

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

MARCEL LAHSENE, JANICE "SUSIE" LAHSENE,
JOAN JOYCE, COLLEEN NYBERG, ARNE NYBERG,
LANDON GENTRY, and JUDE GENTRY,
Petitioners,

vs.

CITY OF RIVERGROVE,
Respondent.

LUBA No. 2026-025

FINAL OPINION
AND ORDER

Appeal from City of Rivergrove.

Ty K. Wyman filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Dunn Carney LLP.

Carrie A. Richter filed the respondent's brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

BASSHAM, Board Member; WILSON, Board Chair; ZAMUDIO, Board Member, participated in the decision.

REMANDED 10/09/2026

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

NATURE OF THE DECISION

Petitioners appeal a city council approval of a conditional use permit to replace an existing boat ramp on the Tualatin River.

FACTS

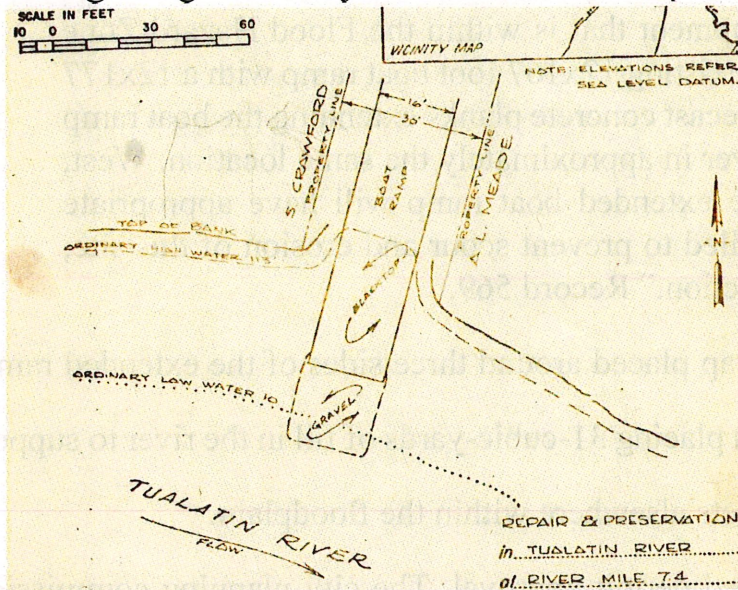
The Leonard & Edith Stark Boat Ramp is a boat ramp on the Tualatin River that has existed at its present location since at least 1975. The upland portion of the property consists of a 30-foot-wide by approximately 100-foot long corridor connecting the riverbank to SW Dogwood Drive. The subject property, like all property within the city, is zoned Residential. The city's Residential zone generally allows "parks" and "recreation uses" as conditional uses. Rivergrove Land Development Ordinance (RLDO) 5.050(g).

When originally constructed, the boat ramp apparently consisted of a 12-foot-wide asphalt ramp with an upland portion above the ordinary high-water line and an in-water portion that extended some distance into the river and down below the ordinary low-water line. However, over the years, much of the ramp's in-water portion has been damaged or lost due to river currents, and launch and retrieval of boats on vehicle-led trailers is difficult or impossible.¹ The ramp's

¹ The city found: "The in-river elements of the previously permitted boat ramp have deteriorated over time from the constant flow of the Tualatin River – much of it is now washed downstream. For this reason, it is difficult to tell the form of the original construction." Record 13. Petitioners do not dispute that finding.

1 current usage is functionally limited to launch and retrieval of hand-carried boats
2 such as kayaks.

3 The city's building plans for the original ramp have been lost. The original
4 boat ramp received approval from the U.S. Army Corps of Engineers (ACE) in
5 1975. The 1975 ACE permit includes a plan drawing that shows a 16-foot-wide
6 asphalt ramp within a 30-foot-wide corridor. Record 589-94.² The plan depicts
7 the ramp, marked as "blacktop," extending an unknown distance into the river,
8 ending in a gravel bed just below the ordinary low-water line.³



Record 162.

² All citations to the record are to the amended record received on May 21, 2026.

³ We note that the current location of the ordinary high and low water lines as shown on surveys in the record differ from those depicted on the 1975 plan drawing, possibly because the current high and lower water lines are based on a different or updated datum than was used in 1975, or possibly due to changed water levels over the decades.

1 In August 2025, the city, as applicant, filed a conditional use application
2 to reconstruct the existing boat ramp. The application summary states:

3 “The applicant proposes to reconstruct the existing boat ramp to
4 correct the disrepair of the lower portion of the ramp. The
5 reconstruction will bring the boat ramp up to current standards
6 consistent with the Oregon Marine Board’s recommended Boat
7 Ramp design guidelines. This will include extending the underwater
8 portion of the ramp 17.5 feet further into the Tualatin River.” Record
9 566.

