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

RAMSEY HAMIDE,
Petitioner,

vs.

CITY OF CANNON BEACH,
Respondent.

LUBA No. 2022-078

FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

David J. Petersen filed a petition for review and argued on behalf of petitioner.

Carrie A. Richter filed the respondent's brief and argued on behalf of respondent.

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

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

AFFIRMED 12/09/2022

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 a city manager decision upholding a stop work order issued by the city building official halting construction of petitioner's single-family residence.

BACKGROUND

The subject property is zoned Residential Medium Density (R2) with an Oceanfront Management (OM) overlay. The western boundary of the property abuts the beach. The eastern boundary of the property abuts Laurel Street.

The OM overlay zone includes all "lots abutting the oceanshore." CBMC 17.42.020(A)(1). Buildings within the OM overlay must be set back a certain distance from the ocean (oceanfront setback). Canon Beach Municipal Code (CBMC) 17.42.050(A)(6), provides, in part:

> "Oceanfront Setback. For all lots abutting the oceanshore, the ocean yard shall be determined by the oceanfront setback line.
>
> "a. The location of the oceanfront setback line for a given lot depends on the location of buildings on lots abutting the oceanshore in the vicinity of the proposed building site and upon the location and orientation of the Oregon Coordinate Line.
>
> "b. For the purpose of determining the oceanfront setback line, the term 'building' refers to the residential or commercial structures on a lot. The term 'building' does not include accessory structures.
>
> "c. The oceanfront setback line for a parcel is determined as follows:

> "i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines.
>
> "ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.
>
> "iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section."

See also Roberts v. City of Cannon Beach, ___ Or LUBA ___ (LUBA No 2020-116, July 23, 2021), *aff'd*, 316 Or App 305, 504 P3d 1249 (2021), *rev den*, 370 Or 56, 512 P3d 813 (2022) (affirming city's application of the oceanfront setback).

On December 29, 2021, petitioner applied for a building permit to construct a single-family residence on the property. The application included a professional survey calculating the oceanfront setback. Record 53. Petitioner's oceanfront setback survey measured setbacks for existing structures at four properties within 100 feet north and south of the subject property, including the property at 232 S. Laurel Street. *Id.* The survey measured the oceanfront setback at 232 S. Laurel Street from a freestanding deck built about 45 inches above grade on the westernmost side and that encroaches westward across the Oregon Coordinate Line by 0.28 feet. *Id.* Based on the average oceanfront setbacks of four existing structures within 100 feet, petitioner's surveyor determined the oceanfront setback for the subject property to be 34.2 feet. *Id.* Petitioner's new dwelling was to be sited immediately east of the oceanfront setback.

In March 2022, the city building official issued a building permit to petitioner. Record 55-58. Shortly thereafter, petitioner commenced construction including excavation, foundation, footing, and framing. Some of the construction took place at or near the oceanfront setback line as identified by petitioner's surveyor. Record 53.

On July 5, 2022, the city received information from a neighbor who was concerned that the new dwelling was too far west and did not comply with the oceanfront setback. Record 59. The community development director and the building official visited the site to review the location of the structures that petitioner's surveyor used to calculate the oceanfront setback. The community development director concluded that the oceanfront setback calculation should not have included the freestanding deck at 232 S. Laurel Street. Record 46-48. Instead, the community development director concluded that the residential structure located at 232 S. Laurel Street is the correct reference for purposes of the oceanfront setback calculation. The community development director concluded that the oceanfront setback would move significantly to the east if the residence were used, which would mean that the partially constructed residence on the subject property would be too far west and within the oceanfront setback.

On July 19, 2022, the building official issued a stop work order that explained that the city concluded that the oceanfront setback at 232 S. Laurel Street should have been measured from the existing residence on that property, and not the freestanding deck. Record 65. On August 5, 2022, petitioner appealed

the stop work order to the city manager pursuant to CBMC 15.04.150.[1] Record 73-76. After briefing and a hearing, the city manager issued their decision upholding the stop work order. The city manager's decision is the final decision of the city. CBMC 15.04.150(E). This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that city manager misconstrued the oceanfront setback regulations. Petitioner and the city appear to agree on the applicable legal framework. The oceanfront setback line is measured from the Oregon Coordinate Line to the "most oceanward point of a building which is thirty inches or higher above the grade at the point being measured." CBMC 17.42.050(A)(6)(f).[2] When

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[1] CBMC 15.04.150(A) provides, in part:

> "A person, firm, corporation or other entity however organized aggrieved by an administrative action of the building official taken pursuant to any section of this code that authorizes an appeal under this section may, within fifteen days after the date of notice of the action, appeal in writing to the building official."

