

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

3  
4                   JOHN MARICK,  
5                   *Petitioner,*

6  
7                   vs.

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9                   CITY OF LAKE OSWEGO,  
10                  *Respondent,*

11  
12                  and

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14                  JENNIFER BIEGE-CARROLL and SHANE CARROLL,  
15                  *Intervenors-Respondents.*

16  
17                  LUBA Nos. 2022-031/032

18  
19                  FINAL OPINION  
20                  AND ORDER

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22                  Appeal from City of Lake Oswego.

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

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

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

32  
33                  ZAMUDIO, Board Member; RYAN, Board Chair; participated in the  
34                  decision.

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

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38                  TRANSFERRED

11/01/2022

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

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**NATURE OF THE DECISION**

Petitioner appeals a planning checklist and revised building plan approval for a nonconforming dwelling in a residential zone.

**FACTS<sup>1</sup>**

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).<sup>2</sup>

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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<sup>1</sup> 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 2022-016/017/028/043, Nov 1, 2022).

<sup>2</sup> 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.”

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

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

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

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

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

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

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

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

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

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

1 official.”

2 LOC 50.10.003(2) defines “maintenance” to mean:

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

9 The planning manager concluded:

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

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

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

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

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

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

15 In a series of emails, petitioner objected to the city that the full demolition  
16 of the 1937 dwelling and the new construction that followed are illegal because,  
17 according to petitioner, the city should require the new dwelling to conform to  
18 current R-7.5 standards, including the five-foot side-yard setbacks. On February  
19 24, 2022, the community development director responded with an email to  
20 petitioner justifying the city’s decision to authorize replacement of the  
21 nonconforming north and south walls and declining to halt construction. Record  
22 167-68. The director concluded that, because the building official found the walls  
23 to be unsafe, “the builder was allowed to restore the walls and maintain their

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

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

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

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



1 We consolidated those seven appeals for review.<sup>3</sup>

2 **STANDING**

3 We conclude that petitioner has standing for the reasons expressed in our  
4 final opinion and order in *Marick v. City of Lake Oswego*, \_\_\_ Or LUBA \_\_\_  
5 (LUBA Nos 2022-016/017/028/043, Nov 1, 2022).

6 **MOTIONS TO TAKE EVIDENCE**

7 We deny the motions to take evidence for the reasons expressed in our final  
8 opinion and order in *Marick v. City of Lake Oswego*, \_\_\_ Or LUBA \_\_\_ (LUBA  
9 Nos 2022-016/017/028/043, Nov 1, 2022).

10 **MOOTNESS**

11 We conclude that these appeals are not moot for the reasons expressed in  
12 our final opinion and order in *Marick v. City of Lake Oswego*, \_\_\_ Or LUBA \_\_\_  
13 (LUBA Nos 2022-016/017/028/043, Nov 1, 2022).

14 **JURISDICTION**

15 **A. Land Use Decision**

16 As relevant here, LUBA’s jurisdiction is limited to review of “land use  
17 decisions” and “limited land use decisions.” ORS 197.825(1). In the joint  
18 response brief, intervenors and the city (collectively, respondents) assert that  
19 some or all of the challenged decisions fall within one of two exceptions to the

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<sup>3</sup> In separate orders issued this same day, we bifurcate LUBA Nos. 2022-031/032 from LUBA Nos. 2022-016/017/028/040/043 and affirm LUBA Nos. 2022-016/017/028/040/043.

1 ORS 197.015(10) definition of “land use decision.”<sup>4</sup> Specifically, we understand  
2 respondents to argue that none of the challenged decisions were made under land  
3 use standards that require interpretation or the exercise of policy or legal  
4 judgment, and all are thus excluded from LUBA’s jurisdiction under ORS  
5 197.015(10)(b)(A). Further, respondents argue that the building permit checklist  
6 and revised building permit approval that are at issue in LUBA Nos. 2022-

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<sup>4</sup> ORS 197.015(10) provides, in relevant part:

“‘Land use decision’:

“(a) Includes:

“(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation;

“\* \* \* \* \*

“(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[.]”

1 031/032 fall within the exclusion at ORS 197.015(10)(b)(B) for a “building  
2 permit issued under clear and objective land use standards.”

3 Petitioner responds that in each of the challenged decisions city officials  
4 explicitly or implicitly interpreted the city’s land use code, which undercuts  
5 respondents’ argument that the decisions were made under land use standards  
6 that do not require interpretation. For the same reason, petitioner disputes that the  
7 building permit planning checklist and revised building permit decision were  
8 approved under “clear and objective land use standards.”

