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 FAMILY LLC,
Intervenor-Respondent.

LUBA No. 2022-080

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 03/09/2023

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 (1) a property line adjustment, (2) a site plan, (3) a major modification of a previously approved site plan, and (4) a conditional use permit related to development of a self-storage building and a hotel.

FACTS

The subject property is approximately 15.67 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 an eight-phase PUD for a 55-acre property owned by intervenor (1995 PUD Decision) and including the subject property. In 1995, the LI zone applied to the subject property and allowed the uses that were permitted in the General Commercial zone, including commercial storage and mini-warehousing but not including hotels or motels. In 1997, the city amended the Sherwood Zoning and Community Development Code (SZCDC), one effect of which was to prohibit commercial storage and mini-warehousing in the LI zone. Record 825-26.

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 322-37. The Development Agreement expired in 2017 and is no longer in effect. Record 336.

In March 2012, intervenor applied to subdivide the 55-acre property into five lots, Lots 1 to 5. The subject property was part of Lot 4. *Former* SZCDC 16.32.020(H) (Apr 6, 2010), which was in effect at the time the subdivision 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.*"[1] (Emphasis added.) Furthermore, as we discuss in more detail below, ORS 92.040(2) 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'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.[2] Record 591.

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[1] *Former* SZCDC 16.32.020(H) (Apr 6, 2010) was repealed on August 7, 2012, and is no longer effective.

[2] Intervenor's representation during the proceedings that led to the 2012 Subdivision Decision regarding the intended use of the subject property was consistent with the Development Agreement. Record 323.

In June 2017, Lot 4 of the 2012 subdivision was partitioned into two parcels, Parcels 1 and 2.[3] In July 2017, intervenor applied to subdivide the subject property, Parcel 2 of the 2017 partition, into five lots, which we refer to as Tax Lots 1100 to 1500. Intervenor simultaneously sought approval of a site plan to site (1) a family entertainment center on Tax Lot 1300, (2) retail space on Tax Lots 1200 and 1400, (3) a drive-through coffee kiosk on Tax Lot 1500, and (4) related paved circulation and parking areas, site lighting and landscaping, trash enclosures, and public infrastructure extensions.

The city approved those applications (2017 Subdivision and Site Plan Decision). The 2017 Subdivision and Site Plan Decision explained that the properties are 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 710.

Intervenor subsequently constructed portions of the family entertainment center, paved circulation and parking areas, site lighting and landscaping, trash enclosures, and public infrastructure extensions. In 2018, intervenor applied for,

