

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

HOLLANDER HOSPITALITY,  
*Petitioner,*

vs.

CITY OF ASTORIA,  
*Respondent.*

LUBA No. 2021-061

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. Also on the brief was Radler White Parks & Alexander LLP.

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

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

RYAN, Board member, did not participate in the decision.

REVERSED

09/30/2021

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

## NATURE OF THE DECISION

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

## BACKGROUND

The appealed decision was made by the city council on remand from our decision in *Hollander Hospitality v. City of Astoria*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-088, Jan 15, 2021) (*Hollander I*). As we explained in *Hollander I*,

“[t]he 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.” \_\_\_ Or LUBA at \_\_\_ (slip op at 2).

Astoria Development Code (ADC) 9.100(A)(1) provides, in part:

“Except as otherwise provided in this Code, a permit shall expire two years from the date of Final Decision unless substantial construction has taken place or use has begun. However, extensions for permits may be granted as provided in this section. A permit remains valid, if a timely request for extension has been filed, until

1 an extension is granted or denied with [certain] limitations[.]”<sup>1</sup>

2 ADC 1.400 defines “substantial construction” as the

3 “*[p]hysical alteration of the land and/or building to an extent that*  
4 *there is obvious progress toward completion of the project as*  
5 *follows: For new construction, it shall include walls extending up*  
6 *from grade level; for existing buildings, it shall include issuance of*  
7 *a building permit with inspections for work equal to or greater than*  
8 *25% of the value of the project as indicated on the building permit;*  
9 *and if no building permit is required, proof that site work equal to*  
10 *or greater than 25% of the value of the project has been completed.*  
11 *Land value and permit costs shall not be included in the calculation*  
12 *for value of construction completed.*” (Emphasis added.)

13 Petitioner did not begin or substantially construct its hotel use within two years  
14 of the city council’s December 20, 2018 decision. As a result, its permits were  
15 scheduled to expire on December 20, 2020. On April 22, 2020, petitioner applied  
16 for one-year extensions of its permits. On June 18, 2020, the community  
17 development director denied the extension requests. On July 2, 2020, petitioner  
18 appealed the community development director’s denial to the city council. On  
19 August 6, 2020, the city council held a public hearing on the appeal. The city  
20 council denied the extension requests.

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<sup>1</sup> ADC 9.100(A)(1) also provides that work completed after the date on which the permit would have expired is at the applicant’s risk, work completed after the date on which the permit would have expired is not considered for purposes of determining whether substantial progress has been completed until an extension is granted, and no additional building or use permits will be issued until an extension is granted.

1           On January 15, 2021, we remanded the city council’s decision. On April  
2   19, 2021, the city council held a public hearing on the permit extension  
3   applications and accepted new evidence into the record. On May 3, 2021, the city  
4   council rendered its decision, again denying the extensions.

5           This appeal followed.

## 6   **FIRST ASSIGNMENT OF ERROR**

7           ADC 9.100(B)(2) provides:

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

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

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

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

19               “1)   Submittal of permit applications to City, State and  
20                      Federal agencies;

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

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

25          “d.   In lieu of compliance with Section 2.c above, the applicant  
26               may demonstrate that poor economic conditions exist in the

1 market that would advise against proceeding with the  
2 project.”

3 ADC 9.100(B)(2) requires that a city decision to extend the life of a permit be  
4 supported by written findings of compliance with subparagraphs (a) and (b) and  
5 *either (c) or (d)*. We explained in *Hollander I* that the city council

6 “misconstrued its code when, in evaluating compliance with ADC  
7 9.100(B)(2)(d), the city council applied subparagraph (2)(c) and  
8 denied the extension based on its conclusion that petitioner could  
9 have begun the project before economic conditions changed. ADC  
10 9.100(B)(2)(d) expressly states that it applies ‘[i]n lieu of  
11 compliance with Section 2.c above.’ ‘In lieu of’ means ‘[i]nstead of  
12 or in place of; in exchange or return for.’ *Black’s Law Dictionary*  
13 858 (9th ed 2009). ADC 9.100(B)(2) requires *either* progress related  
14 to construction *or* negative economic conditions. Petitioner did not  
15 argue that ‘progress has been made’ under (2)(c). Rather, petitioner  
16 argued that poor economic conditions exist in the market that would  
17 advise against proceeding with the project under (2)(d).” \_\_\_\_ Or  
18 LUBA at \_\_\_\_ (slip op at 9) (emphases in *Hollander I*).

