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

SHARON BERGMANN, JERRY BACHMANN, TANA BACHMANN, SHANNON CHRISTOPHER, DEWAYNE CONNER, BRENDA COX, DONALD COX, SANDRA GEIGER, MARCUS GEIGER, DEBRA GLEASON, RON GRISWOLD, LUCILLE HIRSCH, WAYNE HIRSCH, AARON HORTON, PAM HORTON, ROBERT HUNTOON, MARIAN JACOBS, JEFFREY JACOBS, EVA KLAAS, GERALD KLAAS, CAROL MILLER, GLENN MILLER, KAREN O'REAR, KEVIN O'REAR, DENISE ORTEGA, VICTOR ORTEGA, STEPHANIE OVERBECK, MARCO THORSON, APRIL THORSON, BOB TOWNE, SARA TOWNE, DENNIS TRIGLIA, JAMES TURNER, SHAMARA TURNER, GEORGE VELLA, CYNTHIA YOUNG, TIMOTHY YOUNG, and MARK ZIMMERMAN,
Petitioners,

vs.

CITY OF BROOKINGS,
Respondent,

and

BRETT KEMP, AGA KEMP, and
B K QUALITY CONSTRUCTION, LLC,
Intervenors-Respondents.

LUBA No. 2023-015

FINAL OPINION
AND ORDER

Appeal from City of Brookings.

Garrett K. West filed the joint petition for review and reply brief and argued on behalf of petitioners Denise Ortega and Victor Ortega. Also on the

brief was O'Connor Law, LLC. Shannon Christopher, Dewayne Conner, Brenda Cox, Marcus Geiger, Sandra Geiger, Gerald Klaas, Karen O'Rear, Kevin O'Rear, Stephanie Overbeck, and Robert Huntoon filed the joint petition for review on behalf of themselves.

Lori J. Cooper filed the respondent's brief and argued on behalf of respondent. Also on the brief was Local Government Law Group P.C.

Michael M. Reeder represented intervenors-respondents.

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

AFFIRMED 06/16/2023

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 conditional use permit (CUP) for the construction of a 14-unit residential care facility.

FACTS

This is the second time a city council decision approving a CUP for the proposed residential care facility has been before us. We partially restate the facts from *Bergmann et al v. City of Brookings*, ___ Or LUBA ___ (LUBA No 2020-096, Aug 2, 2021) (*Bergmann I*):

> "The subject property is an undeveloped, 0.58-acre flag lot. * * * The 'flag pole' portion of the subject property connects to Passley Road and provides access to the rear or 'flag' portion of the subject property. One residence is located north of the flag pole and east of the flag. West Cliff Drive, a private road serving five residences in the West Cliff Subdivision, is located south of both the flag pole and the flag. Three residential lots in the Oceanside Estates Subdivision are located west of the flag. A church with a large open field is located north of the flag.
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> "The subject property and the immediately surrounding area are zoned Single-Family Residential 6,000-square-foot minimum (R-1-6). Single-family dwellings are permitted uses in the R-1-6 zone. Brookings Municipal Code (BMC) 17.20.020(A). Churches are conditionally allowed in the R-1-6 zone. BMC 17.20.040(B).
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> "Intervenors-respondents (intervenors) applied for a '[CUP] for assisted living,' also describing the proposed use as 'a residential care facility.' Intervenors' proposed residential care facility includes a 9,588-square-foot building containing 14 bedrooms with individual bathrooms, a central kitchen, a dining room, a living room, a library, an office, a laundry room, and storage space. On-site parking is provided for six vehicles." ___ Or LUBA at ___ (slip

op at 3-4).

In *Bergmann I*, we remanded the city's decision. On January 24, 2022, intervenors requested that the city begin proceedings on remand, and that the city reopen the record to allow evidence and argument regarding the issues that were the subject of our decision in *Bergmann I*. Just short of one year later, on January 23, 2023, the city held a public hearing on the application, at which the city council accepted new evidence and argument regarding the issues that were subject of our decision in *Bergmann I*. At the conclusion of the hearing, the city council voted to approve the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners' first assignment of error involves the interpretation of ORS 227.181 and ORS 227.182, which present an issue of first impression for LUBA. We set out the text of the statutes before turning to the assignment of error.