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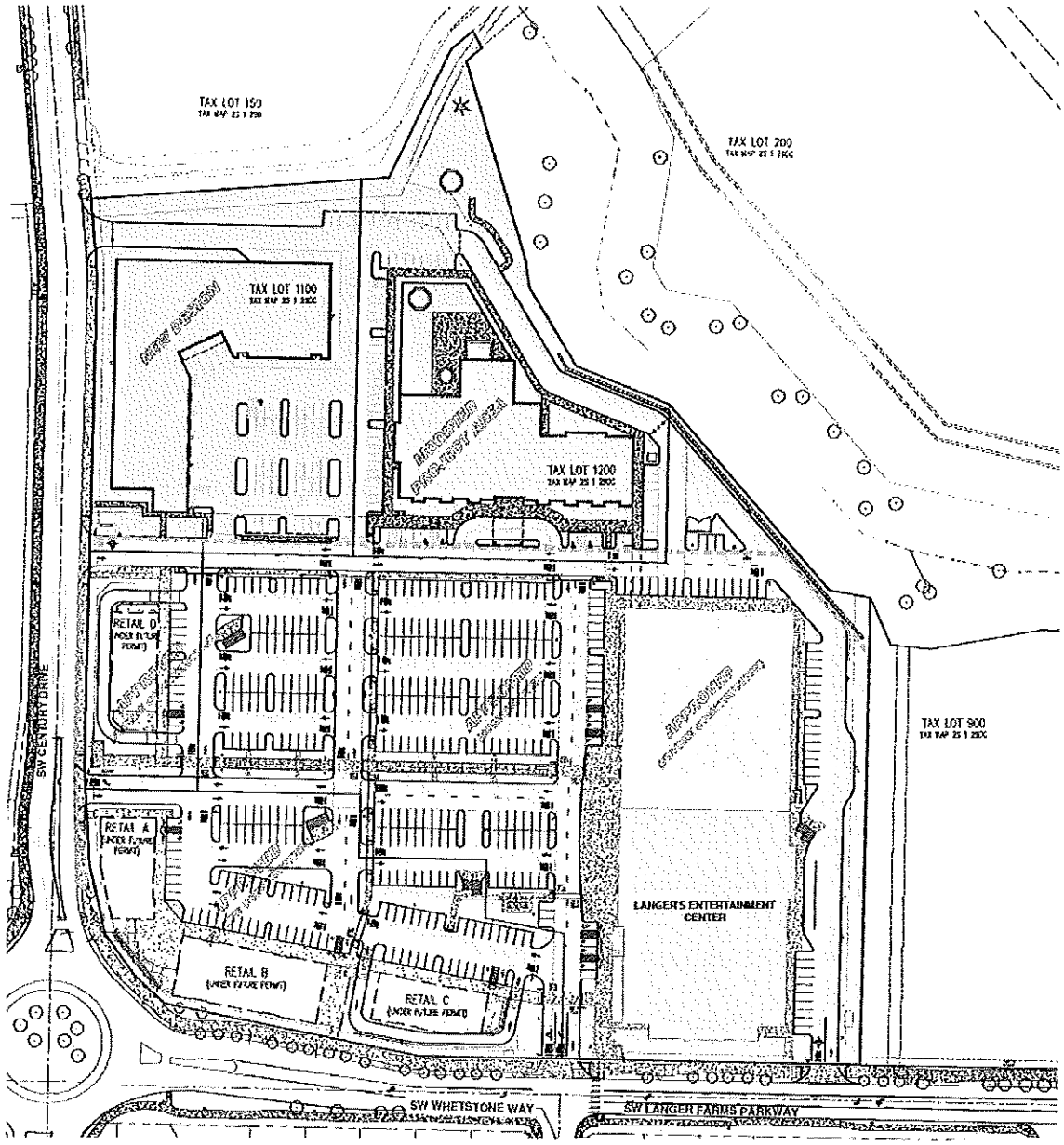
[3] Parcel 1 is the property at issue in *Claus v. City of Sherwood*, ___ Or LUBA ___ (LUBA No 2022-074, Feb 9, 2023) (*Claus I*). Parcel 2 is the subject property in this appeal. As discussed later in this opinion, some of the issues in this appeal were also raised and resolved in *Claus I*.

and the city approved, a minor modification of the 2017 site plan to site a day care center instead of retail space on Tax Lot 1200 and to site retail space instead of a drive-through coffee kiosk on Tax Lot 1500.

In 2020, the city amended SZCDC 16.31.020 to allow hotels and motels as conditional uses in the LI zone. In April 2022, intervenor applied for (1) a property line adjustment to adjust the property lines between Tax Lots 1100, 1200, 1300, and 1500; (2) approval of a site plan to site a 690-unit self-storage building on Tax Lot 1100; (3) a major modification of the 2017 site plan to site a 100-room hotel instead of a day care center on Tax Lot 1200; and (4) a conditional use permit for the hotel. The site plan below shows the proposed configuration of Tax Lots 1100 to 1500. Tax Lots 1100 and 1200 are on the upper half of the site plan and are labeled as such. Tax Lots 1300 to 1500 are on the lower half of the site plan but are not labeled. The site plan shows the proposed improvements on Tax Lots 1100 and 1200 and the existing and approved improvements on Tax Lots 1300 to 1500.



Record 158.

The planning commission held a hearing and approved the applications. 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 applications. This appeal followed.

ASSIGNMENT OF ERROR

A. First Subassignment of Error

The first subassignment of error under petitioners' single assignment of error argues that the city improperly construed ORS 92.040(2) and (3) when it approved intervenor's applications.[4]

1. ORS 92.040(2)

ORS 92.040(2) provides:

> "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 [subdivision] application shall govern subsequent construction on the property unless the applicant elects otherwise."

At the time of the 2012 subdivision application, *former* SZCDC 16.32.020(H) (Apr 6, 2010) allowed intervenor to elect to develop uses permitted at the time of the 1995 PUD Decision. Although, as noted, 1997 amendments to the SZCDC disallowed commercial storage and mini-warehousing in the LI zone, those uses were allowed in the LI zone at the time of the 1995 PUD Decision.