19 We remanded because the city did not address petitioner’s evidence of economic  
20 conditions in denying petitioner’s extension applications. On remand, the city  
21 council found, in part, that ADC 9.100(B)(2)(d) was not met because petitioner

22 “could have proceeded with the project within the first year and a  
23 half of the permit and did not show progress during that time. The  
24 COVID-19 hotel closure in Astoria was only from March 22, 2020  
25 to June 5, 2020 and [petitioner] had time to proceed with the project  
26 in a timely manner.” Record L-99.<sup>2</sup>

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<sup>2</sup> The record transmitted by the city in this appeal contains both the record in *Hollander I* and the record on remand. However, the pages of those records are numbered similarly: the pages of the record in *Hollander I* are numbered L-1 to

1 Petitioner's first assignment of error is that the city council misconstrued ADC  
2 9.100(B)(2)(d) when it denied the permit extensions based on findings that  
3 petitioner did not make progress on the project prior to requesting the extensions.  
4 As explained further below, we agree with petitioner and sustain this assignment  
5 of error.

6 ORS 197.835(9)(a)(D) provides that we will reverse or remand a land use  
7 decision if we find that the local government improperly construed the applicable  
8 law. We review the city's interpretation of its own land use regulations under  
9 ORS 197.829(1), which provides:

10 "[LUBA] shall affirm a local government's interpretation of its  
11 comprehensive plan and land use regulations, unless the board  
12 determines that the local government's interpretation:

13 "(a) Is inconsistent with the express language of the  
14 comprehensive plan or land use regulation;

15 "(b) Is inconsistent with the purpose for the comprehensive plan  
16 or land use regulation;

17 "(c) Is inconsistent with the underlying policy that provides the  
18 basis for the comprehensive plan or land use regulation; or

19 "(d) Is contrary to a state statute, land use goal or rule that the  
20 comprehensive plan provision or land use regulation  
21 implements."

22 No party argues that the relevant code provisions implement state law.

23 Accordingly, we are required to affirm the city council's interpretation of those

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L-256 and the pages of the record on remand are numbered L-1 to L-304. In this opinion, we refer only to the record on remand.

1 provisions so long as that interpretation is not inconsistent with the provisions'  
2 express language, purposes, or underlying policies—that is, if the interpretation  
3 is plausible. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).  
4 In construing the law, we will consider the text, context, and, if provided to us,  
5 legislative history of the law at issue in order to determine the intent of the  
6 enacting legislature. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-  
7 12, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042  
8 (2009).

9 Petitioner argues:

10 “Despite LUBA’s unambiguous rejection of the City’s  
11 interpretation of its own code that it could deny a permit for ‘lack of  
12 progress,’ on remand the City again denied the extension because,  
13 in the City’s opinion, Petitioner had not made progress on its  
14 development during the 15 months preceding its extension request  
15 and because Petitioner’s ‘lack of progress’ was not caused by  
16 adverse economic conditions during that 15-month period.” Petition  
17 for Review 2 (citing Record L-13).

18 The city council acknowledged that its code does not allow it to deny an extension  
19 *simply* because progress has not been made on the project, but it concluded that  
20 a lack of progress informs whether economic conditions justify an extension:

21 “Although an extension cannot be denied under ADC  
22 9.100(B)(2)(d) simply because the applicant has failed to progress,  
23 the City Council finds that issues concerning an applicant’s  
24 progress, or lack thereof, will come into play when deciding whether  
25 economic conditions justify an extension. Only projects that fail to  
26 progress need an extension and ADC 9.100(B)(2)(d) only allows an  
27 extension when adverse economic conditions create a need for that  
28 extension.” Record L-4.

1   ORS 174.010 provides:

2           “In the construction of a statute, the office of the judge is simply to  
3           ascertain and declare what is, in terms or in substance, contained  
4           therein, not to insert what has been omitted, or to omit what has been  
5           inserted; and where there are several provisions or particulars such  
6           construction is, if possible, to be adopted as will give effect to all.”

