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

PAUL T. CONTE,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

HOME BUILDERS ASSOCIATION OF LANE COUNTY, 1000 FRIENDS OF OREGON, AARP OREGON, BETTER HOUSING TOGETHER, ELIZA KASHINSKY, JOSHUA KASHINSKY, RIA ANDERSON, ANNE BROWN, CHRISTOPHER DEEL, JOHN FISCHER, RINA HERRING, ANGELA LIN, ANGIE R. MARZANO, RYAN MOORE, KORY NORTHROP, SIGH O'NARA, WILLIAM A. RANDALL, SETH SADOFSKY, JEAN TATE, and KATE WILSON,
Intervenors-Respondents.

LUBA No. 2021-092

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

William Kabeiseman filed the petition for review and reply briefs and argued on behalf of petitioner. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, PC.

Emily N. Jerome filed the respondent's brief and argued on behalf of respondent.

Bill Kloos filed an intervenor-respondent's brief and argued on behalf of intervenor-respondent Home Builders Association of Lane County.

Alexis Biddle filed an intervenors-respondents' brief and argued on behalf of intervenors-respondents 1000 Friends of Oregon, AARP Oregon, and Better Housing Together.

Eliza Kashinsky, Joshua Kashinsky, Ria Anderson, Anne Brown, Christopher Deel, John Fischer, Rina Herring, Angela Lin, Angie R. Marzano, Ryan Moore, Kory Northrop, Sigh O'Nara, William A. Randall, Seth Sadofsky, Jean Tate, and Kate Wilson filed an intervenors-respondents' brief. Eliza Kashinsky argued on behalf of themselves.

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

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

AFFIRMED 05/09/2022

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 20659, a legislative decision that amends the Eugene Code (EC) in order to implement ORS 197.312(5).

BACKGROUND

ORS 197.312(5) 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.
>
> "(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 June 2018, the city adopted Ordinances 20594 and 20595 to partially implement ORS 197.312(5). Intervenor-respondent Home Builders Association of Lane County (HBA) appealed Ordinances 20594 and 20595 in *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018) (*Home Builders I*). We remanded Ordinances 20594 and 20595 in part for the city to determine in the

first instance which provisions of the EC that regulate accessory dwellings are "reasonable local regulations relating to siting and design."

In January 2020, the city adopted Ordinance 20625 in its second attempt to implement ORS 197.312(5). HBA appealed Ordinance 20625 in *Home Builders Association of Lane County v. City of Eugene*, ___ Or LUBA ___ (LUBA No 2020-015, Nov 24, 2020) (*Home Builders II*). While that appeal was pending, the Court of Appeals issued its decision in *Kamps-Hughes v. City of Eugene*, in which the court affirmed our interpretation of the phrase "relating to siting" in ORS 197.312(5) 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." 305 Or App 224, 232-33, 237, 470 P3d 429 (2020). In *Home Builders II*, based on the court's decision in *Kamps-Hughes*, the city agreed that several EC provisions were facially inconsistent with ORS 197.312(5). We remanded Ordinance 20625 primarily on that basis.

In September 2021, the city adopted Ordinance 20659 (the Ordinance) to implement ORS 197.312(5). This appeal followed.

MOTION TO TAKE OFFICIAL NOTICE

The city moves that we take official notice of the court's order in *Conte v. City of Eugene*, 318 Or App 670, 506 P3d 428 (2022), affirming our decision in *Conte v. City of Eugene*, ___ Or LUBA ___ (LUBA No 2021-049, Dec 17,

2021).[1] ORS 40.090(1) and (2) recognize "[t]he decisional * * * law of Oregon" and "official acts of the * * * judicial departments of this state" as law that may be judicially noticed, and we will take official notice of judicially noticeable law where it is relevant to an issue on appeal. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 691-96 (2007). Court of Appeals decisions are generally subject to judicial notice as the decisional law of Oregon and as official acts of the judicial department.

Petitioner responds that we should deny the motion to take official notice. The motion to take official notice does not state the reason for which it is made. Petitioner assumes that the motion is made for the precedential value of the order and argues that the court's order affirming without opinion our decision in *Conte* is not relevant because ORAP 5.20(6) provides that "[c]ases affirmed without opinion by the Court of Appeals should not be cited as authority" and because the courts have explained that such cases have no "precedential value." *Long v. Argonaut Ins. Co.*, 169 Or App 625, 627-28, 10 P3d 958 (2000) (rejecting the petitioner's reliance on a Court of Appeals decision that affirmed without opinion

[1] In April 2021, the city adopted Ordinance 20647, which amended some standards in the EC to make them easier to satisfy. Petitioner appealed Ordinance 20647. We remanded Ordinance 20647 on one basis and rejected petitioner's remaining assignments of error. Petitioner appealed our decision to the Court of Appeals. While the present appeal was pending, the court affirmed our decision without opinion.

an order of the Workers' Compensation Board invalidating a determination order).

The Oregon Rules of Appellate Procedure govern practice and procedure before the Supreme Court and the Court of Appeals. ORAP chapter 5 sets out rules applicable to the preparation and filing of briefs in the state's appellate courts. ORAP 5.20(6) has no bearing on whether the court's decision in *Conte* is subject to official notice by LUBA, because the present appeal is not a matter before the appellate courts and, therefore, is not subject to the Oregon Rules of Appellate Procedure. Moreover, we agree with the city that the court's order is, at a minimum, subject to official notice as an official act of the judicial department under ORS 40.090(2).

