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

STANLEY ROBERTS and REBECCA ROBERTS,
Petitioners,

vs.

CITY OF CANNON BEACH,
Respondent,

and

HAYSTACK ROCK, LLC, and
OREGON COAST ALLIANCE,
Intervenors-Respondents.

LUBA No. 2020-116

FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Wendie L. Kellington filed the petition for review, a response brief, and reply briefs, and argued on behalf of petitioners. Also on the brief was Kellington Law Group PC.

William K. Kabeiseman filed a response brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram PC.

William L. Rasmussen and Steven G. Liday filed a response brief and the cross petition for review on behalf of intervenor-respondent Haystack Rock, LLC. Also on the brief was Miller Nash Graham & Dunn LLP. William L. Rasmussen argued on behalf of intervenor-respondent Haystack Rock, LLC.

Sean T. Malone filed a response brief and argued on behalf of intervenor-respondent Oregon Coast Alliance.

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

AFFIRMED 07/23/2021

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a city council decision denying their application for a development permit to construct a new residence on their oceanfront property.

OVERLENGTH PETITION FOR REVIEW

A petition for review may "[n]ot exceed 11,000 words, unless permission for a longer petition is given by the Board. Headings, footnotes, and quoted material count toward the word-count limitation. The front cover, table of contents, table of authorities, appendices, certificate of service, any other certificates, and the signature block do not count toward the word-count limitation." OAR 661-010-0030(2)(b). Our rules require petitioners to file a signed certificate of compliance including a statement that the petition for review complies with the word-count limitation in OAR 661-010-0030(2)(b). "The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief." OAR 661-010-0030(2)(k)(A).

Petitioners requested permission to file an overlength petition for review not to exceed 14,000 words. In an order dated January 14, 2021, we denied petitioners' request, concluding that 11,000 words is sufficient to provide focused argument challenging the city's decision.

Petitioners filed their petition for review and included a certification that "(1) this brief complies with the word-count limitation in OAR 661-010-0030(2)

and (2) the word count of this brief as described in OAR 661-010-0030(2) is 10,998 words." Petition for Review Certificate of Compliance.

In its response brief, intervenor-respondent Oregon Coast Alliance (ORCA) points out that petitioners use hyphens in order to omit spacebar breaks and join words and characters that otherwise would not be joined, resulting in a lesser word count as measured by the word-processing system used to prepare the brief. For example, petitioners hyphenate every citation to the Cannon Beach Municipal Code (CBMC) between the abbreviation and the section number. *See, e.g.*, Petition for Review 11 ("CBMC-17.42.050(A)(6)(a)"). Petitioners also hyphenate and provide no spaces between string citations to the record. *See, e.g.*, Petition for Review 6 ("Rec-29,-38-39,-67.").[1] ORCA argues that petitioners thereby attempt to circumvent LUBA's rules and order denying petitioners' request to file an overlength petition for review.

ORCA argues that those violations are not technical violations because respondents must review and respond to an overlength petition for review that LUBA expressly denied. ORCA asserts that the petition for review exceeds the 11,000-word limit somewhere within the third or fourth assignment of error. ORCA requests that LUBA reject the entire petition for review. *See* OAR 661-010-0030(3) ("The Board may refuse to consider a brief that does not

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[1] Petitioners also include a lengthy block quotation that appears to be inserted as an image instead of text. Petition for Review 46.

substantially conform to the requirements of this rule."). In the alternative, ORCA requests that LUBA not consider the fourth assignment of error.

Petitioners do not dispute ORCA's assertion that, in the absence of the identified manipulations, the petition for review exceeds the 11,000-word limit somewhere within the third or fourth assignment of error. Petitioners reply that ORCA cites no standard for citation format that petitioners have violated. Petitioners also renew their motion to file an overlength petition for review. Reply Brief to Oregon Coast Alliance 1.

While we agree with petitioners that our rules do not prescribe citation formats, we also agree with ORCA that petitioners filed an overlength petition for review that violates our previous order denying their request to file an overlength petition for review by manipulating the word count. We also agree with ORCA that violation is not a technical violation that we should overlook. Petitioners' manipulations allowed petitioners to include lengthier arguments and an additional assignment of error.

