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

JIM CLAUS and SUSAN CLAUS,
*Petitioners*,

vs.

CITY OF SHERWOOD,
*Respondent*,

and

LANGER STORAGE 2, LLC,
*Intervenor-Respondent*.

LUBA No. 2022-074

FINAL OPINION
AND ORDER

Appeal from City of Sherwood.

Jeffrey L. Kleinman filed the petition for review and reply brief and argued on behalf of petitioners.

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

Steven L. Pfeiffer filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 02/09/2023

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioners appeal a city council decision approving a major modification of a site plan.

**FACTS**

The subject property is approximately six acres and zoned Light Industrial (LI) with a Planned Unit Development (PUD) overlay. Approvals for development on the property have a long history that we set out here before describing the challenged decision.

In 1995, the city approved a PUD for a 55-acre property owned by intervenor (1995 PUD Decision). In 1995, the LI zone allowed the uses that were permitted in the General Commercial zone, including commercial storage and mini-warehousing. In 1997, the city amended the Sherwood Zoning and Community Development Code (SZCDC), the effect of which was to prohibit commercial storage and mini-warehousing in the LI zone. Record 729-30.

In 2010, the city and intervenor entered into a development agreement (Development Agreement) setting out the permitted and conditional uses that could be developed on the property. Record 191-206. It is undisputed that the city's participation in the development agreement was not subject to public notice or participation.

In March 2012, intervenor applied to subdivide its property into five lots. *Former* SZCDC 16.32.020(H) (Apr 6, 2010), which was in effect at the time the

application was filed, provided that "[a]pproved PUDs may elect to establish uses which are permitted or conditionally permitted under the base zone text applicable at the time of final approval of the PUD." As we discuss in more detail below, ORS 92.040(2) also provides that,

> "[a]fter September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise."

The city planning commission's August 28, 2012 decision approving the subdivision (2012 Subdivision Decision) explained that intervenor indicated that it would seek to develop commercial uses on the property in the future, pursuant to *former* SZCDC 16.32.020(H) (Apr 6, 2010) and the 1995 PUD Decision. Record 1122. *Former* SZCDC 16.32.020(H) (Apr 6, 2010) was repealed on August 7, 2012, and is no longer effective.

In 2016, intervenor applied for, and the city approved, a site plan (2016 Site Plan Decision) to develop the property with four storage buildings, a recreational vehicle storage canopy, and associated landscaping and paved circulation. The 2016 Site Plan Decision explained that the property is subject to a PUD overlay and that

> "[a]ll future development is subject to the conditions of the approved [PUD] and [the 2012 Subdivision Decision]. Because of the approval of the subdivision in 2012, the use of the property is vested for a period of 10 years (ORS 92.040). In this instance, the PUD approval for all of phases 6, 7, and 8 of [the 1995 PUD Decision]

allowed for uses that were permitted within the General Commercial Zone [in] 1995." Record 468.

In February 2022, intervenor applied for a Major Modification of the 2016 Site Plan Decision to remove existing development and to develop a three-story self-storage building. The planning commission held a hearing and approved the application. Petitioners appealed the decision to the city council, which held an on-the-record hearing and, at the conclusion, voted to deny the appeal and approve the application. This appeal followed.

**ASSIGNMENT OF ERROR**

Petitioners' single assignment of error argues that the city council improperly construed ORS 92.040(2) and (3) when it approved intervenor's application.[1] Because ORS 92.040(2) and (3) are central to the city council's decision and to our resolution of this appeal, we first set those provisions out:

> "(2) After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise.
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> "(3) A local government may establish a time period during which decisions on land use applications under subsection (2) of this

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[1] The assignment of error alleges that the city council's decision is not supported by substantial evidence in the record. We are unable to discern any developed argument under our substantial evidence standard of review at ORS 197.835(9)(a)(C).

> section apply. However, in no event shall the time period exceed 10 years, whether or not a time period is established by the local government."

As noted, at the time of the 1995 PUD Decision, commercial storage and mini-warehousing were allowed in the LI zone. Amendments to the SZCDC in 1997 prohibited those uses in the LI zone.

**A. ORS 92.040(2)**

Boiled down to its essence, we understand petitioners to argue that the "local government laws implemented under an acknowledged comprehensive plan" described in ORS 92.040(2) are only local laws that specify permitted uses on a property. Accordingly, petitioners argue, because commercial storage and mini-warehousing were not allowed in the LI zone at the time intervenor submitted its application for subdivision approval in 2012, the city council improperly construed ORS 92.040(2) to allow the self-storage building on the property. Petition for Review 15.

The city council concluded that,

> "through the Development Agreement, [intervenor] had elected to establish uses on the property that were allowed in the base zone at the time of approval of the PUD in 1995. The SZCDC provision permitting this election (*former* SZCDC 5 16.32.020(H)) was still in effect when [intervenor] applied for the Langer Farms Subdivision in 2012. Mini-warehousing was a permitted use in the LI zone at the time of the 1995 final PUD approval. Therefore, under the code in effect at the time the subdivision application was submitted, and based upon the election exercised by the landowner in the Development Agreement, mini-warehousing was a permitted use on the subject property. Furthermore, pursuant to ORS 92.040, upon approval of the subdivision application, the property became vested

> in the standards in effect at the time of the subdivision application for a period of 10 years." Record 7.