The motion to take official notice is granted, and we will consider the order to the extent the motion explains its relevance to an issue in the appeal and cites the order for a permissible purpose. *Tualatin Riverkeepers*, 55 Or LUBA at 694.

MOTION TO STRIKE

The city and intervenors-respondents collectively filed four briefs in response to petitioner's petition for review. One of those briefs was filed by HBA. In its brief, HBA's response to petitioner's assignments of error consists of a single sentence: "The HBA concurs with, joins in, and adopts as its own the responses of both the City of Eugene and Pro Se Intervenors Kashinsky et al." Petitioner subsequently filed four reply briefs, replying to each of the responsive briefs. Under OAR 661-010-0039, a reply brief may not exceed 1,000 words.

Petitioner's brief replying to the city is 997 words. Petitioner's brief replying to HBA is 947 words.

HBA moves to strike petitioner's briefs replying to the city and to HBA. HBA argues that, because it merely adopted the city's arguments as its own, petitioner's briefs replying to the city and to HBA effectively constitute one 1,944-word reply brief, in violation of OAR 661-010-0039.

We agree with petitioner that the reply briefs do not violate OAR 661-010-0039. Where multiple respondents and intervenors-respondents file separate responsive briefs, a petitioner is entitled to file separate briefs replying to each. *Living Strong, LLC v. City of Eugene*, ___ Or LUBA ___, ___ (LUBA Nos 2021-005/006, Apr 30, 2021) (slip op at 3-4) ("Where there is more than one 'respondent's brief' filed, we interpret OAR 661-010-0039 to allow any petitioner who filed a separate petition for review to file a reply brief to respond to arguments in each respondent's brief that is filed in response to that petition for review."). Where separate responsive briefs are substantively identical, a petitioner may choose to address some of the arguments in one reply brief and to address the remaining arguments in the other reply brief(s).

By adopting the city's arguments as its own, HBA effectively filed a responsive brief that is substantively identical to the city's. *See STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539, 542-43 (2013) (incorporation of arguments counts against page limits). Petitioner was entitled to address some of the arguments in its brief replying to the city and to address

the remaining arguments in its brief replying to HBA. Because each reply brief is under 1,000 words, they do not violate OAR 661-010-0039.

The motion to strike is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner's first assignment of error includes two subassignments of error.

A. First Subassignment of Error

In the first subassignment of error under the first assignment of error, petitioner argues that the findings in support of the Ordinance are inadequate. Explaining petitioner's first subassignment of error necessitates explaining the ordinances appealed in *Home Builders I* and *Home Builders II*, which, as noted, we remanded to the city.

Ordinance 20594, one of the ordinances appealed in *Home Builders I*, amended EC 9.3615, which provides land use and permit requirements and special use limitations for the Jefferson Westside Special Area (S-JW) zone. Specifically, Ordinance 20594 amended EC 9.3615(2) to provide that "[a]ny additional (interior, attached or detached) residential structure that is used in conjunction with or that is accessory to a single family dwelling may be permitted on a lot only as an additional 'One-Family Dwelling' and not as an 'Accessory Dwelling.'"[2] After our decision remanding Ordinance 20594, the city adopted

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[2] On appeal, HBA argued that that amendment was inconsistent with ORS 197.312(5) because it banned "Accessory Dwellings" in the S-JW zone. We concluded that the amendment was consistent with ORS 197.312(5) because it

Ordinance 20625, the ordinance appealed in *Home Builders II*, which made identical amendments to EC 9.3615. Ordinance 20625 was also remanded.

However, Ordinance 20659, the ordinance challenged in this appeal, does not amend EC 9.3615 at all. Instead, Ordinance 20659 amends EC 9.3625, which provides development standards for the S-JW zone. Specifically, as relevant here, Ordinance 20659 amends EC Table 9.3625 to allow (1) one dwelling, and one accessory dwelling for each detached single-family dwelling, on lots up to 4,499 square feet; (2) two dwellings, and one accessory dwelling for each detached single-family dwelling, on lots between 4,500 and 8,999 square feet; and (3) one dwelling per 4,500 square feet, and one accessory dwelling for each detached single-family dwelling, on lots 9,000 square feet and larger. In addition, Ordinance 20659 adds a new paragraph (b) to EC 9.3625(1). As amended, EC 9.3625(1)(b) provides, "The development standards applicable to accessory dwellings in the S-JW zone shall be those set out in EC 9.2751(17)(c) and the General Standards for all Development in EC 9.6000 through 9.6885." Prior to Ordinance 20659, EC 9.2751(17)(c) provided the standards for accessory dwellings in certain neighborhoods in the Low-Density Residential (R-1) zone.

Ordinance 20659 provides, "The findings in support of this Ordinance are included in the records compiled for this Ordinance and Ordinances 20594,

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allowed an additional dwelling to be used in connection with or as an accessory to a single-family dwelling, regardless of whether it referred to those dwellings as "Accessory Dwellings" or "additional 'One-Family Dwellings.'" *Home Builders I*, ___ Or LUBA at ___ (slip op at 15-16).