We deny petitioners' renewed motion to file an overlength petition for review; however, we reject ORCA's suggestion that we should refuse to consider the entire petition for review. When a party files a brief that exceeds the applicable word limit without obtaining permission from the Board, the Board does not consider the arguments that exceed the applicable word limit. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25, 29 (2015). Petitioners do not dispute ORCA's assertion that, without word-count manipulations, the petition

for review exceeds the 11,000-word limit somewhere within the third or fourth assignment of error. Accordingly, we do not consider the fourth assignment of error.

FACTS

The subject property is a 5,394-square-foot lot on a steep hillside facing the Pacific Ocean in the Tolovana Park Subdivision. The property is vacant and is zoned Residential Lower Density (RL) with an Oceanfront Management (OM) overlay. The property slopes towards the ocean. Immediately west of the subject property is a platted, but undeveloped, public right-of-way called Ocean Avenue. Rec 2523. Immediately to the east of the subject property is Hemlock Street, the city's main north-south street.

The property to the north and east of the subject property is owned by intervenor-respondent Haystack Rock, LLC (Haystack), and is developed with one residence known as the Oswald West Cabin. The Oswald West Cabin is the only structure located within 100 feet of the subject property.

Petitioners submitted an application to construct a new, 2,712-square-foot residence. City planning staff approved the application with conditions. Petitioners disagreed with the conditions and appealed to the planning commission. The planning commission denied the application. Petitioners appealed the planning commission decision to the city council, which affirmed the planning commission denial. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The purpose of the OM overlay zone

> "is to regulate uses and activities in the affected areas in order to: ensure that development is consistent with the natural limitations of the oceanshore; to ensure that identified recreational, aesthetic, wildlife habitat and other resources are protected; to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of beach and dune areas; and to reduce the hazards to property and human life resulting from both natural events and development activities."[2] Cannon Beach Municipal Code (CBMC) 17.42.010.

The OM overlay zone includes all "lots abutting the oceanshore." CBMC 17.42.020(A)(1). "'Lot abutting the oceanshore' means a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line." CBMC 17.04.320.[3] CBMC 17.42.050(A)(6) provides the oceanfront setback standard for lots abutting the oceanshore, establishing the "ocean yard." "'Ocean yard' means a yard measured horizontally

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[2] The latter part of this purpose statement closely mirrors Statewide Planning Goal 18 (Beaches and Dunes), which is:

> "To conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of coastal beach and dune areas; and
>
> "To reduce the hazard to human life and property from natural or man-induced actions associated with these areas."

[3] The CBMC does not define the terms "oceanshore" or "Oregon Coordinate Line," which we discuss further below.

at right angles from the most easterly of [the] Oregon Coordinate Line or the western property line, to the nearest point of a building. An ocean yard may be a front yard, a rear yard or a side yard." CBMC 17.04.578. The only structures permitted in the ocean yard are fences, decks, or beach access stairs. CBMC 17.42.060(A)(9). Accordingly, a dwelling cannot be constructed in the ocean yard.

The oceanfront setback and resulting ocean yard established by CBMC 17.42.050(A)(6) are at the center of the city's denial and petitioners' arguments in this appeal. CBMC 17.42.050(A)(6)provides:

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

"ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.

"iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section.

"d. If there are no buildings identified by subsection (A)(6)(c)(i) of this section, then the oceanfront setback line shall be determined by buildings that are located two hundred feet north and two hundred feet south of the parcel's side lot lines.

"e. Where a building identified by either subsection (A)(6)(c)(i) of this section or subsection (A)(6)(d) of this section extends beyond one hundred feet of the lot in question, only that portion of the building within one hundred feet of the lot in question is used to calculate the oceanfront setback.

"f. The setback from the Oregon Coordinate Line is measured from the most oceanward point of a building which is thirty inches or higher above the grade at the point being measured. Projections into yards, which conform to Section 17.90.070, shall not be incorporated into the required measurements.