9 For the reasons explained in our final opinion and order in *Marick v. City*  
10 *of Lake Oswego*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2022-016/017/028/043, Nov 1,  
11 2022), we agree with petitioner that five of the seven challenged decisions require  
12 interpretations of the city’s land use standards and those decisions are not subject  
13 to the exclusion at ORS 197.015(10)(b)(A).

14 However, we agree with respondents that the December 15, 2021 building  
15 permit planning checklist and the January 14, 2022 revised building permit  
16 approval both fall within the exclusion at ORS 197.015(10)(b)(B).

17 We have explained that “the ministerial decision exclusion in ORS  
18 197.015(10)(b)(A) is separate and distinct from the building permit exclusion in  
19 ORS 197.015(10)(b)(B).” *Madrona Park, LLC v. City of Portland*, \_\_\_ Or LUBA  
20 \_\_\_ (LUBA No 2019-032, July 17, 2019), *aff’d*, 300 Or App 403, 450 P3d 1050  
21 (2019) (slip op at 9-10). We explained that we have sometimes collapsed the  
22 jurisdictional analysis under ORS 197.015(10)(b)(A) and (B). *See McCollough*  
23 *v. City of Eugene*, 74 Or LUBA 620, 623 (2016) (a “building permit standard that

1 was subjective or discretionary would likely require the exercise of legal or policy  
2 judgment”). Similarly, the LOC categorizes “a building permit issued under clear  
3 and objective land use standards” in the ministerial development classification.  
4 LOC 50.07.003(13)(a)(i)(2). In *Madrona Park*, we explained that “local  
5 governments issue a great number of building permits on a daily and weekly  
6 basis, and the vast majority of those building permits are not subject to our  
7 jurisdiction, except in those limited situations where the land use standards under  
8 which a building permit is issued are not ‘clear and objective.’” \_\_\_ Or LUBA at  
9 \_\_\_ (slip op at 10).

10 In order to determine whether the land use standards under which a  
11 building permit was issued are “clear and objective,” we must determine whether  
12 the standards under which the permit was issued are “ambiguous.” See *Richmond*  
13 *Neighbors v. City of Portland*, 66 Or LUBA 464, 466 (2012) (citing *Tirumali v.*  
14 *City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000), *rev den*, 331 Or 674,  
15 21 P3d 96 (2001)). The applicable land use regulations are ambiguous if they  
16 “can plausibly be interpreted in more than one way.” *Id.*

17 In addition, in construing the phrase “clear and objective” as it is used in  
18 another land use statute—the needed housing statute that is currently at ORS  
19 197.307(4), which requires local governments to apply only standards that are  
20 “clear and objective” to an application for needed housing—we have held that,  
21 in general, approval standards are “clear and objective” if they do not impose  
22 “subjective, value-laden analyses that are designed to balance or mitigate  
23 impacts.” *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139,

1 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594, 987 P2d 514  
2 (1999).

3 The planning checklist includes a line that lists the “zoning standards” as  
4 R-7.5 and the land use number as “LU 20-0007,” which refers to the RID. Record  
5 463. The planning checklist notes under sections addressing side-yard setbacks  
6 and side-yard setback plane that “side setbacks maintained as non-conformity;  
7 declaration of unsafe condition on file allowing for reconstruction of  
8 nonconforming side-walls based on condition of existing structure.” *Id.*; Record  
9 465. The city approval stamp on the revised building plans note that “side yard  
10 setbacks [are] legally nonconforming.” Record 197.

11 We understand petitioner to argue that those determinations required the  
12 application of LOC chapter 50 nonconforming use standards that are not clear  
13 and objective, particularly LOG 50.01.006(2)(b). The checklist and building  
14 permit approval rely upon an earlier land use decision, specifically the November  
15 1, 2021 email from the planning manager, as the basis for the conclusion that the  
16 proposed north and south walls are legally nonconforming.<sup>5</sup> Petitioner correctly  
17 observes in response to the motion to dismiss that the November 1, 2021 email  
18 is the subject land use decision, and that the building plans and building permit  
19 implement that decision. Response to Motion to Dismiss 39. We conclude that

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<sup>5</sup> The November 1, 2021 email is the subject of LUBA No. 2022-016.

1 the exclusion at ORS 197.015(10)(b)(B) applies to those challenged documents.  
2 Accordingly, we lack jurisdiction over LUBA Nos. 2022-031/032.

### 3 **TRANSFER TO CIRCUIT COURT**

4 Petitioner filed a contingent motion to transfer to circuit court any appeals  
5 that LUBA determines are not subject to its jurisdiction, pursuant to ORS  
6 34.102(4) and OAR 661-010-0075(9).<sup>6</sup> Intervenors argue that petitioner’s  
7 contingent motion is untimely and should be denied.