20595, and 20625, including the final orders issued by [LUBA] and the Court of Appeals." 2021-092 Record 61.[3] Petitioner asserts that, while Ordinances 20594 and 20625 would have allowed at least two detached single-family dwellings, one of which being the additional single-family (*i.e.*, accessory) dwelling, on lots that are at least 4,500 square feet in the S-JW zone, for a total of at least two dwellings, Ordinance 20659 allows at least two detached single-family dwellings and two accessory dwellings on such lots, for a total of at least four dwellings. Petitioner asserts that that change will "essentially doubl[e] the potential number of dwellings in the most prevalent (over 50%) lot sizes in the S-JW Zone." Petition for Review 12. Petitioner argues that the findings are inadequate because they do not explain why the city made that change on remand from *Home Builders II* or why that change is consistent with various provisions of the city's comprehensive plan.

Petitioner acknowledges that "there is no generally applicable requirement that [legislative] decisions be supported by findings, although the decision and record must be sufficient to demonstrate that applicable criteria were applied and 'required considerations were indeed considered.'" *Restore Oregon v. City of Portland*, ___ Or LUBA ___, ___ (LUBA Nos 2018-072/073/086/087, Aug 6,

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[3] The record in this appeal includes the records in *Home Builders I* and *Home Builders II*. We refer to the record in *Home Builders I* as "2018-063/064 Record," we refer to the record in *Home Builders II* as "2020-015 Record," and we refer to the record in this appeal as "2021-092 Record."

2019) (slip op at 6-7) (quoting *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002)). Nevertheless, petitioner argues that findings were required in this case.

Petitioner first points out that one basis for our remand in *Home Builders I* was that the city allowed accessory dwellings in a number of zones in which they were previously prohibited, and subjected those newly allowed accessory dwellings to existing standards that applied to accessory dwellings in other zones, without adopting findings explaining why the city concluded that those existing standards were "reasonable local regulations relating to siting and design," as allowed by ORS 197.312(5). Petitioner argues that, just as the city in *Home Builders I* applied existing accessory dwelling standards to new zones without adopting explanatory findings, Ordinance 20659 applies existing accessory dwelling standards from the R-1 zone to the S-JW zone without adopting explanatory findings.

The city responds, and we agree, that *Home Builders I* is distinguishable from the present appeal. In *Home Builders I*, the city did not intend to fully implement ORS 197.312(5). Although it intended to allow accessory dwellings in the new zones, it did not intend for the existing standards to serve as the allowed "reasonable local regulations relating to siting and design." We concluded that those standards were subject to review for compliance with ORS 197.312(5). However, because the city did not intend that result, it did not evaluate whether the existing standards were in fact "reasonable local regulations

relating to siting and design." Consequently, "required considerations were [not] considered."[4] *Citizens Against Irresponsible Growth*, 179 Or App at 16 n 6. We therefore remanded for the city to "address Petitioners' arguments and determine whether the existing EC standards that the city applied to the New Zones fall within the statute's allowance for local regulation of accessory dwellings." *Home Builders I*, ___ Or LUBA at ___ (slip op at 14-15).

Here, petitioner has not established that required considerations were not considered. The findings for Ordinance 20659 partially consist of LUBA's decisions in *Home Builders I* and *Home Builders II*, and LUBA's and the Court of Appeals' decisions in *Kamps-Hughes*. The primary basis for our remand in *Home Builders II* was that, as the city conceded, several accessory dwelling standards were facially inconsistent with ORS 197.312(5), as construed by the court in *Kamps-Hughes*. Accordingly, there is no question that the city considered whether the accessory dwelling standards in Ordinance 20659 are "reasonable local regulations relating to siting and design," as allowed by ORS

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[4] In the respondent's brief, the city argues:

> "LUBA was not required to remand for additional findings in [*Home Builders I*]; LUBA chose to do so because at that point, the record included no City consideration at all of whether the [existing] standards were consistent with the 'siting and design' provision of ORS 197.312(5). In the present appeal, there is a full record and no need for additional findings. [*Home Builders I*] does not control as Petitioner argues." Respondent's Brief 8 n 3 (underscoring in original).

197.312(5). We also observe that the findings for Ordinances 20594, 20595, and 20625, which partially comprise the findings for Ordinance 20659, conclude that none of the comprehensive plan provisions with which petitioner is concerned are relevant. 2018-063/064 Record 43, 57-59; 2020-015 Record 35-38. Although the city took a different approach in adopting Ordinance 20659 than it took in adopting Ordinances 20594, 20595, and 20625, its express readoption of those findings indicates that it reached the same conclusions with respect to the comprehensive plan provisions, *i.e.*, that they remain irrelevant. Because petitioner has not established that required considerations were not considered, *Home Builders I* is inapposite.

Petitioner also cites *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 564-65 (1994); *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998); *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998); and *Bemis v. City of Ashland*, 48 Or LUBA 42, 56 (2004), *aff'd*, 197 Or App 124, 107 P3d 83, *rev den*, 339 Or 66 (2005), for the general proposition that a local government may not shift its position midway through a proceeding without providing an explanation. Petitioner argues that, by choosing to amend EC 9.3625 in Ordinance 20659, instead of amending EC 9.3615 as Ordinances 20594 and 20625 would have done, the city changed its position on how ORS 197.312(5) should be implemented and was therefore required to provide an explanation.