"g. The oceanfront setback line shall be parallel with the Oregon Coordinate Line and measurements from buildings shall be perpendicular to the Oregon Coordinate Line.

"h. The minimum ocean yard setback shall be fifteen feet.

"i. Notwithstanding the above provisions, the building official may require a greater oceanfront setback where information in a geologic site investigation report indicates a greater setback is required to protect the building from erosion hazard.

"j. As part of the approval of a subdivision, the city may approve the oceanfront setback for the lots contained in the subdivision. At the time of building construction, the

> oceanfront setback for such a lot shall be the setback established by the approved subdivision and not the oceanfront setback as it would be determined by subsections (A)(6)(a) through (i) of this section. Before granting a building permit, the building official shall receive assurance satisfactory to such official that the location of the oceanfront setback for said lot has been specified at the required location on the plat or has been incorporated into the deed restriction against the lot."

Petitioners applied for a development permit to construct a two-story, 2,712-square-foot residence that would be situated in the northeastern corner of the property and set back five feet from the eastern and northern property lines.[4] The community development director approved the development permit with conditions, including Condition 2, which provides:

> "Prior to the issuance of a building permit, the applicant shall provide [an] Oceanfront Setback Survey confirming that all proposed structures conform to Chapter 17.42.050(A)(6), or a Setback Reduction approval from the Cannon Beach Planning Commission, under Chapter 17.64 authorizing a setback reduction for the structures on the site." Record 2252.

Petitioners appealed to the planning commission, challenging Condition 2, among other things. The planning commission found that the proposed dwelling violated the oceanfront setback standard. Based on petitioners' oceanfront setback survey, the planning commission found that the Oswald West Cabin is the only "affected building" and that it is set back from the Oregon Coordinate

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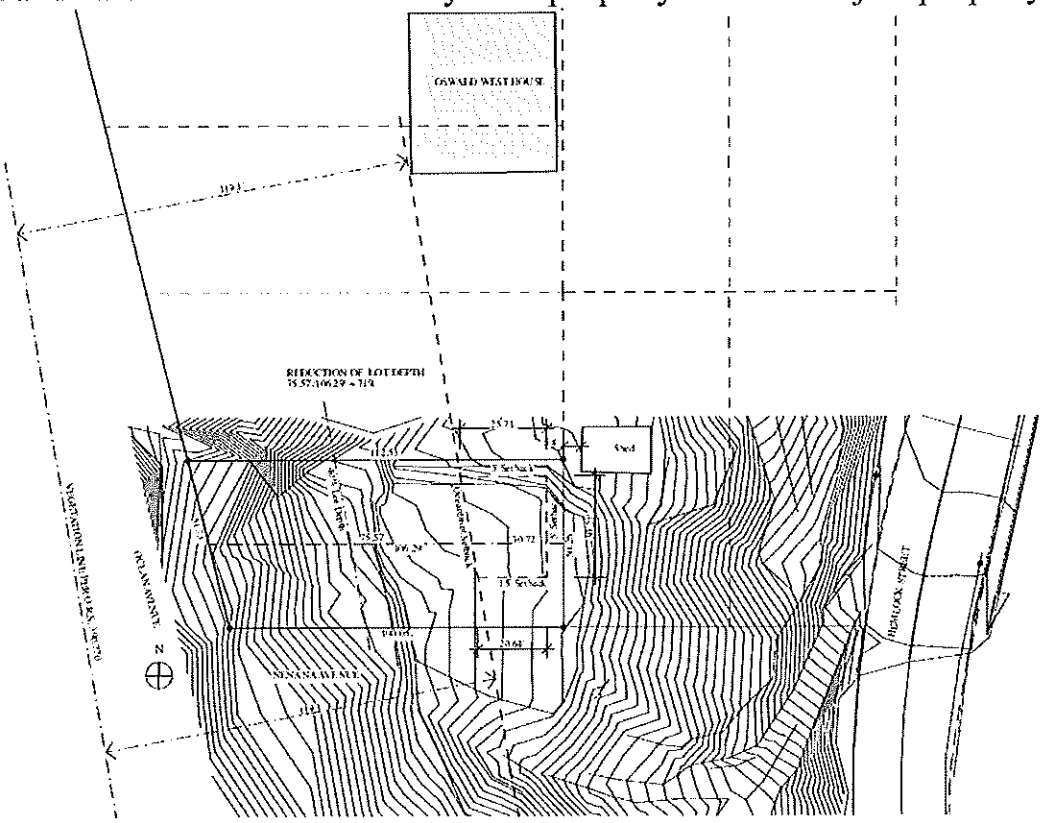
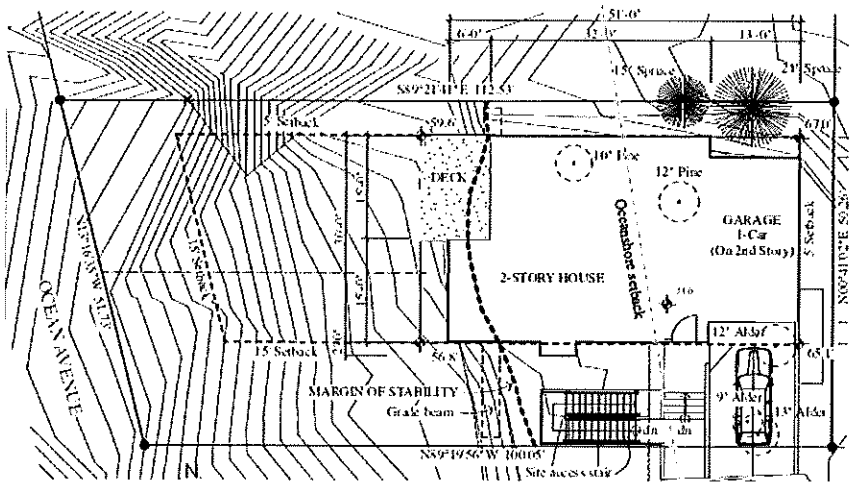
[4] Petitioners explain that they contemporaneously applied for both a development permit and a building permit and that the city acted only on the development permit.