Boiled down to its essence, we understand petitioners to argue that the "local government laws implemented under an acknowledged comprehensive

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[4] 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).

plan" described in ORS 92.040(2) are only local laws that specify permitted uses on a property at the time of subdivision application. 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 improperly construed ORS 92.040(2) in approving the April 2022 applications and allowing the self-storage building on Tax Lot 1100. Petition for Review 18-19.

In denying the appeal and approving the applications, the city council incorporated as findings (1) the July 12, 2022 planning commission decision, (2) the August 17, 2022 staff report to the city council, and (3) an August 23, 2022 letter from intervenor's attorney. The staff report explains 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 § 16.32.020(H)) was still in effect when [intervenor] applied for the [2012 Subdivision Decision] 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.
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> "Applying the law to the facts noted above, the Commission found that the [2012 Subdivision Decision] approved a subdivision for property located within an urban growth boundary after September 9, 1995. Accordingly, by the plain text of ORS 92.040(2) quoted

> above, only those laws in effect at the time of the 2012 application, which included the 1995 PUD/[LI] use standards (which permit self-storage uses) as exercised by [intervenor] through the Development Agreement, govern subsequent construction on the property until August 28, 2022 (10 years after the date of the [2012 Subdivision Decision]), unless [intervenor] elects otherwise." Record 50.

In those findings, we understand the city to have concluded that *former* SZCDC 16.32.020(H) (Apr 6, 2010), which was in effect in March 2012, at the time of the 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 concluded that, at the time of the 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 concluded, ORS 92.040(2) allows intervenor to develop those uses on Tax Lot 1100.

We addressed and rejected an argument similar to petitioners' in *Claus I*. *See* n 3. In *Claus I*, we examined the text and legislative history of ORS 92.040(2) and concluded that *former* SZCDC 16.32.020(H) (Apr 6, 2010) is a "local government law," within the meaning of that statute, that was in effect at the time of the 2012 subdivision application and that provided authority for intervenor to elect to develop Parcel 1 of the June 2017 partition with uses that were allowed at the time of the 1995 PUD Decision. ___ Or LUBA at ___ (slip op at 7-11). For the reasons explained in *Claus I*, we disagree with petitioners that the city

improperly construed ORS 92.040(2) to allow the self-storage building on Tax Lot 1100.[5]

2. ORS 92.040(3)

ORS 92.040(3) provides that "A local government may establish a time period during which decisions on land use applications under subsection (2) of this 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." Again, the city found that, pursuant to ORS 92.040, the standards in effect at the time of the 2012 subdivision application vested for 10 years from August 28, 2012, the date of the 2012 Subdivision Decision. In another part of their first subassignment of error, petitioners argue that the city 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 period. Record 613. Intervenor responds, and we agree, that the two-year expiration referenced in the 2012 Subdivision Decision was a time period

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[5] We understand the city to have relied on the Development Agreement as an alternative and independent basis for concluding that intervenor elected to develop uses that were allowed under the 1995 PUD Decision. Because 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 provided an independent basis for intervenor to develop uses that were allowed under the 1995 PUD Decision, we do not address whether the now-expired Development Agreement also provided a basis for developing those uses.

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 the time when the Development Agreement expired in 2017. Intervenor responds, and we agree, that the city's participation in the Development Agreement was not a city decision to shorten the 10-year period provided in the statute.[6]

Finally, petitioners argue that the 10-year period referenced in ORS 92.040(3) is not a "default" period. In *Claus I*, we examined the text and legislative history of ORS 92.040(3) and concluded that the 10-year period specified in that statute applies in the absence of a local government action to establish a shorter period. ___ Or LUBA at ___ (slip op at 12). For the reasons explained in *Claus I*, we conclude that the city properly concluded that the 2012 Subdivision Decision vested for a period of 10 years from the date of the decision.

3. Effect of the 2017 Subdivision and Site Plan Decision

Finally, we understand petitioners to argue that, even if the standards in effect at the time of the 1995 PUD Decision would have otherwise vested for 10 years from the date of the 2012 Subdivision Decision pursuant to *former* SZCDC

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[6] The Development Agreement was executed in 2010, two years before intervenor applied for subdivision approval in 2012. Record 337.