As relevant here, *Redland* stands for the propositions that, (1) in order for LUBA to perform its review function, legislative decisions may be supported by *either* findings *or* argument in the respondent's brief and citations to facts in the record and, (2) to be reviewable by LUBA, a local government's interpretation of its plan must be provided in the challenged decision or supporting findings, not in the respondent's brief. 27 Or LUBA at 563-64, 568. *Holland* stands for the proposition that, under the goal-post rule at ORS 227.178(3), following remand of a quasi-judicial decision, the local government may not change its prior interpretation that a particular local code provision is not an applicable approval criterion and apply that provision to the subject application. 154 Or App 450. *Gutoski* stands for the proposition that parties to a quasi-judicial proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decision-maker's interpretation of local legislation when, among other things, the interpretation is made after the conclusion of the initial evidentiary hearing and significantly changes an existing interpretation. 155 Or App at 373-74. *Bemis* was our attempt to synthesize *Holland*, *Gutoski*, and other cases, and it stands for the proposition that, in a quasi-judicial proceeding, while a local government may not change its interpretation of *whether* a local code provision applies to an application after it is filed, it may change its interpretation of *how* the provision applies, unless that reinterpretation runs afoul of the law of the case doctrine or is an attempt to act arbitrarily or inconsistently from case to

case, and as long as the local government gives the parties an opportunity to address the reinterpretation. 48 Or LUBA at 55-57.

None of the foregoing cases stands for the proposition that, when a local government changes course on how to amend its land use code to implement state law on remand from LUBA and the Court of Appeals, it must adopt findings explaining why it is changing course and how that change is consistent with its comprehensive plan. Petitioner has not established that, on remand from *Kamps-Hughes* and *Home Builders II*, the city was otherwise required to adopt findings explaining why it chose to take a different approach in implementing ORS 197.312(5) and why that different approach was consistent with its comprehensive plan.

The first subassignment of error under the first assignment of error is denied.

B. Second Subassignment of Error

EC 9.3626 provides special development standards for EC Table 9.3625. Ordinance 20659 added paragraph (g) to EC 9.3626(1). As amended, EC 9.3626(1) provides, in part:

> "For purposes of determining the maximum allowable dwellings on a lot:
>
> "* * * * *
>
> "(g) Accessory dwellings are not subject to the provisions of (1) and shall not be considered within the calculations of

> dwellings or bedrooms in subsections (1)(a) through (f) above."

LUBA is required to reverse or remand an amendment to a land use regulation where "[t]he regulation is not in compliance with the comprehensive plan." ORS 197.835(7)(a); *see also* ORS 197.175(2)(b) (providing that local governments must "[e]nact land use regulations to implement their comprehensive plans"). In the second subassignment of error under the first assignment of error, petitioner argues that EC 9.3626(1)(g) fails to comply with the Eugene-Springfield Metropolitan Area General Plan (Metro Plan) Residential Density Policy A.9 (Policy A.9).[5] Policy A.9 is to

> "[e]stablish density ranges in local zoning and development regulations that are consistent with the broad density categories of this plan.
>
> > "Low density: Through 10 dwelling units per gross acre (could translate up to 14.28 units per net acre depending on each jurisdictions implementation measures and land use and development codes)
> >
> > "Medium density: Over 10 through 20 dwelling units per gross acre (could translate to over 14.28 units per net acre through 28.56 units per net acre depending on each jurisdictions implementation measures and land use and development codes)
> >
> > "High density: Over 20 dwelling units per gross acre (could translate to over 28.56 units per net acre depending on each jurisdiction's implementation measures and land use and

[5] The Metro Plan is a regional comprehensive plan adopted by the Cities of Eugene and Springfield and Lane County.

development codes)"

Petitioner asserts that accessory dwellings are "dwellings" and are therefore subject to the Policy A.9 density ranges. Petition for Review 19. Petitioner argues that the Metro Plan designates most of the S-JW zone as Medium Density Residential (MDR) and some of it as Low Density Residential (LDR). As explained above, Ordinance 20659 allows at least two detached single-family dwellings and two accessory dwellings on S-JW-zoned lots that are 4,500 square feet or larger. Petitioner asserts that that is a density of 38.72 dwellings per net acre, which exceeds the Policy A.9 density ranges for both the MDR and LDR designations. Petitioner argues that Ordinance 20659 therefore fails to comply with the Metro Plan because the former allows "more intensive use" in the S-JW zone than the latter. *See Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975) ("[A] zoning ordinance which allows a more intensive use than that prescribed in the plan must fail.").

The city and intervenors-respondents Kashinsky *et al.* (intervenors) respond that Ordinance 20659 complies with the Metro Plan. The city points to the following language in the Metro Plan:

> "**Residential**
>
> "This category is expressed in gross acre density ranges. Using gross acres, approximately 32 percent of the area is available for auxiliary uses, such as streets, elementary and junior high schools, neighborhood parks, other public facilities, neighborhood commercial services, and churches not actually shown on the Metro Plan Diagram. Such auxiliary uses shall be allowed within residential designations if compatible with refinement plans, zoning

> ordinances, and other local controls for allowed uses in residential neighborhoods. The division into low, medium, and high densities is consistent with that depicted on the Metro Plan Diagram. In other words:
>
> "• Low density residential—Through 10 units per gross acre
>
> "• Medium density residential—Over 10 through 20 units per gross acre
>
> "• High density residential—Over 20 units per gross acre
>
> "*These ranges do not prescribe particular structure types, such as single-family detached, duplex, mobile home, or multiple-family. That distinction, if necessary, is left to local plans and zoning ordinances.*" (Emphasis added.)