In those findings, we understand the city council to have concluded that *former* SZCDC 16.32.020(H) (Apr 6, 2010), which was in effect in March 2012, at the time of subdivision application, is a "local government law[] implemented under an acknowledged comprehensive plan that [was] in effect at the time of [subdivision] application" within the meaning of ORS 92.040(2). The city council concluded that, at or prior to the time of subdivision application in March 2012, intervenor elected to develop uses that were permitted under the SZCDC at the time of the 1995 PUD Decision, which included commercial storage and mini-warehousing. Accordingly, the city council concluded, ORS 92.040(2) allows intervenor to develop those uses on the property.

Petitioners' argument requires us to interpret the meaning of ORS 92.040(2). In interpreting a statute, we examine the text, context, and legislative history with the goal of discerning the enacting legislature's intent. *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). We are independently responsible for correctly construing statutes. *See* ORS 197.805 (providing the legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review"); *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) ("In construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information that they supply

to the court." (Citing *Dept. of Human Services v. J. R. F.*, 351 Or 570, 579, 273 P3d 87 (2012); *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997).)).

Petitioners argue that the "local government laws implemented under an acknowledged comprehensive plan that [were] in effect at the time of [subdivision] application" in 2012 did not include any SZCDC provision that allowed commercial storage and mini-warehousing in the LI zone. Intervenor responds that the express language of the statute does not limit the "local government laws" to a particular type and that the provision applies to *all* local government laws that implement the comprehensive plan that were in effect at the time of subdivision application, which included *former* SZCDC 16.32.020(H) (Apr 6, 2010). We agree with intervenor that the plain language of ORS 92.040(2) is not limited to any particular kind of local government law.

We next consider relevant legislative history. In *Athletic Club of Bend, Inc. v. City of Bend*, the Court of Appeals examined the legislative history of ORS 92.040 in detail, albeit in the context of answering a different question than the ones presented here.[2] 239 Or App 89, 243 P3d 824 (2010). The court quoted testimony from the proponents of the legislation and concluded that "the proponents' testimony about the amendments to ORS 92.040 is a persuasive

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[2] The question presented to the court in *Athletic Club of Bend* was, "Did the legislature intend for ORS 92.040(2) to apply whenever the approval of on-property development depends on the approval of off-property construction on rights-of-way and roadways adjacent to subdivision lots that occurs as a consequence of on-property development?" 239 Or App at 97-98.

indication of the legislature's intent in adopting the amendments." *Id.* at 98. Like the court, we find that testimony to be a persuasive indication of the legislature's intent, so we quote it from the court's opinion:

> "Jon Chandler, then general counsel for the Home Builders Association of Metropolitan Portland, was actively involved in drafting the amendments to ORS 92.040 and provided the following written testimony explaining their purpose:
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> > "* * * * *
> >
> > "'[House Bill (HB)] 2658[A] [(1995)] makes it clear that *all phases of construction are protected from mid-stream local government rule changes, not just the act of subdividing or partitioning.* The bill, as amended, only applies to land inside of urban growth boundaries, and provides that the protection afforded by the bill only lasts for ten years.'
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> "Testimony, Senate Committee on Water and Land Use, HB 2658A, May 18, 1995, Ex H (statement of Jon Chandler) (emphasis added). Chandler also explained in testimony at a House hearing on the bill that the protection to be provided by the statutory amendments was necessary because,
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> > "'[i]f you know at the front end when you're making the subdivision application what the rules are in total, then you can adjust your lots to accommodate those rules and the configuration can change. It's what comes along later that creates a substantial problem because its already platted, in some cases some building has occurred, and now you're faced with losing lots potentially or at least certainly changing the underlying assumptions.'
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> "Tape Recording, House Committee on Natural Resources, Subcommittee on Energy and Environment, HB 2658, Mar 8, 1995, Tape 25, Side A (statement of Jon Chandler). Chandler testified that the regulatory certainty that the bill would provide for land

> developers was important because, 'as urban growth increases and we start looking at greater densities and different building patterns, that certainty is going to become ever more critical for our industry, and, if there are loopholes, we think that they ought to be tightened up.' *Id.*" 239 Or App at 95-96.

In a footnote, the court also explained:

> "[HB] 2658 was the original bill enacted in 1995 to amend ORS 92.040. Promptly after the bill passed both the House and Senate, the proponents of HB 2658 realized that it would prevent land developers from taking advantage of local government laws that were adopted after subdivision approval that were *more* favorable to development. Tape Recording, Conference Committee on [Senate Bill (SB)] 245, May 31, 1995, Tape 1, Side A (statement of Jon Chandler). Consequently, SB 245 was enacted shortly thereafter, in part, to allow land developers seeking approval to construct improvements on land in a subdivision to choose between application of the local government laws in effect at the time of the subdivision application or later-enacted local government laws. *See id.*; Or Laws 1995, ch 812, § 9." 239 Or App at 95 n 1 (emphasis in original).