7   The interpretation put forth by the city council in this case improperly omits  
8   language from the code. As we explained in *Holland I*, the “in lieu” language in  
9   ADC 9.100(B)(2)(d) means that, if ADC 9.100(B)(2)(d) is met, then ADC  
10   9.100(B)(2)(c) does not apply.<sup>3</sup> The city council’s findings again improperly link  
11   subparagraphs (c) and (d), requiring a failure to meet (c) in order to seek approval  
12   under (d), and they ignore the “in lieu” language.

13           We also agree with petitioner that the city council’s interpretation both (1)  
14   changes the existing code language and (2) inserts additional language. ADC  
15   9.100(B)(2)(d) requires only that the applicant “demonstrate that poor economic  
16   conditions *exist* in the market that would advise against proceeding with the  
17   project.” (Emphasis added.) The city council’s interpretation in effect changes  
18   “exist in the market” to “*existed* in the market” and adds a requirement that those  
19   market conditions that would advise against proceeding with the project existed

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<sup>3</sup> Our final opinion in *Hollander I* was not appealed. Thus, our interpretation of ADC 9.100(B)(2)(d) in *Hollander I* is the law of the case, was not subject to dispute on remand, and is not subject to dispute in this subsequent appeal. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).



1 “throughout the permit’s effective period.” This insertion of different and  
2 additional terms violates ORS 174.010.

3 The city council also found that its reading of the code is supported by the  
4 code’s context:

5 “The ADC is designed to limit the life of inactive permits. This  
6 intent is demonstrated in the hierarchy set out for new construction  
7 described in ADC 9.100.B.2, ‘Permit Extension Time Limit’ and  
8 through the definition of substantial construction (ADC 1.400).

9 “• If walls are erected, substantial construction has occurred, and  
10 a permit does not expire, ADC 9.100.A.1 & ADC 1.400;

11 “• If progress is demonstrated, through permit applications, site  
12 specific contracts, engineering/design, or site preparation, an  
13 extension may be permitted, ADC 9.100.B.2.c.;

14 “• *But if no ‘progress’ is demonstrated*, the failure of progress  
15 (ADC 9.100.B.2.c) can be excused by showing that the failing  
16 is a result of poor economic conditions, ADC 9.100.B.2.d.”  
17 Record L-4 (emphasis added).

18 The ADC limits the life of active permits by providing for their expiration, but it  
19 also provides for up to three extensions. ADC 9.100(B)(1)(c). Moreover, nothing  
20 in ADC 9.100(B)(2) suggests that an applicant is only eligible for a permit  
21 extension under subparagraph (d) “if no progress is demonstrated,” as asserted  
22 by the city council. Instead, the code states that an applicant may seek an  
23 extension relying on either ADC 9.100(B)(2)(c) or ADC 9.100(B)(2)(d) or, in an  
24 abundance of caution, both. The text and context do not support the city council’s  
25 interpretation.

26 The first assignment of error is sustained.

1     **SECOND ASSIGNMENT OF ERROR**

2             ORS 227.173(1) provides:

3             “Approval or denial of a discretionary permit application shall be  
4             based on standards and criteria, which shall be set forth in the  
5             development ordinance and which shall relate approval or denial of  
6             a discretionary permit application to the development ordinance and  
7             to the comprehensive plan for the area in which the development  
8             would occur and to the development ordinance and comprehensive  
9             plan for the city as a whole.”<sup>4</sup>

10     On remand, the city council concluded that petitioner relied

11             “solely upon the COVID-19 PANDEMIC as evidence of ‘poor  
12             economic conditions’ by which to justify an extension, but its  
13             evidence only addresses the period of time after it filed its extension  
14             request. The City finds a more relevant time period to be the 15  
15             months after the permit was approved and before [petitioner]  
16             requested an extension. Economic conditions during that period can  
17             help explain a developer’s failure to ‘progress’ and provide a  
18             connection between a failure to progress and an adverse economy.  
19             During the 15 months prior to [petitioner’s] request, economic  
20             conditions, as shown by building permits, and room tax receipts,  
21             [were] strong. [Petitioner’s] evidence does not address that 15-

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<sup>4</sup> In *Hollander I*, the city denied the permit extensions in part because it had adopted significant code changes after issuing the permits that warranted further design and historic review. ADC 9.100(B)(2)(b) requires that the project for which an extension is sought be consistent with any code changes adopted *since the last permit extension*. Because this is petitioner’s first extension request for each permit, there have been no permit extensions to date and there is no “last permit extension.” As a result, code changes adopted since the initial permit approvals may not be considered in determining whether to approve these first extension requests. We therefore concluded that the city council’s decision violated ORS 227.173(1) because it denied the permit extensions based on a standard that is not in the code. \_\_\_\_ Or LUBA at \_\_\_\_ (slip op at 14-16).