First, the city argues that, in adopting EC 9.3626(1)(g), the city council implicitly interpreted the language emphasized above to allow it to exclude particular structure types, such as accessory dwellings, in determining compliance with the Policy A.9 density ranges. We reject that argument because, as explained above, when it adopted EC 9.3626(1)(g) for the first time on remand, the city did not adopt any findings and so did not interpret the Metro Plan.

Second, the city refers to a nonbinding guidance document issued by the Department of Land Conservation and Development (DLCD) to help local governments comply with ORS 197.312(5), titled "Guidance on Implementing the Accessory Dwelling Units (ADU) Requirement." 2021-092 Record 1441-47. The city observes that that guidance document includes a model code that provides, "Accessory dwellings are not included in density calculations." 2019-

092 Record 1447. While the DLCD guidance document is instructive, it does not demonstrate compliance with the Metro Plan.

Third, the city argues that excluding accessory dwellings in determining compliance with the Policy A.9 density ranges is consistent with *Kamps-Hughes* and *Home Builders II*. In *Kamps-Hughes*, the Court of Appeals held that local governments may not apply minimum lot size regulations to accessory dwelling applications because such regulations do not relate to "siting," as that term is used in ORS 197.312(5). In *Home Builders II*, we agreed with the city that, under *Kamps-Hughes*, maximum density regulations also do not relate to "siting."

Intervenors point to various pre-existing EC provisions that require the city to consider one "dwelling" to be multiple "dwellings" for purposes of determining residential density. For example, intervenors point out, EC 9.3626(1) provides, in part:

> "For purposes of determining the maximum allowable dwellings on a lot:
>
> "(a) A dwelling with five or fewer bedrooms that is the only dwelling on a street-abutting lot that is at least 4,500 square feet shall be counted as one dwelling.
>
> "(b) Two dwellings that together have a total of six or fewer bedrooms, and that are the only dwellings located on a street-fronting lot that is at least 4,500 square feet, and where at least one residential building on the lot has a front facade that faces a street and is within the street maximum setback, shall be counted as two dwellings.

"(c) For cases not covered by sections (a) and (b), above, the dwelling count shall be the sum of the dwelling counts calculated under the following subsections:

"1. The total dwelling count for all dwellings with three or fewer bedrooms shall be the number of dwellings,

"2. *The total dwelling count for all dwellings with four or more bedrooms shall be the total number of bedrooms in these dwellings divided by three. Fractional dwelling counts resulting from this calculation shall be rounded up to the next whole number, e.g. a total of seven bedrooms counts as three dwellings.*" (Emphasis added.)

Intervenors argue that, in considering a seven-bedroom dwelling as three dwellings for purposes of determining residential density in the S-JW zone, the city has already interpreted the term "dwelling" in the Metro Plan flexibly and implemented Policy A.9 through EC 9.3626(1)(a) to (c). Intervenors argue that considering an accessory dwelling and the detached single-family dwelling to which it is accessory as one dwelling for purposes of determining residential density is equally permissible.

Intervenors also point to Metro Plan Residential Density Policy A.16 (Policy A.16), which is to

"[a]llow for the development of zoning districts which allow overlap of the established Metro Plan density ranges to promote housing choice and result in either maintaining or increasing housing density in those districts. Under no circumstances, shall housing densities be allowed below existing Metro Plan density ranges."

Intervenors argue that Policy A.16 allows the city to create zones that allow densities that overlap the Policy A.9 density ranges, so long as the zone does not

allow less density than the range for the applicable Metro Plan designation. Intervenors argue that Policy A.16 authorizes the city to allow, as petitioner asserts, a density of 38.72 dwellings per net acre in the S-JW zone because the S-JW zone is designated LDR and MDR, the Policy A.9 density ranges for which are 0 to 14.28 and 14.28 to 28.56 units per net acre. Therefore, intervenors argue, Ordinance 20659 complies with the Metro Plan.[6]

For the reasons explained by the city and intervenors, we agree with the city and intervenors that Ordinance 20659 complies with Policy A.9. In previously adopting EC 9.3626(1)(a) to (c), the city has already interpreted the term "dwelling" in the Metro Plan flexibly in implementing Policy A.9. Considering an accessory dwelling and the detached single-family dwelling to which it is accessory as one dwelling for purposes of determining residential density in EC 9.3626(1)(g) is equally permissible. In addition, although not the question presented under our standard of review at ORS 197.835(7)(a), excluding accessory dwellings in determining compliance with the Policy A.9 density ranges is consistent with *Kamps-Hughes* and *Home Builders II*.

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[6] We understand this argument to be an alternative to the argument that the Metro Plan allows the city to exclude accessory dwellings in determining compliance with the Policy A.9 density ranges. That is, even if accessory dwellings should be included in determining compliance with the Policy A.9 density ranges, Policy A.16 allows the city to create zones with densities greater than those ranges.

The second subassignment of error under the first assignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that Ordinance 20659 fails to comply with Westside Neighborhood Plan (WNP) Land Use Element Policy 1 (Policy 1). Policy 1 is to "[p]revent erosion of the neighborhood's residential character." The WNP plan area includes the S-JW zone. Petitioner argues that Ordinance 20659 fails to comply with Policy 1 because it erodes the S-JW zone's residential character by "doubl[ing] the density of development and allow[ing] significantly larger and more impactful structures in most of the area." Petition for Review 22.

