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

JOHN MARICK,
Petitioner,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

JENNIFER BIEGE-CARROLL and SHANE CARROLL,
Intervenors-Respondents.

LUBA Nos. 2022-016/017/028/040/043

FINAL OPINION
AND ORDER

Appeal from City of Lake Oswego.

Wendie L. Kellington filed the petition for review and argued on behalf of petitioner. Also on the brief was Kellington Law Group PC.

Evan P. Boone filed a joint response brief on behalf of respondent.

Christen C. White filed a joint response brief and argued on behalf of intervenors-respondents. Also on the brief was Radler White Parks & Alexander, LLP.

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

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

AFFIRMED 11/01/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner appeals five city decisions regarding a nonconforming dwelling in a residential zone.

FACTS[1]

The subject property is a narrow, rectangular, 5,882-square foot lot zoned R-7.5 (Residential 7,500 square foot minimum lot size) and is developed with a single-family dwelling. The original dwelling was built in 1937. The R-7.5 zone imposes a five-foot setback from side lot lines. The dwelling is nonconforming with respect to side-yard setbacks. The north wall of the 1937 dwelling was located approximately four inches from the north property line with petitioner's adjoining property. The south wall of the dwelling was located approximately one foot from the south property line. Nonconforming uses, structures, lots, and site features are regulated under Lake Oswego Code (LOC) 50.01.006. Nonconforming structures may be continued. LOC 50.01.006(2)(a).[2]

Intervenors-respondents Jennifer Biege-Carroll and Shane Carroll (intervenors) applied to the city for a Residential Infill Design (RID) permit and

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[1] We set out the same underlying facts in a related decision issued this same day. *Marick v. City of Lake Oswego*, ___ Or LUBA ___ (LUBA Nos 2022-031/032, Nov 1, 2022).

[2] LOC 50.01.006(2)(a) provides: "Subject to the provisions of this section, and except as otherwise provided by this Code, a nonconforming use, structure, lot, or site feature may be continued in use so long as it remains otherwise lawful."

variance as part of a proposal to significantly remodel the 1937 dwelling. The RID application proposed to demolish and rebuild most of the dwelling. The application proposed to maintain the nonconforming north and south walls. A variance to R-7.5 standards was required because intervenors proposed to construct an addition on the west side of the dwelling that would increase the existing maximum lot coverage nonconformity. Intervenors also proposed adding a dormer to the south wing of the house that would increase the existing nonconformity with respect to the south side setback plane.

The city processed the RID application as a minor development action under the LOC. That process required notice to nearby property owners and an opportunity to submit comments. Petitioner received notice of the RID application and submitted comments. On July 15, 2020, the city approved the RID application. Record 536. Petitioner received notice of the RID decision and did not appeal that decision.

On April 22, 2021, intervenors submitted a building permit application in conformance with the RID decision. Record 526. The city building official approved the building permit on August 30, 2021. Record 500. The building official also issued a demolition permit to demolish portions of the 1937 dwelling. Intervenors subsequently removed all portions of the 1937 dwelling except the foundation and the north and south walls, which were propped up and left standing.

On October 20, 2021, intervenors' architect wrote in an email to the city:

> "During demolition we discovered extensive rot to the existing framing and mud sills along the north wall of the structure and no footings under the north and south stem walls. Attached are photos showing the unexpected site conditions. Our drawings called for new footings with the assumption the existing conditions were acceptable and correctly built. Would we be permitted to replace these two walls in their existing locations[?]" Record 485-86.

On October 27, 2021, the building official wrote in an email to the city planning manager:

> "Based on the evidence of the pictures of the walls in question we have some concern about using these existing walls for the home. These walls have deteriorated to the point of having no strength to be connected to or added to the other new construction of the home. Below are the new requirements we are placing on this project in order to comply with the code and be structurally safe." Record 487.

The building official indicated that they would require intervenors to submit revised building permit plans that include "[e]ngineered structural design for new walls to replace unsafe walls in question and footings to support the walls and integrate with the original engineering and design." *Id.*

On November 1, 2021, the planning manager sent an email to intervenors' project manager affirming that, under the LOC, the two nonconforming north and south walls may be replaced, as part of the "maintenance" of a nonconforming structure. Record 481. The November 1, 2021 email quotes LOC 50.01.006(2)(b) and LOC 50.10.003(2). Record 481. LOC 50.01.006(2)(b) provides:

> "On any nonconforming structure or site feature, maintenance may be performed in a manner not in conflict with the other provisions of the City Code. Nothing in this Code shall be deemed to prevent the strengthening or restoring to a safe condition of any structure, or portion thereof, or site feature declared to be unsafe by any official charged with protecting the public safety, upon the order of that

official."

LOC 50.10.003(2) defines "maintenance" to mean:

> "Upkeep or repair of any structure or site feature necessary to keep the structure or site feature in good and safe condition. Maintenance does not include structural alteration unless that structural alteration is required to remedy a condition declared to be unsafe by any official charged with protecting the public safety, upon the order of that official."