10 The application further described the project as follows:

11 “The proposed development that is within the Flood Hazard Zone
12 includes replacing an existing 12x167 foot boat ramp with a 12x177
13 foot boat ramp with precast concrete planks extending the boat ramp
14 into the Tualatin [R]iver in approximately the same location. West,
15 south, and east of the extended boat ramp will have appropriate
16 classes of riprap installed to prevent scour and erosion of this site,
17 improving flood protection.” Record 569.

18 In addition to protective riprap placed around three sides of the extended ramp,
19 the application also proposed placing 31-cubic-yards of fill in the river to support
20 the extended ramp, with offsets elsewhere within the floodplain.

21 City staff recommended permit approval. The city planning commission
22 held a hearing and, on January 5, 2026, approved the permit. Opponents appealed
23 the decision to the city council, arguing in relevant part that the proposed ramp is
24 prohibited under RLDO 5.070, which prohibits any “new development” within
25 25 feet of the ordinary high-water line. Opponents also argued that the existing
26 ramp constituted a nonconforming use, and that the proposed ramp reconstruction
27 is thus subject to the city’s standards for altering a nonconforming use, not the

1 standards for a conditional use. On March 24, 2026, the city council issued the
2 challenged decision denying the appeal and approving the permit, adopting
3 findings and conditions in support. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners challenge the city council's conclusions that the proposed ramp
6 reconstruction does not constitute "new development" for purposes of the
7 prohibition at RLDO 5.070, and that the reconstruction can be approved as a
8 conditional use, rather than as alteration of a nonconforming use, subject to
9 standards at RLDO 2.060.

10 **A. New Development**

11 RLDO 5.070 provides, in full:

12 "Future Development. New development shall be approved only
13 where necessary and adequate services are available or provisions
14 have been made to provide those services and facilities. *There shall*
15 *be no new development within 25 feet of the ordinary [high-water*
16 *mark] of the Tualatin River.* There shall be no new development
17 within 25 feet of a wetland area identified by the U.S. Army Corps
18 of Engineers." (Emphasis added.)

19 The second sentence of RLDO 5.070 prohibits "new development within 25 feet
20 of the ordinary [high-water mark] of the Tualatin River[.]" The city council
21 rejected opponents' arguments that the proposed reconstruction constitutes "new
22 development" for purposes of RLDO 5.070. The city council interpreted the
23 second sentence of RLDO 5.070, in context with its titular focus on "future
24 development" and the first sentence addressing services to new development, to

1 concern only new development of vacant land, not reconstruction or replacement
2 of an existing structure.⁴

3 RLDO 1.050(e) broadly defines “development” in relevant part as “any
4 man-made change to improved or unimproved real estate,” including “alteration
5 of a building or other structure,” as well as “the alteration of the banks or bed of
6 any waterway in the City.” There is no dispute that the proposed ramp
7 reconstruction constitutes “development” as defined in the city code. However,
8 petitioners dispute the city’s conclusion that the ramp reconstruction does not
9 constitute “new” development. Petitioners argue that the city council’s
10 interpretation – that RLDO 5.070 is concerned only with new or initial

⁴ The city council’s findings state, in relevant part:

“The Planning Commission decided that proposed improvements are a replacement of an existing, permitted facility that has been at this location for more than 50 years. It is therefore not ‘new development,’ but rather replacement and improvement of an existing structure. The improved boat ramp will improve its function during summer months when water levels are lower, primarily by extending an additional 10 feet into the water. The City Council agrees.

“The context of this interpretation of a regulation on ‘new development’ is that it is under a heading ‘future development,’ not existing development. Additionally, the first sentence of this standard is directed towards a public service demand provision, which is not affected by reconstruction of an existing boat ramp. This provides additional support for the idea that this standard is directed primarily to development occurring on vacant land where service extensions are required.” Record 12.

1 development of vacant land – is inconsistent with RLDO 5.070’s express
2 language, purpose and underlying policy, and thus not affirmable, even under the
3 deferential standard of review we apply under ORS 197.829(1) to a governing
4 body’s code interpretations.⁵

5 Petitioners first contend that the city council’s interpretation fails to give
6 any independent effect to the second sentence of RLDO 5.070, subsuming the
7 second sentence into the first sentence, which concerns ensuring that adequate
8 public services are available to serve new development. To give full effect to the
9 second sentence, petitioners argue, the prohibition on “new development” within
10 25 feet of the river must include alterations, reconstruction or replacement of
11 existing development. The city responds that the city council cited the first
12 sentence of RLDO 5.070 only as context, context that supports the city council’s
13 interpretation of what “new development” means in the second sentence. We

⁵ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 agree with the city that the city council's contextual analysis does not subsume
2 the second sentence into the first, as petitioners argue, or fail to give effect to the
3 second. The first sentence is concerned with public services to new development;
4 the second and third with locational prohibitions on new development. All three
5 sentences concern new development or, as the title indicates, "future
6 development." Nothing in the text or context of RLDO 5.070 suggests that any
7 part of it is concerned with existing development.