CBMC 15.04.150(D) provides:

> "The city manager or the designee shall hear and determine the appeal on the basis of the appellant's written statement and any additional evidence the city manager or the designee deems appropriate. At the hearing, the appellant may present testimony and oral argument personally or by counsel. The burden of proof shall be on the building official. The rules of evidence as used by courts of law do not apply."

[2] CBMC 17.42.050(A)(6)(f) provides: "The setback from the Oregon Coordinate Line is measured from the most oceanward point of a building which

identifying a "building," "accessory structures" and "projections into yards which conform to Section 17.90.070" are excluded. CBMC 17.42.050(A)(6)(b), (f); CBMC 17.90.070.[3] Thus, to be included in calculating the oceanfront setback, the freestanding deck at 232 S. Laurel Street must be: (1) a building, (2) over 30 inches above grade at the point being measured, (3) not a projection into a yard which conforms to CBMC 17.90.070, and (4) not an accessory structure.

As used in the CBMC, "building" means, generally, "a structure built for the support, shelter or enclosure of persons, animals or property of any kind." CBMC 17.04.085. "For the purpose of determining the oceanfront setback line,

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is thirty inches or higher above the grade at the point being measured. Projections into yards, which conform to Section 17.90.070, shall not be incorporated into the required measurements."

[3] CBMC 17.42.050(A)(6)(b) provides: "For the purpose of determining the oceanfront setback line, the term 'building' refers to the residential or commercial structures on a lot. The term 'building' does not include accessory structures."

CBMC 17.90.070 governs projections into required yards and provides, in part:

> "Patios and decks, including any fixed benches, railings, or other attachments, which are no more than thirty inches in height above the existing grade may project into a required yard, but may not be closer than two feet to any property line. For lots abutting the oceanshore, a deck or patio permitted in the required yard may not be closer than two feet to the western property line or the Oregon Coordinate Line, whichever is further east. Patios and decks constructed in a required yard shall not obstruct significant views of the ocean, mountains or similar features from abutting property." CBMC 17.90.070(E).

the term 'building' refers to the residential or commercial structures on a lot. The term 'building' does not include accessory structures." CBMC 17.42.050(A)(6)(b). "'Accessory structure' or 'accessory use' means a structure or use incidental and subordinate to the main use of property and located on the same lot as the main use." CBMC 17.04.010.

> "'Structure' means any man-made assemblage of materials extending above the surface of the ground and permanently affixed or attached, or where not permanently affixed or attached to the ground not readily portable, but not including landscape improvements such as rock walls, retaining walls less than four feet in height, flag poles, and other minor incidental improvements similar to those described above." CBMC 17.04.540.

The city manager concluded that the freestanding deck is an "accessory structure" that should not be included as a "building" in the oceanfront setback calculation under CBMC 17.42.050(A)(6)(b). The city manager further concluded that the freestanding deck is not part of the residential building and should not be included in the oceanfront setback calculation under subsection CBMC 17.42.050(A)(6)(f). Record 4. The city manager found:

> "The free-standing deck is not attached to, and located across a lawn and a considerable distance from, the residential structure. As a result, the free-standing deck is a separate structure from the residential structure. The residential structure is a single-family dwelling, capable of providing living, bathing, cooking and sleeping quarters. It is also considerably larger than the free-standing deck. The free-standing deck provide some residential uses, such as seasonal dining and lounging, however, these uses are incidental and subordinate to the main use of the property, which is year-round dwelling. Taking these factors together, the free-standing deck is an 'accessory structure' to the primary residential structure as defined

> in CBMC 17.04.010. As an accessory structure, the free-standing deck should not be included when determining the [oceanfront setback]." Record 4 (footnote omitted).

The city manager found that "If the deck was attached to the residential structure, it would be included as part of that structure and would not be deemed 'accessory.'" *Id.*

Petitioner argues that the city manager misconstrued the CBMC and that the freestanding deck should be included in calculating the oceanfront setback because it is a "building" and not an "accessory structure."

The city responds that the freestanding deck is not a "building" for purposes of calculating the oceanfront setback because the deck is not a residential structure. CBMC 17.42.050(A)(6)(b). Instead, according to the city, the deck is a separate accessory structure that is "incidental and subordinate to the main use of the property," the residential use of the dwelling. CBMC 17.04.010. According to the city, for purposes of CBMC 17.42.050(A)(6), a deck may be (1) a part of the residential structure; (2) an accessory structure; or (3) a projection per CBMC 17.90.070. The city argues that the city manager correctly concluded that the freestanding deck at 232 S. Laurel Street is an accessory structure.

Petitioner argues that the city manager erred by inserting a distinction between attached and detached decks that is not present in the definition of "accessory structure" in CBMC 17.040.010. The city responds that while the attached/detached distinction is not express in CBMC 17.040.010, it is inherent

in the definition of "structure" in CBMC 17.04.540 and the context of the oceanfront setback averaging requirements in CBMC 17.42.050(A)(6).