We rejected a similar argument in *Conte*. As explained above in our resolution of the motion to take official notice, in April 2021, the city adopted Ordinance 20647. Ordinance 20647 allowed increased density in some areas of the city where density was previously lower due to larger setbacks and other density-limiting mechanisms. Petitioner appealed Ordinance 20647 in *Conte*, arguing, among other things, that Ordinance 20647 was inconsistent with Policy 1 because it would erode the residential character of the areas subject to the WNP by increasing density therein. The findings for Ordinance 20647 interpreted Policy 1 as prohibiting only those decisions that erode the residential character

of the areas subject to the WNP by rezoning or redesignating residentially zoned properties therein.

We first observed that we had affirmed a similar interpretation of Policy 1 in *Jefferson Westside Neighbors v. City of Eugene*, 57 Or LUBA 421 (2008). We next observed that, while *Jefferson Westside Neighbors* concerned a hearings officer interpretation, which we reviewed for legal correctness, *Conte* concerned a city council interpretation, which is subject to deference under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). Although the city adopted the definition of "Residential Character" at EC 9.0500 after our decision in *Jefferson Westside Neighbors*, we concluded that the city council did not err in failing to address that definition in *Conte* because the focus of the interpretive inquiry is what the enacting city council intended at the time of enactment, which, for Policy 1, was 1987. Because petitioner did not establish that the city council's interpretation was inconsistent with the express language, purpose, or underlying policies of Policy 1, we affirmed it.

Here, citing *Conte*, the city argues that Policy 1 prohibits only those decisions that erode the residential character of the areas subject to the WNP by rezoning or redesignating residentially zoned properties therein. Because Ordinance 20659 does not rezone or redesignate any property, the city argues that Policy 1 is not relevant. We agree with the city that the Ordinance complies with Policy 1 because the Ordinance does not rezone or redesignate any residentially zoned properties.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

ORS 197.307(4) requires local governments to "adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing." In the third assignment of error, petitioner argues that several EC provisions, as amended by Ordinance 20659, are not "clear" for purposes of ORS 197.307(4).

To be "clear" for purposes of ORS 197.307(4), a standard must be "clear enough for an applicant to know what he must show during the application process," it must be "easily understood and without obscurity or ambiguity," and it must not be capable of multiple constructions that support diametrically opposed conclusions. *West Main Townhomes v. City of Medford*, 233 Or App 41, 48, 225, P3d 56 (2009), *adh'd to as modified on recons*, 234 Or App 343, 228 P3d 607 (2010); *Roberts v. City of Cannon Beach*, ___ Or LUBA ___, ___ (LUBA No 2020-116, July 23, 2021) (slip op at 19), *aff'd*, 316 Or App 305, 312, 475 P3d 121 (2021) (quoting *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6)); *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74, 83, *aff'd*, 275 Or App 557, 36 P3d 847 (2015), *rev den*, 359 Or 667 (2016). The city bears the burden of proving that its standards "are capable of being imposed only in a clear and objective manner." ORS 197.831.

A. EC 9.3625(1)(b), EC 9.3065(3)(k), and EC 9.2751(17)(c)

Again, Ordinance 20659 adds a new paragraph (b) to EC 9.3625(1). As amended, EC 9.3625(1)(b) provides, "The development standards applicable to accessory dwellings in the S-JW zone shall be those set out in EC 9.2751(17)(c) and the General Standards for all Development in EC 9.6000 through 9.6885." Ordinance 20659 adds similar language to EC 9.3065, which provides development standards for the Chambers Special Area (S-C) zone. The S-C zone has three subareas: S-C/R-1, S-C/R-2, and S-C/R-3. Ordinance 20659 adds a new paragraph (k) to EC 9.3065(3), which provides development standards for the S-C/R-2 subarea. As amended, EC 9.3065(3)(k) provides:

> "The development standards in subsections (b) through (j), above do not apply to accessory dwellings in the S-C/R-2 subarea. The development standards applicable to accessory dwellings in the S-C/R-2 subarea shall be those set out in EC 9.2751(17)(c) and the General Standards for all Development in EC 9.600 through 9.6885."

Ordinance 20659 also amends EC 9.2751(17). Prior to Ordinance 20659, EC 9.2751(17) provided standards for accessory dwellings in the R-1 zone. As amended, EC 9.2751(17) provides standards for dwellings in all of the city's residential zones. EC 9.2751(17)(a) provides general standards for attached accessory dwellings. EC 9.2751(17)(b) provides general standards for detached accessory dwellings. EC 9.2751(17)(c) provides area-specific accessory dwelling standards. Specifically, EC 9.2751(17)(c) provides:

> "Except as provided in this subsection (c), the standards at (a) and (b) do not apply to accessory dwellings within the city-recognized

> boundaries of Amazon Neighbors, Fairmount Neighbors and South University Neighborhood Association. The following standards apply to all new attached or detached accessory dwellings in the R-1 zone within the city-recognized boundaries of Amazon Neighbors, Fairmount Neighbors and South University Neighborhood Association."