16.32.020(H) (Apr 6, 2010) and ORS 92.040, the 2017 Subdivision and Site Plan Decision had the effect of divesting intervenor of the right to develop the subject property under those standards. Petition for Review 16-17.

We agree with intervenor that petitioners are wrong. As intervenor observes, the 2017 Subdivision and Site Plan Decision itself, quoted above, recognized that the standards in effect at the time of the 1995 PUD Decision would continue to vest for the remainder of the 10-year period. Record 710. Petitioners do not point to, and we do not see, any support in ORS 92.040 for an interpretation that further division of a previously approved subdivision during the 10-year vesting period has the effect of divesting the property owner of the right to develop the subdivided property under the standards in effect at the time of the prior subdivision application.

The first subassignment of error is denied.

B. Second Subassignment of Error

As noted, at the time of the 1995 PUD Decision, hotels and motels were not allowed in the LI zone. Amendments to the SZCDC in 2020 allowed those uses in the LI zone. In order to site the self-storage building, intervenor elected to develop Tax Lot 1100 under the standards in effect at the time of the 1995 PUD Decision, and, in order to site the hotel, intervenor elected to develop Tax Lot 1200 under the standards currently in effect.

1. Different Elections for Tax Lots 1100 and 1200

In one part of their second subassignment of error, petitioners argue that ORS 92.040 does not authorize an applicant to make conflicting choices between developing one portion of the subdivided property under the standards in effect at the time of the subdivision application and developing another portion of the subdivided property under the standards currently in effect.

We agree with intervenor that there is nothing in the language of ORS 92.040 that limits an applicant to one election for the entire subdivided property. The legislative history also does not support such an interpretation. In *Athletic Club of Bend, Inc. v. City of Bend*, the Court of Appeals examined the legislative history of ORS 92.9040 in detail, albeit in the context of answering a different question than the ones presented here.[7] 239 Or App 89, 243 P3d 824 (2010). In a footnote, the court explained:

> "House Bill [(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*

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[7] 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.

> *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." *Id.* at 95 n 1 (first emphasis in original; second emphasis added).

The legislative history quoted above and elsewhere in *Athletic Club of Bend* supports an interpretation of ORS 92.040 that provides flexibility to an applicant regarding the development of subdivided property. As intervenor observes and the city found, had Tax Lots 1100 and 1200 been conveyed to different owners, it is clear that each could make their own election as to whether to develop under the standards in effect at the time of the subdivision application or to develop under the standards currently in effect. We see no reason to conclude otherwise where the owners are the same and where the applications have been consolidated for convenience in processing.

2. Effect of the Development Agreement

The Development Agreement provides:

> "1. Applicable Code. [SZCDC] 16.32.020.H, provides that 'Approved PUDs may elect to establish uses which are permitted or conditionally permitted under the base zone text at the time of final approval of the PUD.' The [1995] PUD was approved and Phases 4, 6, 7 and 8 were assigned the [LI] base zone designation on August 3, 1995.
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> "2. Permitted and Conditional Uses. Accordingly, [intervenor] elects to establish uses on the LI-designated phases of the PUD that were permitted or conditionally permitted under the LI base zone text applicable on August 3, 1995, including 'Uses permitted outright in the [General Commercial] zone Section 2.109.02, except for adult entertainment businesses,

which are prohibited.'" Record 323 (underscoring in original).

In another part of their second subassignment of error, petitioners argue that intervenor elected, through the Development Agreement, to develop the entire subject property under the standards in effect at the time of the 1995 PUD Decision. Petitioners argue that intervenor cannot now partially revoke that election to develop Tax Lot 1200 under the standards currently in effect.

Intervenor responds that, under ORS 92.040, during the 10-year vesting period, an applicant may continually elect and reelect to develop the property under the standards in effect at the time of the subdivision application or the standards currently in effect. For the reasons explained above, namely the flexibility that ORS 92.040 was intended to provide, we agree.

In addition, as explained above, the Development Agreement expired in 2017. Petitioners do not explain why and we do not think that an expired private agreement between intervenor and the city has any bearing on intervenor's statutory right to elect to develop property under the standards currently in effect.[8] Accordingly, we agree with intervenor that nothing prevented it from electing to develop Tax Lot 1200 under the standards currently in effect.