The planning manager concluded:

> "As discussed [in the building official's email], the remaining nonconforming walls are not safe and cannot be approved to tie into the new construction. Per the definition of 'maintenance,' since a structural alteration to a nonconforming structure is allowed if it is to remedy a condition declared to be unsafe by the Building Official, even though the repair or replacement of these walls would be structural alterations, their replacement can be allowed in this specific case." Record 481-82 (underscoring in original).

The November 1, 2021 email reiterated the building official's requirements, including that intervenors' revised building permit application include "property easements for all footings projecting onto neighboring properties." Record 482. Intervenors were also required to change the project description from "Renovate & construct addition to existing single family dwelling" to "Building a new single family home." *Id.* (underscoring omitted). That November 1, 2021 email is the subject of LUBA No. 2022-016.

On December 9, 2021, intervenors submitted revised building permit plans. Record 469. As relevant here, the revised building plans differ from those approved on August 30, 2021, by showing new construction of north and south side walls and footings within the side-yard setbacks and connections between

those walls to the rest of the remodeled dwelling approved in the RID decision. On December 15, 2021, city planning staff issued a "planning checklist" for the revised building permit plans. The planning checklist includes a note that "side setbacks maintained as non-conformity; declaration of unsafe condition on file allowing for reconstruction of non-conforming side-walls based on condition of existing structures." Record 463. That planning checklist is the subject of LUBA No. 2022-031.

The city planning department stamped and approved the revised plans on January 14, 2022. Record 197. A note on the city approval stamp on the approved revised plans states that "side yard setbacks legally nonconforming." *Id.* The approved, revised plans are the subject of LUBA No. 2022-032.

Subsequently, intervenors removed the north and south walls, and started construction of new north and south walls, with new footings, as well as all other portions of the new dwelling.

In a series of emails, petitioner objected to the city that the full demolition of the 1937 dwelling and the new construction that followed are illegal because, according to petitioner, the city should require the new dwelling to conform to current R-7.5 standards, including the five-foot side-yard setbacks. On February 24, 2022, the community development director responded with an email to petitioner justifying the city's decision to authorize replacement of the nonconforming north and south walls and declining to halt construction. Record 167-68. The director concluded that, because the building official found the walls to be unsafe, "the builder was allowed to restore the walls and maintain their

nonconforming rights." Record 167. The director and interpreted the term "restore" in LOC 50.01.006(2)(b) "to include replacement when necessary." *Id.* The director also concluded that "the code's allowances for continuation and maintenance of nonconforming developments are very forgiving" and "the provision for maintenance is a safeguard for situations like this." *Id.* The February 24, 2022 email is the subject of LUBA No. 2022-017.

Petitioner attempted to file local appeals of the foregoing city decisions. In a letter dated March 24, 2022, the city manager rejected petitioner's local appeal of the decisions challenged in LUBA Nos. 2022-016/017, concluding in that the LOC does not provide for local appeals of those decisions. Record 59-60. That decision is the subject of LUBA No. 2022-028.

In a letter dated April 12, 2022 the city manager rejected petitioner's local appeal of the decisions challenged in LUBA Nos. 2022-031/032, concluding in that the LOC does not provide for local appeals of those decisions. Record 13-14. That decision is the subject of LUBA No. 2022-040.

In a letter dated April 20, 2022 the city manager rejected petitioner's local appeal of the decisions challenged in LUBA Nos. 2022-028/040, concluding in that the LOC does not provide for local appeals of those decisions. Record 2-5. That decision is the subject of LUBA No. 2022-043.

We consolidated those seven appeals for review.[3]

STANDING

In the petition for review, petitioner asserts standing under ORS 197.830(3)(a), which provides that a person adversely affected by a land use decision made without a hearing may appeal the decision to LUBA within prescribed deadlines.[4] *See* OAR 661-010-0030(4)(a) (requiring that the petition for review state the facts that establish petitioner's standing).

In the joint response brief, respondent and intervenors (collectively, respondents) challenge petitioner's standing, arguing that petitioner has not established that he is "adversely affected" by any of the appealed decisions. Respondents acknowledge that LUBA has held that a person whose property is within sight and sound of the proposed development is presumptively "adversely

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[3] In separate orders issued this same day, we bifurcate LUBA Nos. 2022-031/032 from LUBA Nos. 2022-016/017/028/040/043 and transfer LUBA Nos. 2022-031/032 to Clackamas County Circuit Court.

[4] ORS 197.830(3) provides in part:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required[.]"

affected" by the development. *Frymark v. Tillamook County*, 45 Or LUBA 685, 690 (2003). However, respondents argue that that presumption is overcome in the present case, because the challenged decisions simply authorize construction of two new walls in the exact same location as two previously existing walls.

We conclude that petitioner is entitled to the presumption that they are "adversely affected." Construction of the north wall approved in the city's decisions is located less than a foot from petitioner's property and petitioner's dwelling is located only a few feet from the common property line. Even if no presumption applied, demolition and reconstruction of a structure that is located inches from their property involves adverse impacts to petitioner as an adjoining residential property owner. Petitioner has demonstrated that they have standing under ORS 197.830(3)(a) to appeal the challenged decisions.