8 Nonetheless, petitioners argue that the city's interpretation that the second
9 sentence is concerned only with new development, not existing development, is
10 inconsistent with the purpose and policy underlying RLDO 5.070, which
11 implements comprehensive plan policies that identify the Tualatin River riparian
12 area as the city's most important natural habitat and directs strict enforcement of
13 the city's water quality resource protections. Rivergrove Comprehensive Plan
14 (RCP) Goal 5, policies 4, 5. Petitioners contend that allowing reconstruction or
15 replacement of existing structures within the riparian area is inconsistent with the
16 purpose and policy of protecting that important natural area.

17 The problem with that "purpose and policy" argument is that the city's
18 water quality resource protection measures expressly allow within the riparian
19 area, as either permitted or conditional uses, the "alteration, rehabilitation, or
20 replacement of existing structures." Record 22 (quoting the Rivergrove Water
21 Quality Resource Area and Flood Ordinance). As the findings note, in 2001, the
22 city adopted a Water Quality Resource Area (WQRA) plan that regulates

1 vegetation removal and development within an overlay zone, to protect riparian
2 areas and water features, including the river. Record 7-8. The boat ramp is located
3 entirely within the WQRA overlay zone. WQRA IV.C.5 allows, as a use
4 permitted outright, the “alteration, rehabilitation, or replacement of existing
5 structures that do not increase the existing structural footprint[.]” WQRA IV.D.7.
6 allows, as a conditional use, “alterations, rehabilitation or replacement of existing
7 structures[.]” that increase the structural footprint.

8 We discuss below the city’s findings under the WQRA. For present
9 purposes, we agree with the city that petitioners have not established that the
10 city’s interpretation—that “new development” as used in RLDO 5.070 does not
11 refer to existing development—is inconsistent with the purpose or policy
12 underlying RLDO 5.070. Read as a whole, the code provisions and
13 comprehensive plan provisions cited to us establish strict riparian protections
14 against “new development” and much less restrictive protections with respect to
15 “existing development.” It is petitioners’ preferred interpretation, which would
16 collapse existing and new development together, that seems inconsistent with the
17 text, context, purpose and policy underlying RLDO 5.070.

18 Petitioners next argue that the proposed ramp reconstruction constitutes
19 “new development” because it involves placement of new materials, replacing
20 asphalt with concrete, and adding protective riprap. The city rejected that

1 argument below.⁶ We agree with the city that petitioners' preferred interpretation
2 is not supported by the text or context of RLDO 5.070. More importantly,
3 petitioners have not demonstrated that the city's contrary interpretation, that
4 "new development" does not include replacement of existing structures with new
5 materials, is reversible under the deferential standard of review we must apply
6 under ORS 197.829(1).

7 Petitioners argue, however, that because the proposed ramp replacement
8 extends further into the river than the existing structure, and thus has a larger
9 structural footprint, the city must treat the entire proposal as one for "new
10 development" that is therefore prohibited within 25 feet of the ordinary high-
11 water line. The city rejected similar arguments below, concluding that extending
12 the ramp deeper into the river was intended to meet current guidelines and
13 maximize safety, not to increase capacity or expand the structural footprint for

⁶ The city's findings state, in relevant part:

"Opponents, including the appellant at City Council, claim that the rip-rap, fill, and concrete planks that constitute repair and replacement of the boat ramp are in fact new and therefore should be prohibited under this standard. The term 'new' is defined in the dictionary to mean 'having existed or having been made but a short time: having originated or occurred lately.' The boat ramp as a facility and a use has existed for many years and as such, it is not 'new.' The proposal is indeed 'development' as defined in the code and state law, but because the scope of this project is to repair and rehabilitate existing, permitted development, it is not prohibited by this standard." Record 12-13.

1 the sake of a bigger structure. The city also noted that the proposed 12-foot-wide
2 ramp is smaller than the 16-foot-wide ramp authorized in the 1975 ACE permit.⁷

⁷ The findings state:

“The in-river elements of the previously-permitted boat ramp have deteriorated over time from the constant flow of the Tualatin River – much of it is now washed downstream. For this reason, it is difficult to tell the form of the original construction. What is known is that the original permit for this ramp approved a larger dock than the one that is proposed here. To reconstruct and repair the boat ramp requires placing new materials—concrete panels, fill, and rip-rap—to prevent it from eroding away again, as it did in the years since it was last improved. The prohibition in this section of code is not triggered by the installation of any ‘new materials,’ as the appellants advocate, but rather new development, which the Planning Commission interpreted to mean a new ‘change,’ *i.e.*, installing an entirely new facility or use. The City Council agrees. Here, the proposal is to restore a boat ramp as it has existed for over 50 years. To interpret the standard more strictly, as the appellants advocate, would prohibit property owners along the river from replacing worn out decks, retaining walls or other backyard amenities in this riparian area, because new materials would be used in those repair projects.