ORS 227.181 was enacted in its current form in 2015 and provides in relevant part:

> "(1) Pursuant to a final order of the Land Use Board of Appeals under ORS 197.830 remanding a decision to a city, the governing body of the city or its designee shall take final action on an application for a permit, limited land use decision or zone change within 120 days of the effective date of the final order issued by the board. For purposes of this subsection, the effective date of the final order is the last day for filing a petition for judicial review of a final order of the board under ORS 197.850(3). If judicial review of a final order of the board is sought under ORS 197.830, the 120-day period established under this subsection shall not begin until final resolution of the judicial review.

"(2)(a) In addition to the requirements of subsection (1) of this section, the 120-day period established under subsection (1) of this section shall not begin until the applicant requests in writing that the city proceed with the application on remand, but if the city does not receive the request within 180 days of the effective date of the final order or the final resolution of the judicial review, the city shall deem the application terminated.

"(b) The 120-day period established under subsection (1) of this section may be extended for up to an additional 365 days if the parties enter into mediation as provided by ORS 197.860 prior to the expiration of the initial 120-day period. *The city shall deem the application terminated if the matter is not resolved through mediation prior to the expiration of the 365-day extension.*"[1] (Emphases added); *see* Or Laws 2015, ch 522, §3.

ORS 227.182 provides, in part:

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[1] ORS 197.860 provides, in relevant part, that

"[a]ll parties to an appeal may at any time prior to a final decision by the Court of Appeals under ORS 197.855 stipulate that the appeal proceeding be stayed for any period of time agreeable to the parties and the board or court to allow the parties to enter mediation."

ORS 197.830(10)(b) similarly provides:

"Within 10 days after service of a notice of intent to appeal, the board shall provide notice to the petitioner and the respondent of their option to enter into mediation pursuant to ORS 197.860. Any person moving to intervene shall be provided such notice within seven days after a motion to intervene is filed. The notice required by this paragraph shall be accompanied by a statement that mediation information or assistance may be obtained from the Department of Land Conservation and Development."

> "(1) If the governing body of a city or its designee fails to take final action on an application for a permit, limited land use decision or zone change within 120 days as provided in ORS 227.181, the applicant may file a petition for a writ of mandamus as provided in ORS 34.105 to 34.240. The court shall set the matter for trial as soon as practicable but not more than 15 days from the date a responsive pleading pursuant to ORS 34.170 is filed, unless the court has been advised by the parties that the matter has been settled."

As explained above, the city council made its final decision on intervenors' application 364 days after intervenors requested in writing that the city begin the proceedings on remand. Petitioners argue that intervenors' application automatically terminated when the city failed to take final action on intervenors' application within 120 days of the date that intervenors requested that the city proceed with the remand.

Petitioners' argument is based on their interpretation of ORS 227.181 and ORS 227.182. Petitioners first rely on the provision in ORS 227.181(1) that requires the city to take final action within 120 days of LUBA's decision. The second provision that petitioners rely on is in ORS 227.181(2)(a) and provides that "the city shall deem the application terminated" if the city fails to receive the applicant's request for remand proceedings to commence within 180 days after LUBA's decision.[2]

The third sentence that petitioners rely on is in ORS 227.181(2)(b) and provides that the 120-day period for final city action may be extended if "the

[2] There is no dispute that intervenors' request satisfied that provision.

parties" enter into mediation, but that "[t]he city shall deem the application terminated if the matter is not resolved through mediation prior to the expiration of the 365-day extension." Petitioners argue that, together, those statutes require that an application on remand from LUBA automatically terminates if the city does not take final action within 120 days after an applicant requests that the city commence proceedings on remand, and that the *only* way for a city and an applicant to forestall automatic termination is to enter into mediation prior to expiration of the 120-day period. Thus, according to petitioners, because the city failed to take final action on remand within 120 days of the applicant's, in this case intervenors', request for remand proceedings, and no mediation occurred, the application automatically terminated and the city exceeded its authority in approving it.

In support of their interpretation, petitioners point to what petitioners characterize as context provided by Statewide Planning Goal 1 (Citizen Participation), which is, "To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." *See* Petition for Review 17-18. Petitioners also cite statutes governing proceedings at LUBA and the Court of Appeals that provide for expeditious briefing and resolution of land use disputes. Petition for Review 18 (citing ORS 197.830, ORS 197.850). Finally, petitioners argue that the legislative history of the 2015 amendments to ORS 227.181 and ORS 227.182, which we discuss in

more detail below, supports petitioners' interpretation that the application automatically terminated.