MOTIONS TO TAKE EVIDENCE

In the petition for review, petitioner alleges that the challenged decisions illegally approved an expansion of the nonconforming structure, specifically authorizing construction of a new north wall that is located further north than the original wall. Petitioner further alleges that the north wall, or at least its footings or supporting fill, physically encroaches on petitioner's property.

In response, intervenors filed a motion to take evidence outside the record challenging the factual premise of petitioner's arguments. OAR 661-010-

0045(1).[5] Attached to the motion are photographs of the constructed north wall, allegedly showing that the wall itself is south of the property line, in the same location as the former wall. Petitioner filed a reply, arguing in part that the photographs do not depict the underground footings, which petitioner contend are located northward of the wall and located on his property. Intervenors then filed a second motion to take evidence, attached to which are photographs of the excavated footings, which intervenors contend are located no further northward than the former north wall.

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[5] OAR 661-010-0045 provides:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.
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> (2) Motions to Take Evidence:
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> (a) "A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

Petitioner opposes both motions, arguing that intervenors have not demonstrated grounds for the motion as required by OAR 661-010-0045(1). In their motions, intervenors state that taking evidence outside the record is warranted because it concerns disputed factual allegations concerning "standing, procedural irregularities, [and] * * * the content of the record." Intervenor-Respondents' Second Motion to Take Evidence Not in the Record 2. We agree with petitioner that none of the cited bases warrant taking evidence under OAR 661-010-0045(1). The disputed factual allegations do not concern the "content of the record" or any "procedural irregularity."

With respect to petitioner's standing, intervenors argue that if the north wall and its footings are in fact located within the footprint of the old north wall, then that would undermine petitioner's claim to be "adversely affected" by the city's decision to approve construction of the new walls.

We conclude above that petitioner is presumptively and actually adversely affected by the challenged decisions. Those conclusions do not depend on whether the north wall might be located a few inches further away from petitioner's property than claimed by petitioner. The evidence that intervenors move us to take is not material to our resolution of intervenors' challenges to petitioner's standing. Intervenors' motions to take evidence are denied.

MOOTNESS

In the joint response brief, respondents suggest that the present appeals should be dismissed because the construction of an entire new dwelling on the subject property has now been completed, including the two disputed

nonconforming walls. Petitioner argues, and we agree, that respondents have not demonstrated that these appeals are moot. LUBA has held that it will dismiss an appeal as moot where LUBA's review would have no practical effect. An appeal is not moot because the authorized development has been built and is in use where LUBA's review may result in remand that may cause the land use approvals to be modified. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479, 481 (2013). Here, sustaining one or more of petitioner's assignments of error would result in remand that may involve additional land use proceedings and decisions, and potentially even result in the city requiring the new structure to comply with current R-7.5 standards. These appeals are not moot.

JURISDICTION

A. Land Use Decision

As relevant here, LUBA's jurisdiction is limited to review of "land use decisions" and "limited land use decisions." ORS 197.825(1). In the joint response brief, respondents assert that some or all of the challenged decisions fall within one of two exceptions to the ORS 197.015(10) definition of "land use decision."[6] Specifically, we understand respondents to argue that none of the

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[6] ORS 197.015(10) provides, in part:

"'Land use decision':

"(a) Includes:

challenged decisions were made under land use standards that require interpretation or the exercise of policy or legal judgment, and all are thus excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(A). Further, respondents argue that the building permit checklist and revised building permit approval that are at issue in LUBA Nos. 2022-031/032 fall within the exclusion at ORS 197.015(b)(B) for a "building permit issued under clear and objective land use standards."

Petitioner responds that in each of the challenged decisions city officials explicitly or implicitly interpreted the city's land use code, which undercuts respondents' argument that the decisions are ministerial decisions made under

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> "(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
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> "(iii) A land use regulation; or
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> "(iv) A new land use regulation;
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> "* * * * *
>
> "(b) Does not include a decision of a local government:
>
> "(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment;
>
> "(B) That approves or denies a building permit issued under clear and objective land use standards[.]"

land use standards that do not require interpretation or the exercise of policy or legal judgement. ORS 197.015(10)(b)(A). Petitioner disputes that the building permit planning checklist and revised building permit decision were approved under "clear and objective land use standards." ORS 197.015(10)(b)(B).

We agree with respondents that we lack jurisdiction over LUBA Nos. 2022-031/032 for the reasons explained in *Marick v. City of Lake Oswego*, ___ Or LUBA ___ (LUBA Nos 2022-031/032, Nov 1, 2022).

We agree with petitioner that the other five challenged decisions concern the application of a land use regulations and that they are not subject to the ministerial exception because they were made under land use standards that require interpretation or the exercise of policy or legal judgment.

The November 1, 2021 email from the planning manager concludes that the new residential construction was exempt from code requirements for new construction. In so concluding, the planning manager applied and interpreted LOC 50.01.006(2)(b) and LOC 50.10.003(2).