“The city’s engineer and applicant testified before the Planning Commission that the scope of this project was narrowly defined: replace the existing ramp and maximize safety, not to increase capacity or expand footprint. With respect to the extension of the ramp into the river, the Staff Report, [at Record 523], includes an image taken from the 1975 approved COE permit, authorizing a larger boat ramp than what is proposed here. For these reasons and for the purposes of this standard, both staff and the Planning Commission concluded that the facility was a reconstruction and not ‘new development.’ The City Council adopts this evaluation as its own.” Record 13.

1 We address below petitioners' similar challenges under the WQRA
2 provisions for alteration, rehabilitation or replacement of an existing structure.
3 For purposes of RLDO 5.070, we understand the city to interpret the scope of
4 "new development" to refer to entirely new development of undeveloped land,
5 and not to encompass replacement of an existing structure, even if, for safety or
6 functionality, that replacement occupies a larger footprint than the existing
7 structure. Petitioners have not demonstrated that that understanding of the scope
8 of "new development" is inconsistent with the express language, purpose or
9 policy underlying RLDO 5.070.

10 The first subassignment of error is denied.

11 **B. Non-Conforming Use**

12 RLDO 1.050(m) defines a nonconforming use or development as "a use or
13 development lawfully existing at the time this ordinance became applicable to it
14 * * * but that would not be lawful except for its pre-existence." RLDO 2.060
15 includes provisions allowing for alteration or extension of a nonconforming use
16 development, but only if the alteration or extension "will decrease the extent of
17 noncompliance." RLDO 2.060(a).⁸

⁸ RLDO 2.060 provides in relevant part:

"Continuation of a Nonconforming Development. Except as provided in Section 2.080, a nonconforming development or use may continue but shall be changed only as authorized by this section.

1 Petitioners argue that the existing ramp is a nonconforming use, because if
2 a similar ramp were proposed as “new development” on vacant land within 25
3 feet of the ordinary high-water line that proposed development would now be
4 prohibited pursuant to RLDO 5.070. Accordingly, petitioners argue, the proposed
5 ramp replacement must be evaluated as an alteration and extension of a
6 nonconforming use, subject to standards at RLDO 2.060. Petitioners argue that if
7 the city had applied the RLDO 2.060 standards, the proposed ramp replacement

“(a) A development that is nonconforming only because of a failure to comply with the Comprehensive Plan or this Ordinance may be altered or extended only if the Planning Commission and the City Council find the alteration or extension will decrease the extent of noncompliance and the development is not a land division that is nonconforming because of a public facility deficiency. * * *

“(b) With the approval of the City Council under the procedure set out in [RLDO] 6.060 and [RLDO] 6.070, a nonconforming development or use may be changed provided, however, that the maximum special relief shall be as follows:

“(1) the floor area of a building shall not be increased by more than twenty (20) percent;

“(2) the land area covered by structures shall not be increased by more than twenty (20) percent; or

“(3) the standard requirement for land area or width or length of a lot or parcel shall not be reduced by more than twenty (20) percent.”

1 would not satisfy those standards, because the proposed alteration would not
2 “decrease the extent of noncompliance.” RLDO 2.060(a).

3 The city council did not directly address the question of whether the
4 existing ramp is a nonconforming use as defined at RLDO 1.050(m). But in
5 addressing WQRA IV.G.7,⁹ the city council offered two reasons why the
6 proposed ramp replacement is not subject to the nonconforming use standards at
7 RLDO 2.060:

8 “Nonconforming use review is necessary only where a subsequent
9 change in the zoning standards makes the use unlawful if that use
10 was reviewed today. A boat ramp is a conditional use because it is
11 located in the Residential Zone and because it is in the WQRA and
12 floodplain. Therefore, this application was reviewed under the
13 currently applicable standards. The applicant did not request any
14 change of use, expansion or alteration of the boat ramp through the
15 nonconforming use section of RLDO 2.060, therefore that section is
16 not relevant.” Record 25.

17 Petitioners argue that this finding misconstrues the applicable law.
18 According to petitioners, whether a use is nonconforming and thus subject to
19 standards at RLDO 2.060 is not a matter of whether the applicant elects to

⁹ As discussed under the second assignment of error, WQRA IV.G.7(a) authorizes within the WQRA overlay zone “[a]dditions to and/or alterations, rehabilitation and replacement of lawful structures that increase the structural footprint,” but specifies that “[f]or existing structures, roadways, driveways, accessory uses and development which are nonconforming, this ordinance shall apply in addition to the nonconforming use regulations of the city zoning ordinance.” Record 25. On its face, WQRA IV.G.7(a) appears to contemplate that a use expressly allowed in the WQRA overlay zone may be subject *both* to WQRA standards *and* nonconforming use standards.

1 proceed under RLDO 2.060. Further, that a boat ramp is categorized as a type of
2 recreational use that is conditionally allowed in the Residential zone and under
3 the WQRA does not mean that an existing use within that category cannot be
4 rendered nonconforming due to operation of other code standards, such as RLDO
5 5.070, that prohibit certain types of development in specific riparian locations.