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<sup>6</sup> OAR 661-010-0075(9) provides:

“Motion to Transfer to Circuit Court:

“(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in 197.015(10) or (12).

“(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be filed not later than 14 days after the date the moving party learns the Board has raised a jurisdictional issue.

“(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (9)(b) of this rule, in which

1           Intervenors argue that the motion to transfer was filed more than 14 days  
2 after the jurisdictional issue was first raised in the joint response brief. OAR 661-  
3 010-0075(9)(b); see n 6. The joint response brief was filed June 27, 2022.  
4 Respondents’ jurisdictional challenges under ORS 197.015(10)(b) were largely  
5 embedded in the responses to the assignments of error. The joint response brief  
6 did not include any jurisdictional motions, denominated as such. On July 11,  
7 2022, petitioner filed a response to the jurisdictional challenges in the joint  
8 response brief in a pleading titled Petitioner’s Response to Motion to Dismiss.  
9 Three days later, on July 14, 2022, petitioner filed a conditional motion to  
10 transfer, 18 days after the joint response brief was filed.<sup>7</sup>

11           Intervenors acknowledge that LUBA has held that the untimely filing of a  
12 motion to transfer is treated as a “technical violation” of LUBA’s rules, absent a  
13 showing of substantial prejudice to opposing parties. *Baker v. City of Woodburn*,  
14 37 Or LUBA 563, 569, *aff’d* 167 Or App 259, 4 P3d 775 (2000); *see also* OAR  
15 661-010-0005 (“[t]echnical violations not affecting the substantial rights of  
16 parties shall not interfere with the review of a land use decision or limited land  
17 use decision”). However, intervenors argue that LUBA should dismiss at least  
18 LUBA No. 2022-032, the appeal of the revised building permit approval, without

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case the Board shall transfer the appeal to the circuit court of  
the county in which the appealed decision was made.”

<sup>7</sup> On July 21, 2022, petitioner refiled the conditional motion to transfer, apparently concerned that LUBA had not received the original motion filed July 14, 2022.

1 requiring intervenors to show any particular prejudice in this appeal, from  
2 petitioner's untimely filed motion to transfer. That is because, intervenors argue,  
3 petitioner's appeal in LUBA No. 2022-032 was itself filed untimely for purposes  
4 of the writ of review statute at ORS 34.102(4), which provides:

5 "A notice of intent to appeal filed with [LUBA] pursuant to ORS  
6 197.830 and requesting review of a decision of a municipal  
7 corporation made in the transaction of municipal corporation  
8 business that is not reviewable as a land use decision or limited land  
9 use decision as defined in ORS 197.015 shall be transferred to the  
10 circuit court and treated as a petition for writ of review. *If the notice  
11 was not filed with the board within the time allowed for filing a  
12 petition for writ of review pursuant to ORS 34.010 to 34.100, the  
13 court shall dismiss the petition.*" (Emphasis added.)

14 ORS 34.030 requires that a writ of review must be filed within 60 days of the  
15 date of the decision or determination sought to be reviewed. Intervenors argue  
16 that, because petitioner filed LUBA No. 2022-032 with LUBA 75 days from the  
17 date of the revised building permit approval, if LUBA transfers that appeal to  
18 circuit court, then the court will have no choice but to dismiss the writ, pursuant  
19 to ORS 32.102(4). For that reason, intervenors argue, transfer to circuit court  
20 under OAR 661-010-0075(9) would be pointless. Intervenors argue that waiving  
21 the consequences of petitioner's untimely filing under LUBA's rules would  
22 prejudice intervenors' substantial rights in the present case, because it would  
23 require intervenors to appear in an untimely filed and meritless writ of review  
24 proceeding.

25 As we observed in *Bishop v. Deschutes County*, 72 Or LUBA 103, 121  
26 (2015), ORS 34.102 assigns to the circuit court the responsibility for determining



1 the timeliness of filings under the statute. We reject intervenors' suggestion that  
2 prejudice is automatically shown, for purposes of OAR 661-010-0005 and OAR  
3 661-010-0075(9), based on speculation as to the potential fate of a writ of review  
4 proceeding under the statute.

5 Here, petitioner's motion to transfer was filed with LUBA four days late.  
6 Intervenors have not demonstrated that filing the motion four days late prejudices  
7 their substantial rights in this review proceeding. Accordingly, petitioner's  
8 untimely filing is a technical violation of LUBA's rules, which does not provide  
9 a basis to deny the motion to transfer. OAR 661-010-0005. Because intervenors  
10 offer no other basis to deny the motion, it is granted with respect to LUBA Nos.  
11 2022-031/032.

12 The city's decisions are transferred to Clackamas County Circuit Court.