Petitioner challenges the city manager's interpretation of "building" and "accessory structure" as used in CBMC 17.42.050(A)(6)(b) and CBMC 17.040.010. We must determine whether the city manager's interpretation is correct. *Gage v. City of Portland*, 319 Or 308, 315-16, 877 P2d 1187 (1994). When reviewing a challenged interpretation of a local land use regulation, we consider the text of the regulation in its context and any helpful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993).

A "structure" is an "assemblage of materials extending above the surface of the ground." CBMC 17.04.540. It is undisputed that 232 S. Laurel Street contains at least two structures—a freestanding deck and a dwelling. It is undisputed that that the deck is physically separate and not structurally connected to the dwelling. Petitioner does not argue that the freestanding deck is part of the dwelling—which is undisputedly a residential structure and a "building" for purposes of CBMC 17.42.050(A)(6)(b). Instead, petitioner argues that the freestanding deck is itself a residential structure and a "building." According to petitioner, the main use of 232 S. Laurel Street is residential, and the deck is part of that main use; it is not "incidental and subordinate to the main use of the property." CBMC 17.04.10; *see* Petition for Review 8-9.

The terms "incidental" and "subordinate" are not defined in the CBMC. "Incidental" means "subordinate, nonessential, or attendant in position or significance" and "occurring as a minor concomitant." *Webster's Third New Int'l Dictionary* 1142 (unabridged ed 2002). "Concomitant" means "accompanying or attending, esp. in a subordinate or incidental way" and "something that accompanies or is collaterally connected with another." *Webster's* at 471. "Subordinate," when used as an adjective, means "placed in a lower order, class, or rank: holding a lower or inferior position." *Webster's* at 2277.

We conclude that the city manager correctly concluded that the affected "building" at 232 S. Laurel Street is the dwelling, which is residential structure. When viewed in context, the city manager correctly concluded that the term "building" in CBMC 17.42.050(A)(6)(b) refers to a singular structure, *i.e.*, a man-made assemblage of materials extending above the surface of the ground and permanently affixed or attached to the ground and to each other. CBMC 17.04.540. An attached deck is part of a dwelling structure, while a detached deck is not part of a dwelling structure.

The city manager correctly concluded that the freestanding deck is not an independent residential structure. The CBMC does not define "residential." "Residential" is an adjective that means "used, serving, or designed as a residence or for occupation by residents" and "of, relating to, or connected with residence or residences." *Webster's* 1931. Relatedly, the CMBC defines "Dwelling unit" as "a room or group of rooms including living, cooking and sanitation facilities

designed for occupancy by one or more persons living as a household unit with a common interior access to all living, kitchen and bathroom areas." CBMC 17.04.210. The city manager found that the dwelling provides living, bathing, cooking, and sleeping quarters—*i.e.*, residential uses. Record 4. The city manager acknowledged that the freestanding deck may be used for some limited residential uses, such as seasonal dining and lounging. The city manager determined that those limited uses are "incidental and subordinate" to the main residential use. *Id.*

No party disputes that the subject deck is smaller than the dwelling, lacks any cooking or bathroom facilities, and may be used by residents for more limited purposes than the dwelling. The city manager did not err in concluding that the deck is a structure, the use of which is incidental and subordinate to the main residential use of the dwelling.

While the city may have previously interpreted the terms "building" and "structure" differently to include detached decks as residential structures in oceanfront setback calculations, we cannot say that the city manager's interpretation of the city's regulations is incorrect in this case. Instead, we conclude that it is consistent with the text and context of the oceanfront setback regulation and CBMC definitions.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city manager's conclusion that the deck is an accessory structure is not supported by substantial evidence. Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

The city manager found that the freestanding deck is used for "residential uses, such as seasonal dining and lounging," and concluded those uses are "incidental and subordinate" to the main residential use of the property. Record 4. Petitioner points out that there is no evidence in the record as to the uses of this particular deck, so the city manager's statement is a general characterization of uses of decks in residential areas in Cannon Beach.

Petitioner does not dispute that the city manager's assumption and conclusion about the use of a deck is not one that a reasonable person could make. Instead, petitioner argues that if the general use of a deck is for "seasonal dining and lounging," and those uses are "incidental and subordinate" to the main residential use of the property, then all decks are accessory structures that cannot be used in the calculation of the oceanfront setback. Petitioner points to seven

surveys of the oceanfront setback for other properties within the city, which were accepted by the city, and show 11 separate measurements of the oceanfront setback by reference to a deck or porch. Record 9-15. Petitioner points out that, in at least one case, the oceanfront setback measurement appears to include a detached deck. Record 11.