6 We tend to agree with petitioners that the two rationales stated in the
7 above-quoted finding are an insufficient basis to conclude that RLDO 2.060 does
8 not apply. The existing ramp *appears* to fall squarely within the definition of a
9 nonconforming use at RLDO 1.050(m), in that a *new* boat ramp at that location
10 would be prohibited by RLDO 5.070. That boat ramps in general fall within a use
11 category that is allowed as a conditional use in the underlying Residential zone
12 does not mean that an existing boat ramp cannot be viewed as a nonconforming
13 use, based on application of a different, applicable code standard that would
14 prohibit construction of a new boat ramp at the same location. Further, if the
15 proposed ramp replacement is properly viewed as the alteration or extension of
16 that nonconforming use, then the fact that the applicant elected not to seek review
17 under RLDO 2.060 does not render that code provision inapplicable. Nothing
18 cited to us in the RLDO suggests that when an application proposes alteration of
19 an existing nonconforming use as defined at RLDO 1.050(m), it is the applicant's
20 choice whether or not to subject it to the code standards that govern such
21 alterations.

1 The city's brief offers a different basis to conclude that the nonconforming
2 use standards at RLDO 2.060 do not apply. The city argues that whether the
3 existing boat ramp is a nonconforming use is premised solely on RLDO 5.070,
4 which the city council interpreted to concern itself exclusively with "new
5 development," meaning new development of vacant land. We have affirmed that
6 narrow interpretation of RLDO 5.070. We understand the city to argue in its brief
7 that, under the city council's narrow interpretation of RLDO 5.070, that code
8 provision does not apply *at all* to either the existing ramp or the ramp
9 replacement. That is because neither the existing ramp nor the ramp replacement
10 constitute "new development" as the city council has interpreted that term. For
11 this reason, the city argues, the city council correctly concluded that the
12 nonconforming use standards at RLDO 2.060 are not relevant approval criteria
13 for the proposed ramp replacement.

14 The city's scheme for addressing nonconforming uses does not implement
15 any statute or statewide regulation cited to us. The statutory provisions at ORS
16 215.130 governing nonconforming uses apply only to counties, not cities, and
17 there is no similar statutory provisions in ORS chapter 227, applicable to cities.
18 The city thus has wider latitude than a county would to establish and implement
19 a scheme for defining and dealing with nonconforming uses, and wider latitude
20 to harmonize that scheme with other provisions of its land use legislation that
21 might be in tension with it. Any such harmonization would likely require

1 interpretation, and any city council interpretation would be subject to a
2 deferential standard of review from LUBA and other review bodies.

3 In the present case, RLDO 1.050(m) broadly defines “nonconforming use”
4 in a manner that would appear to encompass the existing boat ramp. Without
5 addressing that definition, the city council concluded that the RLDO 2.060
6 standards that would normally apply for alteration of a nonconforming use do not
7 apply in the present case, but without adequately explaining why. The city’s brief
8 offers an interpretation of RLDO 1.050(m), RLDO 2.060, and RLDO 5.070 that
9 attempts to harmonize those code provisions. The city argues that, as a
10 consequence of the narrow interpretation the city council applied to RLDO 5.070,
11 the city council could conclude that the existing boat ramp is not a
12 nonconforming use and the ramp replacement is not subject to the nonconforming
13 use standards at RLDO 2.060.

14 However, the city council’s decision fairly read does not embody or
15 endorse the attempt at harmonizing code provisions set out in the city’s brief.
16 ORS 197.829(2) authorizes LUBA to interpret local code provisions in the first
17 instance, where a local government fails to interpret a provision of its
18 comprehensive plan or land use regulations, or if such interpretation is inadequate
19 for review, in which case we may make our own determination of whether the
20 local government decision is correct. No party requests that LUBA exercise the
21 authority granted us under ORS 197.829(2). Given the odd and complex
22 interactions between the relevant code provisions, we conclude that the best

1 course is to remand the decision to the city to address this interpretative issue in
2 the first instance. The city council is in the best position to understand how its
3 scheme for regulating nonconforming uses interacts with its land use code and its
4 WQRA ordinance. And, if the city concludes on remand that the standards at
5 RLDO 2.060 do apply, the city will be in a position to determine whether those
6 standards are satisfied in the present case.

7 The second subassignment of error is sustained.

8 The first assignment of error is sustained, in part.

9 **SECOND ASSIGNMENT OF ERROR**

10 As noted, the city's WQRA ordinance allows as a permitted use in the
11 overlay zone alterations, rehabilitation or replacement of existing structures that
12 do not increase the structural footprint, and allows as a conditional use
13 "[a]dditions to and/or alterations, rehabilitation and replacement of lawful
14 structures * * * that increase the structural footprint," subject to conditional use
15 standards at WQRA IV.G.7. WQRA IV.D.7. WQRA IV.G.7(b) specifies that
16 additions, alterations, rehabilitation or replacement of existing structures "shall
17 not encroach closer to the Protected Water Feature than the existing structures,
18 roadways, driveways, accessory uses and development."