The legislative history quoted and described above further supports an interpretation of the phrase "local government laws" in ORS 92.040(2) that includes all SZCDC provisions that were in effect at the time of subdivision application, including *former* SZCDC 16.32.020(H) (Apr 6, 2010). In particular, we find it notable that, after HB 2658 passed the House and Senate, developers realized that it could *limit* their development choices and convinced the legislature to pass SB 245 to allow developers more latitude in development choices.

In sum, we conclude that *former* SZCDC 16.32.020(H) (Apr 6, 2010) is a "local government law," within the meaning of ORS 92.040(2), that was in effect at the time of the 2012 subdivision application and that provided authority for intervenor to elect to develop the property with uses that were allowed at the time of the 1995 PUD Decision.

**B. ORS 92.040(3)**

The city council found that the city has not established a time period for vesting under ORS 92.040(3) that is shorter than 10 years and, accordingly, the 10-year time period referenced in the statute is the default time period. Record 9. In another part of their assignment of error, petitioners argue that the city council improperly construed ORS 92.040(3). Petitioners first argue that the city has established a time period for vesting under ORS 92.040(3) that is shorter than 10 years, in the following ways.

First, petitioners argue that the 2012 Subdivision Decision established a two-year time period. Record 1144. Intervenor responds, and we agree, that the two-year expiration referenced in the 2012 Subdivision Decision was a time period for recording the final subdivision plat, not a city decision to shorten the time period provided in ORS 92.040(3).

Second, we understand petitioners to argue that entering into the Development Agreement constituted a city decision to shorten the time period provided in ORS 92.040(3) to when the Development Agreement expired in 2017. Intervenor responds, and we agree, that the city's participation in the

Development Agreement was not a decision to shorten the 10-year time period provided in the statute.[3]

Finally, petitioners argue that the 10-year period referenced in ORS 92.040(3) is not a "default" period. Again, we employ the statutory construction principles articulated in *Gaines*. We agree with intervenor and the city that the 10-year period specified in ORS 92.040(3) applies in the absence of a local government action to establish a shorter period. The permissive language of the statute that *allows*, but does not require, the city to establish a shorter time period for vesting, and that limits the time period to no more than 10 years, "whether or not a time period is established," supports that interpretation. In addition, the legislative history supports that interpretation. In testimony quoted by the court in *Athletic Club of Bend*, a proponent of the legislation explained:

> "HB 2658[A] makes it clear that all phases of construction are protected from mid-stream local government rule changes, not just the act of subdividing or partitioning. The bill, as amended, only applies to land inside of urban growth boundaries, *and provides that the protection afforded by the bill only lasts for ten years*." 239 Or App at 96 (quoting Testimony, Senate Committee on Water and Land Use, HB 2658A, May 18, 1995, Ex H (statement of Jon Chandler) (original emphasis omitted; emphasis added)).

The city council properly concluded that the 2012 Subdivision Decision vested for a period of 10 years from the date of the decision.

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[3] The Development Agreement was executed in 2010, two years before intervenor applied for subdivision approval in 2012. Record 512.

### C. Modification of the 2016 Site Plan Decision

Finally, we understand petitioners to argue that the 2016 Site Plan Decision may not be modified because intervenor has implemented it by developing the property with the buildings and structures that currently exist on it. Petition for Review 23-24; Reply Brief 2-3. Intervenor responds, initially, that petitioners are precluded from raising the issue raised in the first assignment of error under the exhaustion waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004), because petitioners failed to identify the issue in their appeal statement at Record 51.

ORS 197.825(2)(a) provides that LUBA's jurisdiction "[i]s limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review." In *Miles*, the Court of Appeals concluded that, when the local appeal ordinance requires an appealing party to specify the issues for appeal, and the local ordinance expressly or impliedly limits the appeal body to the issues so specified, the appeal body's review is generally limited to the specified issues. 190 Or App at 509-10. SZCDC 16.76.010(A) provides, "The only issues which may be raised on appeal are those issues which were raised on the record before the Hearing Authority with sufficient specificity so as to have provided the City, the applicant, or other persons with a reasonable opportunity to respond before the Hearing Authority." To us, that provision appears not to limit the appeal body to the issues specified in the notice of appeal but, rather, to limit the issues on appeal to the issues that were raised before the

lower hearing body. Accordingly, petitioners are not precluded under *Miles* and ORS 197.825(2)(a) from raising the issue at LUBA.

However, we agree with intervenor that petitioners are wrong. SZCDC 16.90.030 sets out the procedure for requesting a modification of an approved site plan. Petitioners do not explain why intervenor was precluded from using the procedures in SZCDC 16.90.030 to modify the approved site plan.

The assignment of error is denied.

The city's decision is affirmed.