The February 24, 2022 email from the community development director justifying the city's decision to authorize replacement of the nonconforming north and south walls and declining to halt construction involves the application of land use standards that required interpretation and the exercise of policy or legal judgment. For example, the director concluded that, because the building official found the walls to be unsafe, "the builder was allowed to restore the walls and maintain their nonconforming rights." Record 167. The director interpreted the term "restore" in LOC 50.01.006(2)(b) "to include replacement when

necessary." Record 167. The director also concluded that "the code's allowances for continuation and maintenance of nonconforming developments are very forgiving" and "the provision for maintenance is a safeguard for situations like this." *Id.* That decision required interpretation of LOC 50.01.006(4)(a)(i) and LOC 50.01.006(2)(b) and the exercise of policy judgment.

The March 24, 2022, April 12, 2022, and April 20, 2022 city manager letters conclude that no right of local appeal exists for any of the underlying decisions. In so concluding, the city manager applied the local appeal provisions in LOC Chapter 50 and determined that there existed no right to a local appeal. Those conclusions required interpretation and exercise of legal judgment. Those decisions are not subject to the exclusion at ORS 197.015(10)(b)(A).

B. Finality

As defined in ORS 197.015(10)(a), a "land use decision" must be a final decision. Respondents contend that some of the challenged decisions are not final decisions, and hence do not qualify as land use decisions.

Petitioner filed local appeals of all of the challenged decisions. The city rejected those local appeals, in letters dated March 24, 2022, April 12, 2022, and April 20, 2022, concluding that the LOC provides no right of local appeal for the challenged decisions. In effect, the letters declared that the decisions being appealed were "final" decisions, in the sense that the LOC did not provide for local appeal or any subsequent decision process. Respondents have not

demonstrated that the decisions at issue in these consolidated appeals are not final decisions.

We conclude that we have jurisdiction over the five decisions challenged in these consolidated appeals.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioner challenges the code interpretations adopted in the challenged decisions. Petitioner contends that the decisions erroneously interpret the LOC to allow intervenors to construct an entirely new single-family dwelling that does not conform to required setbacks and other R-7.5 standards under the "guise" of "maintenance" or "restoration" of the preexisting 1937 dwelling. Petition for Review 21-22, 33.

The RID application did not propose, and the RID decision did not approve, any changes to the location of the nonconforming walls within the five-foot side-yard setbacks. The proposed house remodel approved in the RID decision indicated that all the existing walls within the five-foot side-yard setbacks would remain in place. Petitioner argues that when intervenors subsequently requested city approval to also remove the north and south walls, they were effectively asking the city to approve construction of an entirely new nonconforming dwelling, including all portions within the side-yard setbacks, nonconforming construction that had not been approved in the RID decision.

In its decisions, the city interpreted several LOC provisions to approve intervenors' request to construct an entirely new dwelling. As explained above, in the November 1, 2021 email, the planning manager concluded that the removal

and construction of new north and south walls and foundations, are "maintenance" of a nonconforming structure under LOC 50.01.006(2)(b) and LOC 50.10.003.

In the February 24, 2022 email, the community development director provided an additional interpretation supporting replacement of the north and south walls. The director interpreted the term "restoring" in LOC 50.01.006(2)(b) to include "replacement when necessary, provided there is no increase in nonconformance, i.e., it is not any closer to the property line than the original wall." Record 167.

In the April 20, 2022 letter rejecting petitioner's local appeals, the city manager cited LOC 50.01.006(4)(a)(i) as an additional basis for allowing replacement of the north and south walls. Record 3. LOC 50.01.006(4)(a)(i) permits an owner to reconstruct all or any portion of a nonconforming structure, if the structure "is damaged by any cause other than by an intentional act of the owner."[7] The city manager concluded that the north and south walls had been

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[7] LOC 50. 50.01.006(4)(a)(i) provides:

> "[W]hen all or any portion of a nonconforming structure listed above is damaged by any cause other than an intentional act of the owner, and no part of the structure is located in the flood management area, the reconstruction of the nonconforming structure shall be exempt from the provisions of this Code to the extent that the damaged portions of the structure failed to conform."

"damaged" by deterioration over the 85-year life of the 1937 dwelling and that that damage was not caused by the intentional act of the owner.[8] Record 3-4.

On appeal, petitioner challenges the city's interpretations and conclusions on several grounds, which we address in turn.

A. Increased Nonconformity

Petitioner argues that, even under the city's expansive code interpretations, replacement of the north and south walls is impermissible, because in the November 1, 2021 email the city required intervenors to "[p]rovide for property easements for all footings projecting onto neighboring properties" and "[p]rovide property easements for all footing and rain drain and storm lines that may be in an adjacent property line due to the walls being on the property line." Record 482. Petitioner contends that the November 1, 2021 email authorized intervenors to construct the side walls and footings closer to the property line than the original walls and footings, indeed even upon adjoining property (subject to obtaining easements), which necessarily increases the degree of nonconformity. Petitioner

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[8] LOC 50.10.003(2) defines "damaged" as follows:

> "A building or site feature, or part of a building or site feature, that has been ruined or destroyed by intentional or unintentional actions of persons or inanimate objects, or by natural forces, so that its function and usefulness have been impaired or its value has been diminished so that it needs to be reconstructed or repaired to restore its functionality and value. Damage does not include dismantling of a building or site feature or portion of a building or site feature in the course of voluntary reconstruction or repairs."

contends that no code interpretation or rationale can explain how the city can approve structural alterations to a nonconforming structure that increases its nonconformity, without granting a variance to the R-7.5 standards, or at least as a modification to the RID decision or a new RID decision.