19 In its findings, the city council offered two bases for its conclusion that the
20 proposed ramp replacement would not violate the prohibition on expanded
21 footprints that encroach closer to the Protected Water Feature (the Tualatin River)
22 than the existing structure. First, the city council found that the ramp approved in

1 the 1975 ACE permit had a larger structural footprint than the proposed
2 replacement.¹⁰ Second, the city council found that, to the extent the replacement
3 ramp extended deeper into the river than the existing ramp, extension of the

¹⁰ The findings state, in relevant part:

“With regard to interpretation of the language in [WQRA IV.G.]7(b), there are several ways to read this regulation. First, the baseline for ‘structural footprint’ and ‘existing structures’ in both the first and second parts of that sentence should be the existing boat ramp on city property. Proposed development restores an existing ramp structure and does not expand its footprint. The applicant has submitted a 1975 permit from the [ACE] that notes several key facts. According to the permit, ‘this facility was legally constructed prior to declaration of navigability of the Tualatin River,’ indicating the longstanding use of the site for boat ramp activities. Additionally, it includes an attachment to the permit that has [a] plan drawing[.]

“* * * * *

“This drawing [attached to the 1975 ACE permit] shows that the approval included 16 feet of pavement within a 30[-]foot corridor. This indicates a larger ‘structural footprint’ was approved than either current conditions or what is proposed. The proposed new development in this application is less, only 12 feet of concrete, either cast-in-place or planks. In that sense, the proposed development may be seen as a reduction in structural footprint, impacts, or encroachment. What was actually constructed historically is difficult to determine with any precision because the deteriorated sections of the boat ramp below the water line have been washed away. This fact is the entire reason for the restoration project. Both Planning Commission and City Council can reasonably rely on the 1975 approval documents as evidence to support their finding that this project does not ‘increase the structural footprint.’” Record 25-26.

1 underwater portions of the ramp further into deeper water cannot, definitionally,
2 “encroach closer” to the protected waterway, because the underwater portions of
3 the existing ramp were already within the waterway.¹¹ Petitioners challenge both
4 conclusions as inconsistent with the express language of WQRA IV.G.7(b).

5 **A. Baseline for Comparison of Replacement to Existing Structure**

6 Petitioners first argue that the city chose the wrong baseline to compare
7 the “existing structure” to the proposed replacement, in order to determine
8 whether the replacement “encroaches closer” to the protected water feature than
9 the existing structure. Petitioners argue that the only correct basis for comparison
10 is the ramp structure as it exists today, with much of its underwater portion
11 washed away. Using that comparator, petitioners argue that the replacement
12 ramp’s structural footprint is indisputably larger than the footprint that exists
13 today. According to petitioners, the city erred in using the footprint as approved

¹¹ The city’s finding state on this point:

“Also, the language of this standard says that new structures ‘shall not encroach closer to the Protected Water Feature’ than existing structures. Insofar as any part of the proposed development is extending farther than existing conditions, it is to replace sections of the ramp that are below the ordinary high[-]water line of the Tualatin River and therefore inside the Protected Water Feature. Definitionally, if the boat ramp is already inside the Protected Water Feature, it cannot be said to ‘encroach closer’ to it. The work that occurs below [the ordinary high-water line] is subject to state and federal permitting requirements, but this standard does not apply to those changes.” Record 26 (underscoring omitted).

1 in the 1975 ACE permit as the comparator, which cannot possibly be understood
2 to represent the “existing structure.”

3 The city responds, and we agree, that the city council correctly rejected as
4 the comparator the ramp as it exists today in its current form, with much of the
5 underwater portion washed away. Because WQRA IV.G.7 allows as a
6 conditional use the “rehabilitation and replacement” of the existing structure, it
7 is clear that deteriorated structures can be restored to the condition existing prior
8 to their deterioration. We agree with the city that for purposes of WQRA
9 IV.G.7(b) the comparator is the existing structure as built, and not the existing
10 structure in its current deteriorated state.

11 The city also argues that the city council correctly relied upon the plan
12 drawing attached to the 1975 ACE permit, as the only available evidence, to
13 determine the extent of the structural footprint of the existing ramp as built,
14 before it deteriorated. According to the city, because no building plans remain
15 showing the dimensions or extent of the ramp as-built, the only available
16 evidence on that point in the record is the ramp as approved under the 1975 ACE
17 permit. Based on the footprint approved in that permit, the city argues that the
18 city council could reasonably conclude that the proposed ramp replacement has
19 a smaller footprint than the as-built “existing structure” prior to its deterioration,
20 and accordingly the replacement ramp cannot possibly “encroach closer” to the
21 protected water feature than the existing ramp.