1 month period, it makes no effort to demonstrate a connection or  
2 nexus between the pandemic and its request for an extension.  
3 Therefore, denial is appropriate.” Record L-4 to L-5.

4 Petitioner’s second assignment of error is that the city council applied approval  
5 criteria that are not present in the code. We agree with petitioner.

6 First, the city council found that petitioner was required to establish a  
7 nexus between the market conditions advising against proceeding with the  
8 project and petitioner’s decision not to begin work on its project prior to seeking  
9 the extensions. Petitioner testified that, after its permits were approved, it paused  
10 its development plans because it wanted to evaluate the implications of code  
11 changes that the city had adopted after issuing the permits. The city council found  
12 that petitioner “voluntarily decided to delay its project and not proceed during the  
13 15 months prior to the request for an extension. The failure to proceed during this  
14 15-month permit period was a business decision not caused by or related to  
15 economic conditions created by the COVID-19 PANDEMIC.” Record L-8.  
16 Nothing in the code alerts an applicant that they must show that, but for the  
17 market conditions, they would have proceeded with the project earlier or would  
18 proceed with the project at the time the extension request is made. The city argues  
19 in its response brief that petitioner told the city council the real reason for the  
20 delay as follows:

21 “[A]fter I finally get this thing approved, then you want to change  
22 the goalposts, and then you start carving out some other property  
23 owners, large property owners that are close to me, that could be  
24 potential competitors; so, as a developer, I have to take a pause. I  
25 have to think about let’s let the smoke clear and see what the City’s

1 next move is in terms of changing the goalposts on the waterfront.  
2 So, there are reasonable reasons for me to take a pause.” L-66.

3 The code does not, however, require that market conditions be the sole reason the  
4 extension is requested. ADC 9.100(B)(2)(d) requires a consideration of the  
5 market conditions that exist at the time the extension request is made, not before.  
6 The reason petitioner chose not to move forward between December 2018 and  
7 April 2020, and in April 2020 applied for the extensions, is not related to an  
8 approval criterion, and the city council imposed a standard that is absent from the  
9 ADC.

10 In addition, as explained above, the city improperly linked satisfaction of  
11 ADC 9.100(B)(2)(d) with satisfaction of ADC 9.100(B)(2)(c). In *BCT*  
12 *Partnership v. City of Portland*, the Court of Appeals explained:

13 “[I]f an ordinance contains provisions that can reasonably be  
14 interpreted and explained as embodying the standards and criteria  
15 applicable to the particular decision, it is specific enough to satisfy  
16 ORS 227.173. \* \* \* If ordinance provisions can reasonably be  
17 interpreted as the applicable one, the proponents and opponents of  
18 the permit can reasonably be expected to discern their potential  
19 significance.” 130 Or App 271, 276-77, 881 P2d 176 (1994),

20 “ORS 227.173(1) does not require perfect standards, but only standards that are  
21 clear enough for an applicant to know what he must show during the application  
22 process.” *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982) (citing  
23 *Sun Ray Dairy v. OLCC*, 16 Or App 63, 72, 517 P2d 289 (1973)). In *Waveseer v.*  
24 *Deschutes County*, the county denied an application for a marijuana production  
25 facility based upon a 10-factor analysis and conclusion that the proposed facility

would be too close to a “youth activity center.” 308 Or App 494, 495-98, 482 P3d 212 (2021). The court held that

“nothing in the provisions of the code signal[ed] the notion of a 10-factor analysis, let alone the particular 10 factors identified by the county as relevant. Under those circumstances, LUBA was correct to conclude that the county’s interpretation of the ‘youth activity center’ criterion in [the code] violate[d] the codification requirement of [the county analog to ORS 227.173(1)].” *Id.* at 502.

Here, the city council found:

“The extension described by ADC 9.100.B.2.d is allowed for a failure to ‘progress’ as a result of adverse economic conditions. ‘Progress’ in this regard means the submittal of permit applications, contracts for site specific reports, engineering and architectural plans, as noted in ADC 9.100.B.2.c. An applicant must show that adverse economic conditions prevented these actions, not that actual construction was prevented.” Record L-8.