EC 9.2751(17)(c) then goes on to provide lot coverage, building size, minimum attachment, maximum bedroom, building height/interior setback, pedestrian access, primary entrance, outdoor storage/trash, and maximum wall length standards for accessory dwellings in the specified neighborhoods in the R-1 zone. Thus, under Ordinance 20659, accessory dwellings in both the S-JW zone and the S-C/R-2 subarea are subject to the standards for accessory dwellings in certain neighborhoods in the R-1 zone.

Petitioner argues that, together, EC 9.3625(1)(b), EC 9.3065(3)(k), and EC 9.2751(17)(c) are not "clear" for purposes of ORS 197.307(4) because, while the former two provisions state that accessory dwellings in the S-JW zone and the S-C/R-2 subarea are subject to the standards at EC 9.2751(17)(c), EC 9.2751(17)(c) itself states that its standards apply to certain neighborhoods in the R-1 zone. Petitioner argues that, together, those provisions are capable of constructions that support either of two diametrically opposed conclusions: (1) accessory dwellings are subject to the standards at EC 9.2751(17)(c) or (2) they are not subject to those standards.

The city responds, initially, that EC 9.3265(1)(b) and EC 9.3065(3)(k) are not "standards." We reject that response. *See Davenport v. City of Tigard*, 121

Or App 135, 141, 854 P2d 483 (1993) (construing the term "standards and criteria" in ORS 227.178(3) and ORS 215.427(3) as including "the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application" for permit approval).

However, we agree with the city that, together, EC 9.3265(1)(b), EC 9.3065(3)(k), and EC 9.2751(17)(c) are clear. To be sure, the city has chosen perhaps an overly complicated mechanism to implement ORS 197.312(5), but complicated does not equate to ambiguous. That EC 9.2751(17)(c) states that its standards are applicable to accessory dwellings in certain neighborhoods in the R-1 zone does not make ambiguous that EC 9.3265(1)(b) and EC 9.3065(3)(k) subject accessory dwellings in the S-JW zone and the S-C/R-2 subarea to the same standards. As the city explains, "[a]n owner seeking to establish an [accessory dwelling] on land zoned S-JW or S-C will naturally begin review of the code within the sections pertaining the S-JW or S-C zone, where it will find the challenged reference to the R-l [accessory dwelling] standards at EC 9.2751(17)(c)." Respondent's Brief 32.

B. EC Table 9.3625

Petitioner argues that, under Ordinance 20659, it is not clear whether a property owner who has two detached dwellings on a 4,500-square-foot lot in the S-JW zone has (1) two detached single-family dwellings, in which case they are entitled to construct two additional accessory dwellings, or (2) one detached single-family dwelling and one accessory dwelling, in which case they are

entitled to construct one additional detached single-family dwelling and one additional accessory dwelling. Similarly, petitioner argues that it is not clear whether a property owner who has two attached dwellings on a 4,500-square-foot lot in the S-JW zone has (1) a duplex, in which case they are not entitled to construct an accessory dwelling, or (2) a detached single-family dwelling with an attached accessory dwelling, in which case they are entitled to construct an additional detached single-family dwelling and an additional accessory dwelling.

The city responds, initially, that petitioner identifies no "standard" that is required to be "clear" for purposes of ORS 197.307(4). However, we understand petitioner to challenge EC Table 9.3625, as amended.

The city further responds, and we agree, that the EC is not unclear in the way petitioner argues. As amended, EC Table 9.3625 allows "2 dwellings per lot and 1 accessory dwelling for each detached one family dwelling" on lots between 4,500 and 8,999 square feet in the S-JW zone. EC 9.0500 defines "Dwelling" as "[a] building, or portion thereof, designed and used as a residence for occupancy by 1 family. This includes both buildings constructed on-site and manufactured homes." EC 9.0500 defines "Dwelling, Duplex" as "[a] building designed and used as dwellings for 2 families living independently of each other and having separate housekeeping facilities for each family that are connected either by common walls or common ceiling/floor connection. A building is not a duplex if one of the dwellings is an accessory dwelling." Ordinance 20659 adds to EC 9.0500 a definition for "Dwelling, Accessory," which is "[a]n interior, attached

or detached residential structure that is used in connection with or that is accessory to a single-family dwelling."

Given those definitions, whether two *attached* units qualify as a single-family dwelling with an attached accessory dwelling or a duplex, and whether two *detached* units qualify as a single-family dwelling with a detached accessory dwelling or two detached single-family dwellings, largely depends on the use of and relationship between the units. To qualify as an accessory dwelling, a unit must be "used in connection with or [be] accessory to a single-family dwelling." The definition of "Dwelling, Accessory" in Ordinance 20659 implements ORS 197.312(5)(b)(A). We discussed the meaning of that definition in *Kamps-Hughes v. City of Eugene*, 79 Or LUBA 500 (2019). Petitioner does not address that definition or explain why EC Table 9.3625, as amended, is unclear in light of it.

C. EC 9.3626(1)(c)(2)

As amended, EC Table 9.3625 allows "1 dwelling per lot for every 4,500 square feet (fractional values are rounded down to the nearest whole number) and 1 accessory dwelling for each detached one family dwelling" on lots at least 9,000 square feet in the S-JW zone. Again, EC 9.3626 provides special development standards for EC Table 9.3625, and EC 9.3626(1) provides, in part:

> "For purposes of determining the maximum allowable dwellings on a lot:
>
> "(a) A dwelling with five or fewer bedrooms that is the only dwelling on a street-abutting lot that is at least 4,500 square feet shall be counted as one dwelling.