1 However, we note that the record does include some evidence suggesting
2 that the footprint of the “as-built” ramp was smaller than the footprint approved
3 in the 1975 ACE permit. First, there is no dispute that the upland portion of the
4 existing ramp is only 12 feet wide, not the 16 feet authorized in the ACE permit.
5 There is no suggestion in the record that the upland portion was originally built
6 16 feet wide, but has uniformly deteriorated to 12 feet in width. To the extent the
7 ACE permit can substitute for evidence regarding the footprint of the “as-built”
8 existing ramp, the record does not support a conclusion that the “as-built” ramp
9 was 16 feet in width, which undercuts the city’s conclusion that the proposed
10 ramp has a smaller footprint than the existing ramp. Further, the application
11 proposes to add rip-rap around the three sides of the underwater portion of the
12 ramp, something the 1975 plan drawing does not indicate or purport to approve.
13 That rip-rap appears to extend several feet in three directions, increasing the
14 footprint of the proposed ramp beyond the 12-foot width. Record _____. In addition,
15 the city’s engineering consultant surveyed the upland and in-water portions of
16 the existing ramp, and indicated that the proposed ramp extends 10 feet further
17 into the river than the existing ramp. Record 583. It is not clear exactly what
18 existing structural elements remain to measure that 10-foot difference from, but
19 the survey’s statements on this point seem to undermine any conclusion that the
20 furthest southern extent of the proposed ramp is within the as-built footprint of
21 the existing ramp.

1 In sum, while we reject petitioners' argument that the relevant basis for
2 comparison is the existing ramp in its current dilapidated condition, we disagree
3 with the city to the extent it argues, or found, that the dimensions shown on the
4 plan drawing attached to the 1975 ACE permit establish the relevant basis for
5 comparison. At best, the plan drawing is some evidence of what was actually
6 built, which is the relevant comparator. But because the record includes evidence
7 that the "existing structure" was built to a narrower width than authorized in the
8 1975 ACE permit, and the replacement ramp extends further into the river than
9 the as-built structure, the 1975 plan drawing is not conclusive, or particularly
10 helpful, in determining whether and to what extent the proposed replacement
11 ramp expands the footprint, compared to the "existing structure."

12 Even though we agree with petitioners that the city relied on an improper
13 comparator by relying on the 1975 ACE permit instead of the actual prior ramp
14 as built, we reject this subassignment of error because petitioners argue that the
15 only proper comparator is the dilapidated ramp as it existed at the time of the
16 replacement application, which is an issue of code interpretation, and not fact or
17 evidence. The record lacks evidence on the as-built boat ramp. Even assuming
18 the as-built ramp was smaller than the illustration in the 1975 ACE permit, it is
19 undisputed that the only potential increase to the structural footprint of the prior
20 ramp is in the river. For the reasons explained below, we agree with the city that
21 expansion within the river does not encroach closer to the river and, thus, is not
22 prohibited under the city code.

1 The first subassignment of error is denied.

2 **B. Encroach Closer To**

3 As an alternative basis for finding compliance with WQRA IV.G.7(b), the
4 city found that to the extent the replacement ramp extends further into the river
5 than the existing structure, it still complies with WQRA IV.G.7(b), which allows
6 replacement structures with a larger structural footprint, as long as the larger
7 footprint does not “encroach closer to” the protected water feature, the Tualatin
8 River. The city found that “[d]efinitionally, if the boat ramp is already inside the
9 Protected Water Feature, it cannot be said to ‘encroach closer’ to it.” Record 26.
10 In its brief, the city argues that the city council correctly concluded that expansion
11 of the in-water portion of an existing structure cannot possibly “encroach closer
12 to” the protected water resource that surrounds it. The city argues that the city
13 council plausibly interpreted the phrase “encroach closer to” to refer to structures
14 that are geographically separate from the river, in the upland riparian area, where
15 the structure is extended or increased in size such that that upland portion
16 becomes “closer to” the river itself.

17 Petitioners argue that the city council’s interpretation of “encroach closer
18 to” the river has the absurd result that a structure already in the river can be
19 expanded further into the river without violating WQRA IV.G.7(b), while a
20 structure located one foot from the river cannot be extended one inch closer to
21 the river. Even if that interpretation can be squared with the text of WQRA
22 IV.G.7(b), petitioners argue, the interpretation is flatly inconsistent with the

1 purpose of WQRA IV.G.7(b), which is clearly to protect both the upland riparian
2 area and the water resource itself.

3 The city argues, and we agree, that the city council's interpretation of the
4 phrase "encroach closer to" as applying only to structural expansions in the
5 upland riparian area, and not to include expansions of structures already within
6 the water body itself, must be affirmed under the deferential standard of review
7 we must apply to a governing body's code interpretation. ORS 197.829(1).
8 Textually, that interpretation is plausible and consistent with the express
9 language of WQRA IV.G.7(b). The phrase "encroach closer to" a protected water
10 feature cannot be readily understood to apply to expansion of structures that are
11 already located within the water feature itself. Had the city intended that meaning,
12 that intent could have been expressed much more clearly with different language.
13 We cannot say that the city council's interpretation of the phrase "encroach closer
14 to" is implausible or reversible under ORS 197.829(1)(a).