The city disputes petitioners' interpretation of the statutes. The city argues that ORS 227.181 was enacted to protect the rights of applicants to have a final action within a specified time, and that petitioners' interpretation would allow a city to effectively deny an application merely by failing to take action. The city also points out that petitioners' interpretation fails to account for ORS 227.182(1), which allows, but does not require, an applicant to file a petition for a writ of mandamus if the city fails to take action on remand within 120 days. According to the city, if an application automatically terminated for failure to take final action within 120 days, ORS 227.182(1) would have no meaning because the application would already be void at the time the mandamus petition was filed.[3] According to the city, the city has an obligation to take action within 120 days, but if the city fails to take action within 120 days, the application does not automatically terminate. Rather, the applicant has the option to seek mandamus relief in circuit court.[4]

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[3] Petitioners argue, without citation to any language in the statute, that the filing of a mandamus action "resurrects" a terminated application. Petition for Review 25.

[4] The mandamus relief available to the applicant under ORS 227.182 is different from the mandamus relief available under ORS 227.179. Under ORS 227.182, a circuit court issues a writ that orders the local government to *make a decision* on the application. ORS 227.182(2). Under ORS 227.179, the circuit

In interpreting a statute, we examine the statutory 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 conclude that the city's interpretation is the correct interpretation of the relevant statutes.

We begin with the text and legislative history of the original version of ORS 227.181 and ORS 227.182, enacted in 1999. The statutes were enacted to address the fact that there was no deadline for a local government to act after LUBA remanded a decision to the local government. This stood in contrast to the 120-day statutory deadline for a city to take final action on an application for a permit under ORS 227.178, with the resulting mandamus remedy available to an applicant under ORS 227.179. Senate Bill (SB) 863 (1999) was proposed in part to address the problem that the Court of Appeals identified, in dicta, in *State ex rel Holland v. City of Cannon Beach*:

> "Perhaps unwittingly, the legislature has created a statutory scheme that: (1) requires local governments to dispose of land use applications within 120 days in the first instance; but (2) allows local governments to consign the same applications to legal limbo following successful appeals to LUBA. Mr. Holland's odyssey to LUBA, this court, the Supreme Court, this court (again), and LUBA

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court issues a writ ordering the local government to *approve* the application unless the governing body or any intervenor shows that the application would violate a provision of the comprehensive plan or land use regulations. ORS 227.179(1), (5); *see Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332, 347-48 (2013).

> (again) yielded a Pyrrhic victory: His application can now languish indefinitely before the City of Cannon Beach. If that is the legislature's intent, so be it. *See, e.g., Grijalva v. Safeco Ins.*, 153 Or App 144, 956 P.2d 995 (1998), (Haselton, J., *concurring*). But to describe that result as 'incongruous' is far too mild. 'Inane' is more like it." 153 Or App 176, 181-82, 956 P2d 1039 (1998) (Haselton, J., concurring).

See also Exhibit C, Senate Water and Land Use Committee, SB 863, April 13, 1999 (accompanying testimony provided by Oregonians in Action representative David Hunnicutt). During the hearings on SB 863, testimony described the proposed legislation as "clos[ing] a loophole * * * that has been called out by the courts[.] It is silly to have cases have to go through a 120-day process at the front end and have no process at all at the back end. This sets up that process." Audio Recording, House Water and Environment Committee, SB 836A, May 17, 1999, at 57:58 (comment of Jon Chandler, Oregon Business Industry Association); *see also* Audio Recording, Senate Water and Land Use Committee, SB 836, Apr 13, 1999, at 24:40 (Jon Chandler, Oregon Business Industry Association, commenting that, under the current law, there is "the ability for local government to 'sandbag' an application they do not want to hear."). The legislative history of ORS 227.181 and ORS 227.182 makes clear that the statutes were intended to provide applicants for permits with a remedy on remand -- to require the city to take action on an application within a specified time frame or risk the applicant seeking mandamus relief in circuit court.

However, the original legislation did not require that proceedings on remand commence within any specified time period. Thus, some decisions that

were remanded by LUBA languished for many years before an applicant would, sometimes suddenly, request that proceedings on remand commence. That burdened local government planners and decision makers, and parties to the LUBA proceeding that resulted in remand, who did not expect or plan for the request.

In 2015, the legislature amended ORS 227.181 to provide two circumstances under which an application subject to a remand by LUBA will automatically terminate. First, an application will automatically terminate if the applicant does not request remand proceedings to commence within 180 days of LUBA's final order. ORS 227.181(2)(a).

