permit and did not show progress during that time. The COVID-19 hotel closure in Astoria was only from March 22, 2020 to June 5, 2020, and [petitioner] had time to proceed with the project in a timely manner." Record 10.

These findings suffer from the interpretive flaw that we identified above in our resolution of the first assignment of error and, for that reason, are inadequate to explain why the city concluded that it could deny the extension. In addition, the findings fail to address petitioner's evidence, including the market data, developer testimony, and lender letters, or explain why that evidence is not sufficient to justify an extension.

The third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner argues in its fourth assignment of error that the city council's decision violates ORS 227.173(1) because the denial is not based on the standards and criteria set forth in ADC 9.100(B)(2). ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

We sustain this assignment of error.

ADC 9.100(B)(2) sets out the standards that the city is required to apply, and subparagraphs (c) and (d) provide that an extension is approvable if either progress on developing the use has occurred or the economic conditions test is met. The city denied the extensions because the city enacted significant code changes after approving the development and it believed that those changes supported requiring additional design and historic review. This denial is improperly based on standards not found in the code.

The hotel development was originally approved in 2018 and does not meet the BVO zone standards that took effect in 2019. The city council found:

> "[E]ven if compliance with [ADC 9.100.B] had been established, allowing a permit extension is not required by the [ADC]. Throughout Section 9.100.B.2 the [ADC] provides that the granting authority 'may' allow a permit extension. The use of this word provides the City discretion in granting any extension request. As

> noted above the City Council has made significant code changes relative to design, size, and location of any new construction in the [BVO zone] where this project is located. These changes, as they apply to this project, warrant further design and historic review. Coupled with [petitioner's] failure to advance this project for over 16 months (12-18 to 4-20), these changes warrant denial of this request for a permit extension." Record 11.

ADC 9.100(B)(2)(b) provides that the project seeking the extension must be consistent with any code changes *since the last permit extension*. There have been no prior extensions of the initial two-year approval period. The city council nonetheless apparently interpreted the code to allow it to deny the extension because the project is inconsistent with code changes adopted during *the initial two year approval period.* The city council relies on the presence of the word "may" to conclude that the city has unfettered discretion to deny a permit extension request. We discussed the approval criteria applicable to extension requests in our resolution of the first, second, and third assignments of error. The city's conclusion that it has unfettered discretion to deny a permit extension request whether or not it meets the criteria in ADC 9.100(B) is not consistent with the text of the code that applied in 2018 to petitioner's application for design review and historic new construction review. The city council's interpretation essentially erases these standards from the ADC by requiring that progress on the use occur during the first two years in which the approval is effective, something that no ADC provision requires.

The city's interpretation is also inconsistent with local legislative history. The ADC previously provided that the city could issue extensions "at its

discretion." *Scovel v. City of Astoria*, 60 Or LUBA 371, 375 (2010). The removal of this language supports the conclusion that the city intended to remove any discretion that it may have had.

> "In determining whether the city's interpretation is inconsistent with the 'express' language of ADC 9.100, we also apply statutory construction principles in ORS 174.010, which preclude interpretations that insert or delete words." *Scovel v. City of Astoria*, 60 Or LUBA 371, 374 (2010).

We agree with petitioner that the city's interpretation of ADC 9.100.B adds words that do not appear in that code provision and applies standards not found in the code.

The fourth assignment of error is sustained.

DISPOSITION

Petitioner argues that we should conclude that the decision is outside the city's range of discretion and reverse the decision with an order that city grant the extension. ORS 197.835(10)(a)(A).[2] In *Weyerhaeuser v. Lane County*, we held:

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[2] ORS 197.835(10)(a) provides, in part:

> "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:
>
> "(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[.]"

> "The proponent of a land use change has a heavy burden to prove the findings of fact and conclusions in support of denial of the change were not supported by substantial evidence. In a typical denial case, the proponent must prove the denial was erroneous as a matter of law. In other words, the proponent's evidence must be so strong and so convincing that the county's findings of fact, reasons and conclusions for denying the requested change cannot be upheld. There need not be evidence in the record supporting the county's findings so long as there is some reasonable basis by which the county could find the proponent's evidence was not convincing. It is not enough for the proponent to introduce evidence supporting affirmative findings of fact and conclusions on all applicable legal criteria. The evidence must be such that a reasonable trier of fact could only say the evidence should be believed." 7 Or LUBA 42, 46 (1982) (citing *Jurgenson v. Union County Court*, 42 Or App 505, 600 P2d 1241 (1979)).

We determined in our resolution of the second assignment of error that the city's decision is not supported by substantial evidence and that the city erred in failing to address petitioner's abundant evidence regarding economic conditions. At this point, however, we cannot conclude as a matter of law that petitioner's evidence is such that only it should be believed. The city did not address petitioner's evidence of economic conditions or describe the other hotels on which it relied to determine that petitioner had failed to establish that economic conditions at the time of petitioner's extension application supported granting the extension. We remand the decision so that the city may conduct the narrow economic conditions analysis.

The city's decision is remanded.