15 The more difficult question is whether the city council's interpretation is
16 inconsistent with the purpose or policy underlying WQRA IV.G.7(b), under ORS
17 197.829(1)(b) and (c). Petitioners argue that the WQRA as a whole implements
18 RCP Goal 6 (Air, Water and Land Resources Quality). RCP Goal 6 states that
19 the Tualatin River was once considered Oregon's most polluted river, but that
20 "[s]tronger environmental enforcement, stringent WQRA ordinances, improved
21 waste treatment upstream, the construction of water storage facilities to augment
22 meager summer flows, and an effort to educate citizens have all contributed to

1 measurable improvement.” Petitioners argue that the purpose of improving water
2 quality in the Tualatin River is undermined by interpreting the “encroach closer
3 to” standard in WQRA IV.G.7(b) to be inapplicable to a proposal to expand the
4 footprint of an existing structure within the river.

5 The city responds that RCP Goal 6 has little obvious bearing on the
6 purpose of the WQRA IV.G.7(b) prohibition on expanded footprints that
7 “encroach closer to” the river. The city argues that a more direct and illuminating
8 purpose and policy statement is found in Section I of the WQRA itself, which
9 states that the purpose of the WQRA is to “protect and improve water quality,”
10 among other things, by engaging in six listed activities, which almost largely
11 focus on or are mediated through protection of the vegetated riparian area.¹² The

¹² WQRA Section I(A) states in relevant part that the purpose of the WQRA is:

“To protect and improve water quality, to support the designated beneficial water uses and to protect the functions and values of existing and new established Water Quality Resources Areas, by:

- “1. Providing and improving the vegetated corridor separating Protected Water Features from development;
- “2. Maintaining or reducing stream temperatures;
- “3. Maintaining natural stream corridors;
- “4. Minimizing erosion, nutrient and pollutant loading into water;
- “5. Providing filtration, infiltration and natural water purification; and

1 city argues that none of the listed items in WQRA I focus on, much less seek to
2 prohibit, in-water activities that are allowed within waterways subject to state and
3 federal regulation.

4 Petitioners do not reply to the city's arguments regarding WQRA I(A). We
5 agree with the city that WQRA I(A) provides a more focused and illuminating
6 statement of the purpose of the WQRA than does RCP Goal 6, for present
7 purposes. As the city argues, the six listed activities in WQRA I(A) seem to focus
8 on protective measures achieved through maintaining and improving riparian
9 areas, and do not specifically identify any in-stream measures. Activities 1, 4 and
10 6 explicitly focus on upland areas, describing measures to prevent sediment etc.,
11 from reaching the protected water feature. Activities 2, 3 and 5 are not expressly
12 specific to upland and riparian areas, but refer to functions that are provided by
13 riparian banks and vegetation, maintaining temperature, stream corridors, and
14 filtration. None of the six activities or measures expressly or specifically apply
15 to in-stream areas. That is consistent with the city's textual interpretation, that the
16 "encroach closer to" phrase is intended to operate on existing structures in the
17 riparian area, not on existing structures within the water feature itself. Certainly,
18 petitioners offer no reason to conclude that the city's textual interpretation is
19 inconsistent with the purposes set out in WQRA I(A).

“6. Stabilizing slopes to prevent landslides contributing to the
sedimentation of protected water features.”

1 In addition, as the findings note, in-stream development in bodies of water,
2 particularly a navigable river such as the Tualatin River, is heavily regulated and
3 largely, if not exclusively, governed by state and federal law, administered by
4 state and federal agencies. Record 2, 6, 26. Under petitioners' view that the
5 "encroach closer to" language applies to in-water structures, which by definition
6 are surrounded by water, that would function as an absolute prohibition on any
7 expanded in-water structure, including those owned, operated or regulated by
8 state or federal agencies. Under petitioners' apparent view, no existing in-stream
9 water control facility, water quality facility, navigation aid or similar facility,
10 such as a dam or weir, could be replaced with a larger footprint, even if that larger
11 footprint were necessary for safety or to maintain or improve the facility's
12 function. Viewed in this light, the city council's interpretation, distinguishing in-
13 stream existing structures from upland existing structures, is consistent with the
14 larger regulatory framework in which the WQRA operates.

15 In sum, we agree with the city that petitioners have not demonstrated that
16 the city council's interpretation, that the phrase "encroach closer to" is concerned
17 with regulating existing structures on upland riparian areas, and is not intended
18 to regulate in-water structures, is inconsistent with the purpose or policy
19 underlying WQRA IV.G.7(b).

20 The second subassignment of error is denied.

21 The second assignment of error is denied.

22 The city's decision is remanded.