Petitioner acknowledges that intervenors represented to the city that they could construct the new north and south walls and footings within the footprint of the original walls without increasing the nonconformity. The city appears to have accepted that representation. However, petitioner argues that the revised building plans the city approved show that the new north wall is located on the property line, or at least that fill supporting the footing of the new north wall is located on either side of the property line, and thus the city authorized placement of fill on petitioner's property. Further, petitioner argues that, *as constructed*, the north wall itself and its footing physically encroach on petitioner's property.

As noted above in discussing the motions to take evidence, intervenors dispute that the constructed north wall or its footing encroaches on petitioner's property or is constructed closer to the property line than the 1937 dwelling wall. Intervenors argue that petitioner misunderstands the drawings in the revised building permit, which intervenors argue show no encroachment or increased nonconformance.[9]

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[9] In the petition for review, petitioner inserted copies of drawings from the revised building permit application, which highlights in yellow a vertical line, which we understand petitioner to assert represents the property line. Petition for Review 26. That yellow highlighted line appears to correspond to the north face

In opposing the motions to take evidence, petitioner argued that what matters in these appeals is what the city authorized in the challenged decisions, not what was in fact constructed. Petitioner argues that evidence of what was actually constructed might be relevant to an enforcement action in circuit court, but is not relevant to the issues on appeal. We agree with that argument. Accordingly, we do not need, or attempt, to resolve the parties' dispute about where the newly constructed north wall and its footings are located. What matters on appeal is what the challenged decisions authorize.

On that point, the city approved intervenors' proposal to locate the new side-walls and footings entirely within the footprint of the pre-existing walls, without increasing the side-yard setback nonconformity. For example, the February 24, 2022 email from the development director states the city's understanding that the "restored" side walls conform to the placement of the original side walls. Record 167. The city did not approve a wall or footing location closer to the property line, or an increase in nonconformity with respect to the north and south walls. If the north wall, as constructed, is in fact closer to the property line than the original wall, that is potentially an enforcement issue,

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of the north wall, and the north face of the concrete footings underneath the wall. We understand intervenors to argue that petitioner identified the wrong line, and that the property line is represented by a dashed line further to the north that is labeled "Property Line." The vertical dashed line labeled "Property Line" transects the northern portion of a below-grade shaded or cross-hatched area. That below-grade shaded area is unlabeled, but we understand it to represent gravel or drain rock fill.

but it is not a basis for reversal or remand of the city decisions challenged on appeal.

B. Maintenance, Restoration, and Reconstruction of the North and South Walls

As discussed below, much of petitioner's arguments under the first assignment of error do not concern the city's determinations regarding the north and south walls and, instead, focus on the demolition and replacement of other portions of the 1937 dwelling. Petitioner challenges the city's interpretation of the code terms "maintenance," "restoration," and "reconstruction" as applied to the north and south walls. We address those interpretative challenges here.

As noted, the various city decisions justify replacement of the north and south walls based on several LOC provisions: LOC 50.01.006(2)(b) (maintenance and restoration of damaged nonconforming structures), the LOC 50.10.003(2) definitions of "maintenance" and "damaged," and LOC 50.01.006(4)(a)(i), which exempts from contrary LOC provisions the "reconstruction" of unintentionally damaged nonconforming structures. The city found that the north and south walls were "damaged" through no fault of intervenors, and that the walls can therefore be lawfully replaced, as the "maintenance," "restoration," or "reconstruction" of the damaged portions of a nonconforming structure.

Petitioner contends that "maintenance," "restoration," or "reconstruction" all entail some physical continuation of the original structure, not the complete replacement of the original structure with an entirely new structure. According to

petitioner, those terms cannot be interpreted to approve complete replacement of the damaged portions of the structure. Petitioner argues that the LOC uses a similar term "replacement cost" in other nonconforming use provisions, and the city's choice to use more limited language indicates that the drafters did not intend to allow a complete replacement of a portion of a nonconforming structure as part of "maintenance," "restoration," or "reconstruction."[10]

Respondents respond that the city correctly interpreted the code terms in context to conclude that, depending on the degree of damage, it is possible that the entirety of the damaged part of a structure must be completely replaced in order to restore the functionality of that part of the structure. Respondents argue that the building official determined that the north and south walls were damaged and unsafe and that complete replacement of those walls was the only safe option.