In denying the permit extensions because petitioner did not show that market conditions between December 2018 and April 2020 were what prevented petitioner from submitting to the city permit applications or copies of development contracts before April 2020 and thereby qualifying for extensions under ADC 9.100(B)(2)(c), the city council imposed criteria that are not in the code.

The second assignment of error is sustained.

## **DISPOSITION**

ORS 197.835(10) provides, in part:

“(a) The board shall reverse a local government decision and order the local government to grant approval of an application for

1 development denied by the local government if the board  
2 finds:

3 “(A) Based on the evidence in the record, that the local  
4 government decision is outside the range of discretion  
5 allowed the local government under its comprehensive  
6 plan and implementing ordinances[.]”

7 Petitioner asks that we reverse the city council’s decision and order the city  
8 council to issue the permit extensions.<sup>5</sup> We sustained the first and second  
9 assignments of error. Because the city council denied the applications based upon  
10 criteria that are absent from its code, the city council’s decision is outside the  
11 range of discretion allowed it under its code. For the reasons explained below,  
12 we conclude that petitioner has established as a matter of law that the permit  
13 extensions were justified by conditions existing in the market, we reverse the  
14 decision, and we order the city to issue the permit extensions.

15 Before the city council, petitioner bore the burden of proving that the  
16 permit extension criteria were met. In order to reverse a denial, we must conclude  
17 that “the proponent of change sustained his burden of proof as a matter of law.”  
18 *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979);  
19 *see also Garre v. Clackamas County*, 18 Or LUBA 877, 881, *aff’d*, 102 Or App  
20 123, 792 P2d 117 (1990). “It is not enough for the proponent to introduce

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<sup>5</sup> ORS 197.835(10)(b) provides, “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.” Petitioner includes a request for attorney fees in its petition for review. A motion for attorney fees must be made as provided in OAR 661-010-0075.

1 evidence supporting affirmative findings of fact and conclusions on all applicable  
2 legal criteria. The evidence must be such that a reasonable trier of fact could only  
3 say the [proponent's] evidence should be believed.” *Weyerhaeuser v. Lane*  
4 *County*, 7 Or LUBA 42, 46 (1982).

5 Petitioner argued before the city council that the COVID-19 pandemic  
6 introduced uncertainty into the hospitality market of such a magnitude as to  
7 justify issuance of the requested permit extensions. The city council identified  
8 evidence that it found supported denial of the extensions.

9 We discuss the evidence that was before the city council below. We  
10 conclude that, although there was evidence which, viewed in isolation, could  
11 support denying the permit extensions, that evidence was sufficiently refuted by  
12 other evidence and petitioner is entitled to the permit extensions as a matter of  
13 law.

#### 14 **A. Construction Loans**

15 Petitioner submitted evidence from banking institutions stating that banks  
16 were hesitant to issue construction loans for hotel projects in 2020 and 2021.  
17 Petitioner’s representative testified that they were unable to secure a construction  
18 loan and that, if they had the means to move forward with the project, they would.  
19 The city council found that that was not evidence that petitioner had actually  
20 applied for and been denied a loan. The city council also found that evidence of  
21 lending conditions *after petitioner applied for the extensions* was not relevant,

1 and it therefore did not consider petitioner's submittals from lenders as to  
2 economic conditions in 2021.

3 We cannot say that lending conditions in 2021, alone, are sufficient to  
4 establish as a matter of law "that poor economic conditions exist in the market  
5 that would advise against proceeding with the project." Although the code  
6 provides that a permit remains valid during the time an extension request is being  
7 considered, the code also provides that work completed after the expiration date  
8 will not be considered in evaluating whether substantial construction has  
9 occurred. This context supports the city council's conclusion with respect to  
10 considering market conditions in 2021.

11 The code language requires a showing that market conditions which  
12 support issuing the permit extension "exist." This necessarily requires looking at  
13 the conditions at the time the extension request is made. Petitioner's  
14 representative stated that a project construction loan was not available in 2020  
15 and 2021, and petitioner submitted lender letters confirming that it was a difficult  
16 time for financing such projects. The written evidence did not show that  
17 petitioner had in fact applied for and been denied a construction loan in 2020. We  
18 conclude that a reasonable person could, as the city council did, decide not to rely  
19 on the 2020 (and 2021) construction loan evidence.