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[8] In *Claus I*, we noted that the Development Agreement was not subject to a public process. ___ Or LUBA at ___ (slip op at 3). We therefore refer to it as a private agreement between intervenor and the city.

3. Inconsistent Findings

As noted, in denying the appeal and approving the applications, the city council incorporated as findings (1) the July 12, 2022 planning commission decision, (2) the August 17, 2022 staff report to the city council, and (3) an August 23, 2022 letter from intervenor's attorney (the King Letter). Petitioners argue that, in so doing, the city council adopted inconsistent findings. We briefly explain the circumstances that led to the city council's decision.

In their appeal of the planning commission's decision to the city council, petitioners raised three issues. Appeal Issue 1 argued that the planning commission improperly construed ORS 92.040(2) and (3) when it approved intervenor's applications. Appeal Issue 2 argued that the planning commission erred in allowing intervenor to make conflicting choices between developing Tax Lot 1100 with a self-storage building under the standards in effect at the time of the 1995 PUD Decision and developing Tax Lot 1200 with a hotel under the standards currently in effect.

In responding to Appeal Issue 2, the staff report explains that

> "ORS 92.040 requires the local government to apply only those laws in effect at the time of the 2012 subdivision to govern construction on the property, unless the applicant elects otherwise. * * * [Intervenor's] narrative provides [intervenor's] intent with respect to their election of applicable code. The narrative states that self-storage is a permitted on the site because the use was permitted on the property in 2012 when the subdivision occurred. For the proposed hotel use, [intervenor] has 'elected otherwise' and is utilizing the current development code. For all other standards, [intervenor] has also elected otherwise, and the site has been

designed to current development code standards." Record 52.

The King Letter states:

> "Subject to one qualification, [intervenor] concur[s] with the Staff Report responses to Appeal Issues 1 and 2.
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> "As explained in [intervenor's] open record submittals to the Planning Commission and as previously found by the City Council, pursuant to ORS 92.040, the standards in effect at the time of the 2012 subdivision govern development on the property for a 10-year period of time ending in 2022, 'unless the applicant elects otherwise.' For one lot, [intervenor] ha[s] 'elected otherwise' because [it] ha[s] submitted an application for a hotel use, which would not have been allowed on the property in 2012. Although [petitioners] contend that the election is improper, they do not identify any legal authority that supports their position. Moreover, the hotel use is being reviewed pursuant to a noticed public process, and for the reasons stated in the Staff Report, it may be approved based upon compliance with applicable conditional use permit criteria. Finally, although [intervenor] did not elect to apply the post-2012 use standards to the storage facility, that development is on a separate lot, and for that matter, is the subject of a different application that was only included with the hotel conditional use permit for processing convenience.
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> "The Staff Report response to Appeal Issue 2 captures the above response. However, as [intervenor] read[s] it, the Staff Report response to Appeal Issue 1 does not capture the 'unless the applicant elects otherwise' contingency that is relevant to the hotel use. Accordingly, [intervenor] request[s] that, to the extent the City Council decides to rely upon the Staff Report for its findings in support of the decision, that the City Council first modifies the Staff Report response to Appeal Issue 1 to reflect that [intervenor] has elected not to apply the use standards in effect in 2012 as to the lot with the hotel use." Record 33-34 (citations omitted).

Petitioners argue that, despite the King Letter's request, the city council did not modify the staff report response to Appeal Issue 1. Petitioners therefore

argue that the staff report and the King Letter, which are both incorporated as findings, conflict with one another. Because the city's findings do not resolve the alleged conflict, petitioners argue that they are inadequate.

We disagree with petitioners that the staff report and the King Letter conflict. The staff report took the position that, for the proposed hotel use, intervenor elected to proceed under the standards currently in effect. Record 52 ("For the proposed hotel use, [intervenor] has 'elected otherwise' and is utilizing the current development code."). The King Letter also took the position that, for the proposed hotel use, intervenor elected to proceed under the standards currently in effect. Record 34 ("[Intervenor] has elected not to apply the use standards in effect in 2012 as to the lot with the hotel use."). There is no conflict.

The second subassignment of error is denied.

The assignment of error is denied.

The city's decision is affirmed.