We review city staff interpretations of the LOC to determine whether those interpretations are correct. *Gage v. City of Portland*, 28 Or LUBA 307, 309 (1994), *aff'd*, 133 Or App 346, 891 P2d 1331 (1995); ORS 197.835(9)(a)(D) (LUBA shall reverse or remand a local government decision where the local government improperly construes the applicable law). We agree with respondents that city staff did not misconstrue the applicable code provisions in concluding that complete replacement of the north and south walls is a

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[10] LOC 50.01.006(4)(b)(ii), part of a code provision governing nonconforming structures other than single-family dwellings, allows "rebuilding" of damaged nonconforming structures, depending on whether the damaged portion represents less than 50 percent of the "replacement cost" of the entire building.

permissible option under LOC 50.01.006(4)(a)(i), which allows the "reconstruction" of a damaged nonconforming structure, and exempts that reconstruction from contrary LOC provisions to the extent that the damaged portions of the structure failed to conform.

We also agree with the city that "restoring to a safe condition of any structure, or portion thereof," could, depending on the degree and extent of damage, and the effect of that damage on the safety of the overall structure, involve replacement of the entirety of a damaged, unsafe structure, or portion of a structure, for purposes of LOC 50.01.006(2)(b). In the present case, petitioner cites to no evidence that something short of complete replacement of the north and south walls could have restored the safety of those walls. Petitioner has not demonstrated that the city misconstrued the applicable law in concluding that the north and south walls can be replaced.

C. Demolition and Construction within the Side-Yard Setback

Petitioner argues that even if the city's interpretations of "maintenance," "restoration," and "reconstruction" are sustained as applied to the north and south walls in isolation, those interpretations cannot be applied to justify the construction of what is essentially an entirely new dwelling. Petitioner argues that intervenors voluntarily demolished all portions of the 1937 dwelling (walls, roofs, fireplace, chimney, etc.) located within the five-foot side-setbacks (but for the north and south side-walls), even though there is no evidence that those structural elements were damaged or unsafe in any way. Petitioner argues that

the demolition and replacement of those undamaged walls and roof structures are nonconforming structural alterations that were not authorized in the RID decision, and cannot be authorized even under the city's expansive interpretations of "maintenance," "restoration," or "reconstruction." Because intervenors voluntarily demolished undamaged nonconforming structural elements, petitioner argues that all reconstruction of the dwelling must comply with current R-7.5 standards under LOC 50.01.006(4)(a)(iv).

LOC 50.01.006(4)(a)(iv) provides that "[w]hen all or any portion of a nonconforming structure is damaged by an intentional act of the owner, all reconstruction of the structure shall conform to this Code." LOC 50.10.003(2) defines the term "damaged" to exclude "dismantling of a building or site feature or portion of a building or site feature in the course of voluntary reconstruction or repairs." See n 8.

Petitioner argues that the RID decision approved only a relatively modest remodel of the 1937 house. That approved remodel did not include modifying any portions of the dwelling located within the five-foot side-yard setbacks. Instead, as the city noted in the November 1, 2021 email, the RID application and approval contemplated that all portions of the 1937 dwelling located within the side-yard setbacks would remain in place. Thus, petitioner argues, when intervenors voluntarily chose to demolish the entirety of the dwelling, including all portions within the side-yard setbacks, that was an intentional act that triggered LOC 50.01.006(4)(a)(iv). Thus, petitioner argues, reconstruction of the

entire dwelling must therefore conform to the current R-7.5 standards and no portion of the dwelling may be located within the five-foot side-yard setbacks.

Petitioner further argues that LOC 50.01.006(4)(a)(i) allows for reconstruction of an entire structure only when the entire structure is damaged by a cause other than an intentional act of the owner. Petitioner argues that LOC 50.01.006(4)(a)(iv) requires that elements that are voluntarily removed must conform to the code. Petition for Review 74. Petitioner argues:

> "The plain language of LOC 50.01.006.4.a.i cannot mean that if an owner voluntarily demolishes the majority of a dwelling, and the remaining portion of the nonconforming structure is found to be partially damaged, that damage justifies razing the remainder of the structure and foundations and building an entire new house that is exempt from all code standards applicable to new construction." Petition for Review 75.

We refer to that argument as the "whole house" argument. According to petitioner, if intervenors want the benefit of a nonconforming setback, then they must retain the nonconforming structure or, "if it is unsafe, undertake the more costly construction necessary to strengthen and restore or otherwise reconstruct the damaged portions of the nonconforming structure." Petition for Review 77.

Petitioner's argument requires interpretation and application of LOC 50.01.006(4)(a)(i), LOC 50.01.006(4)(a)(iv), and LOC 50.10.003(2). The challenged decisions do not cite LOC 50.01.006(4)(a)(iv) and respondents do not address petitioner's arguments under that provision. However, based on the city's express conclusions, we conclude that the city implicitly interpreted LOC 50.01.006(4)(a)(iv) and concluded that provision does not apply and does not

result in the loss of the intervenors' right to continue the side-yard setback nonconformity. In all events, the absence of a city interpretation, we may interpret relevant code provisions as necessary to resolve the issues raised on appeal. ORS 197.829(2). We exercise our discretion to do so here.