1           **B.     Development Activity During the 15 Months Prior to the**  
2           **Extension Applications**

3           The city council found that the evidence did not show that market  
4           conditions were such that petitioner could not have made progress on its project  
5           during the first 15 months of permit life without a construction loan:

6           “[S]ubmissions such as the building permit, sewage disposal plan,  
7           and vehicle access and circulation plan require engineered drawings  
8           and often take more than a year and the plans submitted to the City  
9           for approval and issuance. These permits and approvals must be  
10          obtained before construction can begin and before there is any need  
11          for construction financing. [Petitioner] has not contended and there  
12          is no evidence that construction financing is necessary in order for  
13          it to progress on this project by submitting plans necessary to obtain  
14          these approvals.” Record L-11.

15       As we explained in our resolution of the first assignment of error, the code does  
16       not require progress during the time prior to the extension application. As a result,  
17       the fact that petitioner did not begin work on the hotel earlier and the reasons for  
18       petitioner’s delay are not relevant. To the extent that the city council required  
19       petitioner to show that they were unable to submit plans or obtain permits or  
20       contracts as a condition to proceeding under ADC 9.100(B)(2)(d), the city  
21       council misconstrued that provision and imposed requirements that are not in the  
22       code. Such evidence is not relevant to the satisfaction of ADC 9.100(B)(2)(d),  
23       and the city erred in considering and relying on it, or the lack thereof, to deny the  
24       extensions.

25       The city council found that petitioner’s “failure to engage with City Staff  
26       in preparation for obtaining these permits and approvals supports a conclusion

1 that [petitioner's] failure to proceed with this project and its subsequent need for  
2 an extension was not a result of the COVID-19 PANDEMIC." Record L-11. We  
3 have concluded, however, that petitioner's motivation in delaying the start of its  
4 project is irrelevant.

### 5 **C. Other Hotel Development**

6 The city argues that, "[i]n April 2020, there was a booming construction  
7 market in Astoria including two other hotel projects that were proceeding  
8 unabated."<sup>6</sup> Response Brief 18. The city council found that progress on two other  
9 hotels in 2020 meant that market conditions did not support the permit  
10 extensions. The findings include a discussion of the two referenced hotel projects:  
11 the Bowline Hotel and the Home 2 Suite (H2S) Hotel. The Bowline Hotel project  
12 is a renovation of an existing building. A conditional use permit was issued on  
13 January 29, 2019; a building permit application was approved on August 1, 2019;  
14 a conditional building permit was issued on May 4, 2020; and construction began  
15 immediately. The H2S Hotel is a four-story, 90-unit new construction project.  
16 The applicant filed a building permit application on March 17, 2020; the  
17 applicant filed building plans and paid plan review fees on August 18, 2020; a  
18 demolition permit was issued on April 14, 2020; and the demolition permit was

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<sup>6</sup> The city does not explain the relevance of general construction activity in April 2020 to the assessment of economic conditions for the development of temporary lodging facilities, and we do not discuss that aspect of the city's argument further.

1 “finaled” on October 20, 2020. Record L-12. The Bowline and H2S hotels moved  
2 forward with development between when petitioner applied for the permit  
3 extensions in April 2020 and when the permits were due to expire in December  
4 2020.

5 The evidence of progress on the Bowline Hotel project, viewed in  
6 isolation, could be relied upon to conclude that the market was conducive to  
7 petitioner’s project progressing. However, we explained in *Hollander I* that, on  
8 remand, the city council must address petitioner’s evidence of market conditions,  
9 including petitioner’s argument that work on the other two hotels was not relevant  
10 because one involved a building renovation and was therefore a different type of  
11 project and because it was unclear when either project obtained financing.<sup>7</sup> \_\_\_\_  
12 Or LUBA at \_\_\_\_ (slip op at 11-12, 17). The city council did not address the  
13 evidence that the Bowline Hotel project is not comparable to petitioner’s project

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<sup>7</sup> We held in *Hollander I* that the city’s decision denying the permit extensions was not supported by substantial evidence:

“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.” \_\_\_\_ Or LUBA at \_\_\_\_ (slip op at 12).

1 because it is a renovation and because it is on a different development timeline.  
2 As a result, the evidence of progress on the Bowline Hotel project is not  
3 substantial evidence that market conditions did not support delaying petitioner's  
4 project.