The city responds, and we agree, that petitioner's second assignment of error challenges the city's interpretation of the oceanfront setback regulations, and is not really a substantial evidence challenge.

To the extent that petitioner challenges the city's conclusion that the deck is used for seasonal dining and lounging, we agree with the city that a reasonable person could reach that conclusion based on the evidence in the record. Photos of the property show the deck as detached from the dwelling, uncovered, open on three sides, and fenced on one side. The deck appears to have built-in benches and a stairway that leads to the beach. Record 64, 80. From that evidence, a reasonable person could conclude that the deck is used by the residents of the dwelling for activities such as seasonal dining and lounging.

Record 80.

With respect to the interpretive challenge in the second assignment of error, the city responds, and we agree that petitioner challenges the city manager's failure to rely on the evidence of past city practice. Inconsistent interpretation or application of a local regulation does not provide a basis to reverse or remand a decision. *Reeder v. Clackamas County*, 20 Or LUBA 238, 244 (1990); *Okeson v. Union County*, 10 Or LUBA 1, 4-5 (1983); *BenjFran Development v. Metro Service Dist.*, 17 Or LUBA 30, 46-47 (1988), *aff'd*, 95 Or App 22, 767 P2d 467 (1989); *S & J Builders v. City of Tigard*, 14 Or LUBA 708, 711-12 (1986).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city manager erred by not applying only clear and objective criteria, as required by state law for standards regulating the development of housing. ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:
>
> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

ORS 227.173(2) provides: "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance."

Approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). We have explained that the term "clear" means "easily understood" and "without obscurity or ambiguity," and that the term "objective" means "existing

independent of mind." *Nieto v. City of Talent*, ___ Or LUBA ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6).

Petitioner argues that CBMC 17.42.050(A)(6)(b) cannot be applied to their application because the phrase "accessory structure," as defined in CBMC 17.04.010, is not clear and objective.

The city responds, initially, that the issue raised in the third assignment of error was not raised below and is therefore waived.

Issues before LUBA on review "shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable." ORS 197.835(3). To be preserved for LUBA review, an issue must "be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." ORS 197.797(1). Specific arguments need not have been raised below to preserve an issue for LUBA review, so long as the issue was raised with sufficient specificity. *See Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991) (the "raise it or waive it" principle does not limit the parties on appeal to the exact same arguments made below, but it does require that the issue be raised below with sufficient specificity so as to prevent "unfair surprise" on appeal). When attempting to differentiate between "issues" and "arguments," there is no "easy or universally applicable formula." *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). While a petitioner is not required

to establish that precise argument made on appeal was made below, that does not mean that "*any* argument can be advanced at LUBA so long as it has some bearing on an applicable approval criterion and general references to compliance with the criterion itself were made below." *Id.* (emphasis in original). A particular issue must be identified in a manner detailed enough to give the governing body and the parties fair notice and an adequate opportunity to respond. *Boldt v. Clackamas County*, 107 Or App 619, 623 (1991); *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d 712 (2008) ("[I]issues [must] be preserved at the local government level for board review * * * in sufficient detail to allow a thorough examination by the decision-maker, so as to obviate the need for further review or at least to make that review more efficient and timely.").

Petitioner cites to Record 74 to establish that the issue raised in the first assignment of error is preserved for LUBA review. Record 74 is petitioner's local notice of appeal and includes a statement of the grounds for appeal and includes the following paragraph:

> "The stop work order was improperly issued because the City has applied the methodology in the CBMC for identifying the oceanfront setback line in a manner that is inconsistent with both the requirements of the CBMC and prior practice of the City. Specifically, the City erred in reversing its prior agreement that the oceanfront setback for a neighboring property is measured from the vegetation line to the nearest point of a detached deck. Proper application of both the CBMC and prior practice requires confirmation that the [petitioner's] original identification of the oceanfront setback line is correct. Additionally, the criteria applied

> by the City to identify the oceanfront setback line are not clear and objective and therefore in violation of ORS 197.307(4)." Record 74.

Petitioner's appeal statement did not identify which criteria petitioner believed violated ORS 197.307(4). Petitioner did not further develop the "clear and objective" issue before the city manager. The CMBC includes multiple criteria governing the manner in which the oceanfront setback is calculated. The challenge that petitioner raises in this appeal relates to the definition of "accessory structure." Petitioner did not assert to the city manager that the phrase "accessory structure" is not clear and objective. The city responds, and we agree, that petitioner's general statement that the criteria are not clear and objective did not provide the city manager fair notice and an adequate opportunity to respond to the issue raised in the third assignment of error. *DLCD v. Coos County*, 25 Or LUBA 158, 167-68 (1993).

We conclude that the issue raised in the third assignment of error was not raised during the local proceeding and is waived under ORS 197.797(1).

The third assignment of error is denied.

The city's decision is affirmed.