Second, an application will automatically terminate if the parties enter into mediation before the expiration of the 120-day period and cannot resolve the matter within one year from that date. ORS 227.181(2)(b). Petitioners argue that whether mediation occurred is relevant based on ORS 227.181(2)(b), and that ORS 227.181(2)(b) gives them procedural rights. Petitioners argue that because the parties to *Bergmann I* did not enter into mediation, the 365-day extension of the 120 day deadline is not available to the city or intervenors, and the application terminated on the 121st day.

The express language of ORS 227.181 and ORS 227.182 supports the city's interpretation, and the legislative history of the original enactment of the statutes, as well as the legislative history of the 2015 amendments, support that interpretation. We described the intent of the original legislation above. The 2015

amendments to ORS 227.181 were largely intended to require an applicant whose permit decision was remanded by LUBA to make a decision to move forward, or not, with its original application within 180 days. Legislative history relied on by petitioners indicates that the legislation was introduced to address concerns about decisions that were remanded by LUBA and that languished in perpetuity. Petition for Review 21-22. The consequence of not requesting that remand proceedings commence within that time frame is that the application terminates.

The 2015 amendments also provided that mediation between the parties could automatically extend the city's obligation to make a decision within 120 days for an additional year if the parties entered into mediation prior to the expiration of the 120-day deadline. While the language could be clearer, we conclude that nothing in that language requires automatic termination of an application in process on the 121st day after the request to commence remand proceedings is made by an applicant, where no mediation between the parties is ongoing.[5] Rather, absent mediation, on the 121st day, pursuant to ORS 227.182(1), an applicant may at any time thereafter seek mandamus relief in circuit court to compel the city to make a decision. Nothing in the legislative

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[5] One purpose of the 2015 amendments to ORS 227.181 is to prevent an applicant from leaving an application on remand from LUBA pending indefinitely. However, the legislature did not provide a statutory limit for applicant extensions of the 120-day deadline on remand. *Compare* ORS 227.181 *with* ORS 227.178(5) (providing a 245-day total extension limit for the initial 120-day requirement).

history indicates that the amendments were intended to entirely change the purpose of the original legislation which, as described above, was to provide applicants with a remedy (the option to seek a writ of mandamus under ORS 227.182) should a city fail to act within the specified time. In other words, nothing in the legislative history of the 2015 amendments suggests that the legislature intended to allow a city to "sandbag" a remanded application by simply not taking action within 120 days and effectively causing the application to be denied, as terminated.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

One of the bases for remand in *Bergmann I* was that the city's decision, that the driveway on the site is adequate to handle vehicular traffic that would be generated by the proposed use, was not supported by substantial evidence in the whole record. Brookings Municipal Code (BMC) 17.136.050(C)(2). During the proceedings on remand, intervenor submitted a technical memorandum prepared by a professional engineer that modeled the turning path of a standard delivery vehicle turning into and around on the site, and concluded that the site design is sufficient to accommodate all types of delivery vehicles that would enter and exit the site. Record 397- 426.

In their second assignment of error, petitioners argue that the city's decision that the site is adequate to accommodate expected delivery vehicle traffic is not supported by substantial evidence in the record because an accessible

parking space is located in the area that delivery vehicles would need to use to turn around. The city responds, initially, that the issue raised in the second assignment of error was not raised below and is therefore waived.

The issue raised in the second assignment of error is whether the site's design is adequate to handle vehicular traffic to be generated given the location of the accessible parking. For the reasons explained below, we agree with the city that the issue raised in the second assignment of error was not raised for purposes of LUBA review.

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 a 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 potentially obviate the need for further review or at least to make that review more efficient and timely.").

Petitioners cite to Record 461 and oral testimony from the January 23, 2023 city council hearing to establish that the issue raised in the first assignment of error is preserved for LUBA review. Record 461 is a letter from one of the petitioners that expresses concern regarding the adequacy of the width of the driveway for two-way traffic, and states their opinion that "a fire truck would have to back out, since there is no turnaround space." Nothing in that testimony raises any issue regarding the location of the accessible parking space as interfering with the capability of delivery vehicles to turn around once on the site.

Similarly, we have reviewed the audio recordings cited by petitioners, and that testimony raised concerns about the width of the driveway, the commenters' opinions that the driveway is too narrow for ambulances and fire trucks to turn

into, and that the site does not have sufficient turn around space. Audio Recording, City of Brookings City Council Meeting, Jan 23, 2023, at 1:22:33, 1:27:12. Again, nothing in that testimony raises any issue regarding the location of the accessible parking space as interfering with delivery vehicles maneuvering on the site. Accordingly, we agree with the city that the issue raised in the second assignment of error was waived.

The second assignment of error is denied.

The city's decision is affirmed.