Petitioner's proffered interpretation that LOC 50.01.006(4)(a)(i) allows reconstruction of an entire nonconforming dwelling only when the whole house is damaged by a cause other than an intentional act of the owner is inconsistent with the express language of that provision. LOC 50.01.006(4)(a)(i) allows for code-exempt reconstruction of a nonconforming structure "when all *or any portion* of a nonconforming structure * * * is damaged by any cause other than an intentional act of the owner." (Emphasis added.) Conversely, LOC 50.01.006(4)(a)(iv) removes legal nonconforming status protection for reconstruction of a damaged nonconforming structure when a property owner intentionally damages "all or any portion of a nonconforming structure."

As noted, the LOC 50.10.003(2) definition of "damaged" excludes "dismantling of a building or site feature or portion of a building or site feature in the course of voluntary reconstruction or repairs." As we understand it, petitioner argues that the portions of the dwelling that were approved to be removed and remodeled under the RID were all voluntary reconstruction and, thus, are not eligible for reconstruction under LOC 50.01.006(4)(a)(i). The challenged decisions approve reconstruction of the north and south walls at their nonconforming setback locations and allow those walls to be tied into the rest of the remodeled dwelling. We do not understand the city to have approved the

remainder of the dwelling under LOC 50.01.006(4)(a)(i). Petitioner's argument that LOC 50.01.006(4)(a)(iv) removes the right to reconstruct the nonconforming walls is another iteration of petitioner's "whole house" argument, which is not supported by the language of LOC 50.01.006(4)(a)(i) or LOC 50.01.006(4)(a)(iv).

We also understand petitioner to argue that the north and south walls are not "damaged" for purposes of LOC 50.01.006(4)(a)(i) because, ultimately those walls were dismantled "in the course of voluntary reconstruction" of the entire dwelling. This argument is another iteration of petitioner's "whole house" argument, which we reject.

Again, LOC 50.10.003(2) defines "damaged" as

> "A building or site feature, or part of a building or site feature, that has been ruined or destroyed by intentional or unintentional actions of persons or inanimate objects, or by natural forces, so that its function and usefulness have been impaired, or its value has been diminished so that it needs to be reconstructed or repaired to restore its functionality and value. Damage does not include dismantling of a building or site feature or portion of a building or site feature in the course of voluntary reconstruction or repairs."

The city concluded that the north and south walls could be replaced as "damaged" under LOC 50.01.006(4)(a)(i), despite the remainder of the dwelling being voluntarily reconstructed under the RID approval. The city concluded that the nonconforming north and south walls had been ruined or destroyed by natural processes (dry rot and age) and that only complete removal and reconstruction would restore their functionality. LOC 50.01.006(4)(a)(iv) requires compliance

with the code (i.e., loss of nonconforming status) for the entire structure only "[w]hen all or any portion of a nonconforming structure is damaged by an intentional act of the owner." In other words, LOC 50.01.006(4)(a)(iv) prevents a property owner from continuing a nonconformity when the property owner has intentionally damaged the nonconforming structure. However, LOC 50.10.003(2) excludes from the definition of "damaged" the "dismantling of a building or site feature or portion of a building or site feature in the course of voluntary reconstruction or repairs." Intervenors' intentional, voluntary remodel of the remainder of the building is not "damage[]" under LOC 50.10.003(2). Contrary to petitioner's argument, LOC 50.01.006(4)(a)(iv) does not require that all reconstruction of the dwelling conform to current code requirements, including side-yard setbacks.

We conclude that the city did not misinterpret LOC 50.01.006(4)(a)(i) or (iv) in allowing intervenors to remove the damaged north and south walls and replace them with new walls in the nonconforming setback locations as part of building an entire new dwelling.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural error by failing to process its approval of the wall replacement as a modification to the RID decision or as a new minor development permit with a decision process that would provide petitioner notice and opportunity for hearing. LOC 50.07.003(11)(a) requires that a modification to a ministerial or minor development permit be subject to the

same procedures and review criteria as the original application.[11] Petitioner contends that, in approving intervenors' request to replace the north and south walls, and to connect those walls to the rest of the dwelling, the city necessarily modified the RID decision, which was a minor development permit. Alternatively, petitioner argues that in approving intervenors' request the city made a new minor development permit decision. Either way, petitioner argues, the city should have processed intervenors' request according to the procedures that apply to a minor development permit, providing notice and an opportunity for a hearing.

In the March 24, 2022 letter rejecting petitioner's local appeal of the November 1, 2021 staff email, the city manager noted that intervenors did not apply for a modification to the RID decision, request a new RID decision, or apply for a formal code interpretation. Instead, intervenors asked the city to find the north and south walls unsafe and allow their replacement and integration into the dwelling as "maintenance" or "restoration" of a part of a nonconforming structure. The city processed that request as a modification of the August 31, 2021 building permit and not as a modification to the RID decision. Under the

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[11] LOC 50.07.003(11)(a) provides:

> "For ministerial or minor development permits, modifications to a development permit are classified as the same type of development as the original permit and shall be reviewed under the applicable review criteria for that classification of development, except that the review criteria shall be limited to those criteria that are affected by the requested modification."