5 The evidence of progress on the H2S Hotel project, viewed in isolation,  
6 also appears to support the conclusion that market conditions did not support  
7 delaying petitioner's project. The applicant engaged in activities such as applying  
8 for building and demolition permits. The record as a whole, however, does not  
9 include evidence of progress on the H2S Hotel project between October 2020 and  
10 the expiration date for petitioner's permits, December 20, 2020, or thereafter. The  
11 lack of post-October 2020 progress on the H2S Hotel project supports the  
12 conclusion that market conditions existed in late 2020 which supported delaying  
13 petitioner's project.

#### 14 **D. Transient Lodging Tax Revenue and City Actions**

15 During the *de novo* remand hearing, petitioner's attorney read into the  
16 record the following excerpts from the city's budget document:

17 "We will need to be diligent in reaffirming and revising our plan  
18 throughout the year as better data becomes available and we can  
19 better estimate lost resources such as transient lodging taxes. *We*  
20 *anticipate lodging revenues will flat line in the short-term and gas*  
21 *tax revenues will decline due to stay at home orders.*

22 "*The anticipated transient room tax collections for April through*  
23 *June have been significantly reduced from prior year collections*  
24 *and with the high demand tourist season around the corner it is*  
25 *difficult to predict the lost revenues for overnight stays which*

1       translate to transient lodging tax revenue for municipalities.” Record  
2       L-9 (citations omitted; emphases added).

3       The city budget document therefore acknowledged that revenue from hotel stays  
4       dropped significantly from prior years in April through June 2020 and that future  
5       revenue was uncertain.

6       The findings include a chart of historic transient room tax revenue and the  
7       following conclusion:

8       “Monthly room tax collections reflect the previous month’s  
9       occupancy. This chart shows that until the March 2020 lodging  
10      restrictions, transient lodging in Astoria was generally above 2017-  
11      2018 levels and slightly below 2018-2019 levels. December and  
12      January occupancies for all three years were about the same.  
13      However, there was a definite drop in tax revenues starting with the  
14      March 2020 room tax receipts which were collected in April 2020,  
15      the month [petitioner] filed its extension request. The transient room  
16      tax statistics used during the budget process do show a decline in tax  
17      revenues in the month of [petitioner’s] request but not during the  
18      previous 15 months.” Record L-10.

19      This reflects declining hotel market conditions as of April 2020, when petitioner  
20      applied for the extensions.

21      The city council concluded that petitioner could not have been relying on  
22      collected tax receipts when it decided to request the extensions, but this misstates  
23      the requirement. Petitioner did not have to rely on collected tax receipts. Rather,  
24      petitioner had to submit evidence that economic conditions in the market  
25      supported not proceeding with the project at that time. The budget document and  
26      tax receipts are substantial evidence that the market for hotel rooms at the time  
27      of the extension request was declining. The statements in the budget document,

1 quoted above, are an acknowledgement by city staff that predicting transient  
2 room tax revenue for fiscal year 2020-21 would be difficult due to stay-at-home  
3 orders. This is substantial evidence that economic conditions existed in the  
4 market which supported not moving forward with the project.

5 Evidence of the city's temporary hotel closures is also relevant. The city  
6 council found that its closure of hotels in March 2020 was not relevant evidence:

7 "The City's temporary lodging restrictions, adopted in response to  
8 the COVID-19 PANDEMIC, were imposed March 22, 2020. Less  
9 than one month later, [petitioner] requested an extension. The  
10 restrictions, which are no longer in place, placed no limits on pre-  
11 construction/planning and/or construction activities. During the 15  
12 months prior to [petitioner's] request for an extension, construction  
13 activities flourished within Astoria. [Petitioner] has not shown that  
14 temporary lodging restrictions imposed by the City justify an  
15 extension under ADC 9.100.B.2.d." Record L-9.

16 We explained above that the lack of progress prior to the extension  
17 requests is not related to an approval criterion. The city's restrictions on lodging  
18 are relevant evidence of a declining or unstable hotel market at the time the permit  
19 extensions were requested, April 2020, even if the restrictions were subsequently  
20 lifted. Viewing the evidence as a whole, petitioner has shown that it is entitled to  
21 the permit extensions as a matter of law.

22 The city's decision is reversed, and the city is ordered to approve  
23 petitioner's applications.