"(b) Two dwellings that together have a total of six or fewer bedrooms, and that are the only dwellings located on a street-fronting lot that is at least 4,500 square feet, and where at least one residential building on the lot has a front facade that faces a street and is within the street maximum setback, shall be counted as two dwellings.

"(c) For cases not covered by sections (a) and (b), above, the dwelling count shall be the sum of the dwelling counts calculated under the following subsections:

"1. The total dwelling count for all dwellings with three or fewer bedrooms shall be the number of dwellings,

"2. *The total dwelling count for all dwellings with four or more bedrooms shall be the total number of bedrooms in these dwellings divided by three. Fractional dwelling counts resulting from this calculation shall be rounded up to the next whole number, e.g. a total of seven bedrooms counts as three dwellings*." (Emphasis added.)

Petitioner argues that, together, EC Table 9.3625 and EC 9.3626(1)(c)(2) are not "clear" for purposes of ORS 197.307(4). Petitioner posits a scenario in which two detached single-family dwellings, each containing four bedrooms, exist on a 13,500-square-foot lot in the S-JW zone. Petitioner observes that, although there are two detached single-family dwellings on the lot, there are three dwellings for purposes of EC 9.3626(1)(c)(2). Petitioner argues that it is not clear whether, in such a scenario, the property owner would be entitled to construct two additional accessory dwellings—one for each detached single-family dwelling—or three additional accessory dwellings—one for each dwelling for purposes of EC 9.3626(1)(c)(2).

The city responds, and we agree, that EC Table 9.3625 and EC 9.3626(1)(c)(2) are not unclear in the way petitioner argues. Under EC 9.3626(1)(c)(2), the two detached single-family dwellings would be considered three dwellings only for density purposes, that is, for purposes of determining whether additional single-family dwellings are allowed on the lot. There would still be only two "detached one family dwellings" for purposes of determining the number of accessory dwellings that are allowed under EC Table 9.3625. The city points out that Ordinance 20659 added paragraph (g) to EC 9.3626(1). EC 9.3626(1)(g) provides, "Accessory dwellings are not subject to the provisions of (1) and shall not be considered within the calculations of dwellings or bedrooms in subsections (1)(a) through (f) above." We agree with the city that, under EC 9.3626(1)(g), the method of determining density under EC 9.3626(1)(c)(2) is not relevant to determining the number of accessory dwellings that are allowed under EC Table 9.3625.

D. EC 9.3626(6) and EC 9.3065(3)(j)

EC 9.3626(6) provides that, in the S-JW zone, "[t]he maximum area covered by paved and unpaved vehicle use areas including but not limited to driveways, on-site parking and turnarounds, is 20 percent of the total development site area." EC 9.3065(3)(j) provides that, in the S-C/R-2 subarea, "[t]he total vehicle use area shall not exceed 20 percent of the lot size." EC 9.0500 defines "Vehicle Use Area" as "[p]arking spaces, driveways, interior roadways, loading areas, and fleet vehicle storage areas." Again, Ordinance 20659 makes

accessory dwellings in the S-JW zone and the S-C/R-2 subarea subject to the development standards at EC 9.2751(17)(c). Prior to Ordinance 20659, EC 9.2751(17)(c)(4) provided that "[t]he maximum area covered by paved and unpaved vehicle use areas including but not limited to driveways, on-site parking and turnarounds, shall be limited to 20 percent of the total lot area." However, Ordinance 20659 deleted that provision. 2021-092 Record 99-100.

Petitioner argues that EC 9.3626(6) and 9.3065(3)(j) are not "clear" for purposes of ORS 197.312(5) because it is unclear how they apply if a proposed accessory dwelling would share vehicle use areas with a detached single-family dwelling on the property. Petitioner posits a scenario in which a property owner simultaneously applies to construct a detached single-family dwelling and an accessory dwelling that would share a driveway but have their own parking spaces. Petitioner argues that it is unclear whether, in that scenario, the entire vehicle use area would count towards the 20 percent maximum, whether only the driveway and the detached single-family dwelling's parking space would count, or whether only the detached single-family dwelling's parking space would count.

The city responds that EC 9.3626(6) and EC 9.3065(3)(j) are clear and that whether vehicle use areas proposed in an application count toward the 20 percent maximum depends on the subject of the application. We agree. If the application is to construct an accessory dwelling, then any proposed vehicle use areas *do not* count toward the 20 percent maximum. If the application is to construct a

detached single-family dwelling, then any proposed vehicle use areas *do* count toward the 20 percent maximum. That an application to construct a detached single-family dwelling also proposes to construct an accessory dwelling does not change the applicability of EC 9.3626(6) and EC 9.3065(3)(j).

Petitioner cites a number of other standards at EC 9.3626 and EC 9.3065(3) that do not have equivalents at EC 9.2751(17)(c) and argues that they are similarly unclear. For the same reason discussed above with respect to EC 9.3626(6) and EC 9.3065(3)(j), we agree with the city that those standards are clear.

For the foregoing reasons, we agree with the city that each of the standards petitioner cites are "clear" for purposes of ORS 197.307(4).

The third assignment of error is denied.

The city's decision is affirmed.