LOC, a building permit is categorized as a "ministerial" development permit, which generally involves no application of discretionary approval criteria, no public land use procedures, and no right of local appeal. LOC 50.07.003(13)(a), (c)-(d).

On appeal, petitioner argues that the city erred in processing intervenors' request as a request to modify the building permit, or as a ministerial decision of any kind, because, in the course of approving that request, city planning staff rendered several interpretations of the LOC, as discussed under the jurisdictional analysis above and under the first assignment of error. Petitioner argues that LOC 50.07.003(13)(a)(i)(1) defines a ministerial development decision in relevant part as one that "[i]s made pursuant to land use standards which do not require interpretation or the exercise of policy or legal judgment." We understand petitioner to argue that, given the need to render interpretations of ambiguous code provisions, city staff should have processed the request as a modification of the RID decision, or a new RID decision, which would follow the procedures for a discretionary minor development permit.

As the city noted, in requesting approval to replace the north and south walls, intervenors did not apply for a new or modified RID decision, or seek a variance from any standard. The planning manager concluded that no additional application was required because the replacement of the walls would remedy a condition declared to be unsafe by the building official. Record 481-82. Petitioner does not explain why an application for a new or modified RID permit was required to process intervenors' request. Petitioner does not identify any

applicable residential infill design review standards that would apply to intervenors' request.

Intervenors' request to replace the north and south walls was initially addressed by the building official, who is responsible for administering the city's structural building code. The buildings official determined that the walls were damaged and unsafe and that only removal and complete reconstruction would restore their functionality. The building official required revised building plans reflecting those modifications to the building permit. Planning staff reviewed the building official's determination and concluded that the walls were damaged and the wall replacement is allowed as "maintenance," "restoration," or "reconstruction" of a nonconforming structure.

LOC 50.01.006(4)(a)(i) provides that reconstruction of a damaged nonconforming structure "shall be exempt from the provisions of this Code to the extent that the damaged portions of the structure failed to conform." Similarly, LOC 50.01.006(2)(b) provides that "[n]othing in this Code shall be deemed to prevent the strengthening or restoring to a safe condition of any structure, or portion thereof, or site feature declared to be unsafe by any official charged with protecting the public safety, upon the order of that official."

Respondents argue, and we agree, that the city's approval of the reconstruction of the nonconforming south and north walls of the residence is exempt from the LOC. However, we disagree with respondents' argument that that exemption *ipso facto* makes the challenged decisions not land use decisions. Whether the decisions are exempt from the LOC depends on a determination

whether LOC 50.01.006(4)(a)(i) applies. LOC 50.01.006(4)(a)(i) is a land use standard that requires interpretation and the exercise of legal judgment in deciding whether a nonconforming structure is "damaged by any cause other than an intentional act of the owner." As explained above, "damaged" has a specific meaning under LOC 50.10.003(2) and whether a structure is "damaged" requires the application of legal judgment. Similarly, whether damage is caused by an intentional act of the owner requires legal judgement.

As explained above under the jurisdictional analysis, we agree with petitioner that the five decisions over which we exercise review jurisdiction are not ministerial decisions because the city actors applied LOC provisions that require interpretation or exercise of policy or legal judgment. However, that conclusion does not lead to remand for a local appeal. In the first assignment of error, we affirm the city's conclusion that LOC 50.01.006(4)(a)(i) and LOC 50.01.006(2)(b) apply to intervenors' request to replace the north and south walls. Based on that conclusion, we agree with respondents that the challenged approvals are exempt from other provisions of the LOC.

ORS 227.215 provides that cities may regulate "development," which is broadly defined as including, as relevant here, "making a material change in the use or appearance of a structure." The city regulates development through adopting a development ordinance and requiring that development comply with that development ordinance. A development ordinance may provide for development for which a permit is granted as of right, development for which a permit is granted discretionarily, development which need not be under a

development permit, and development which is exempt from the ordinance. ORS 227.215(3).[12] ORS 227.215(3) delegates to cities the authority to decide what development requires discretionary review, with certain exceptions for development of housing that are not at issue in this appeal.[13] Under ORS 227.215(3)(d), the city may provide that certain development is exempt from the development ordinance.

LOC 50.01.006(4)(a)(i) allows reconstruction of "all or any portion" of a nonconforming single-family dwelling when it "is damaged by any cause other than an intentional act of the owner." If those circumstances are established, as they were here, then the reconstruction is exempt from the provisions of the LOC "to the extent that the damaged portions of the structure failed to conform." Thus,

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[12] ORS 227.215(3) provides:

"A development ordinance may provide for:

"(a) Development for which a permit is granted as of right on compliance with the terms of the ordinance;

"(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173;

"(c) Development which need not be under a development permit but shall comply with the ordinance; and

"(d) Development which is exempt from the ordinance."

[13] Pursuant to ORS 197.307(4) "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing."

even if petitioner had identified a residential infill design standard or other discretionary approval standard that might, in other circumstances, apply to construction on the subject property, the replacement of the north and south walls is exempt from those standards and the city was not required to process intervenors' request as a request for discretionary review.

The second assignment of error is denied.

The city's decisions are affirmed.