Line by 119.1 feet. CBMC 17.42.050(A)(6)(c)(i). Thus, the planning commission calculated "the average of the setbacks" of the affected buildings at 119.1 feet. CBMC 17.42.050(A)(6)(c)(iii).

The Oregon Coordinate Line lies west of the subject property and is angled south and east in relation to the Haystack property and the subject property.



Record 377. Applying a 119.1-foot setback to the subject property results in a setback line that runs through the middle of petitioners' proposed dwelling and reduces the buildable footprint for a dwelling on the subject property. Record 376-78.



Record 378.

The planning commission determined that the proposed dwelling could not satisfy the required oceanfront setback and, therefore, denied the application. Record 486. The planning commission opined that petitioners have the options of "either seeking a setback reduction under CBMC Chapter 17.64 to construct the residence as proposed, or re-designing their development to comply with the Oceanfront Setback." Record 484.

Petitioners appealed the planning commission decision to the city council. The city council concluded that the proposed residence violates the oceanfront setback standard and affirmed the denial on that basis.

In the first assignment of error, petitioners argue that the city council misconstrued the oceanfront setback standard and adopted inadequate findings not supported by substantial evidence.

We are required to affirm a governing body's interpretation of its own comprehensive plan provision or land use regulation unless the interpretation is

inconsistent with the provision or regulation's express language, purpose, or underlying policy—that is, we must affirm such an interpretation if it is plausible. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (applying ORS 197.829(1)).[5] We are required to affirm the city's plausible interpretation, even if petitioners present or we conceive of a stronger interpretation. *See Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012) ("The existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* standard.").

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[5] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless [LUBA] determines that the local government's interpretation:
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> "(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;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

A. "Average"

The city determined the oceanfront setback by calculating "the average of the setbacks of each of the [affected] buildings." CBMC 17.42.050(A)(6)(c)(iii). The city identified the Oswald West Cabin as the only affected building. Thus, the city concluded that the setback for the subject property is the same as the setback of the Oswald West Cabin—119.1 feet. The city explained:

> "[A]n average is calculated by taking the sum of a group of values and dividing the sum by the number of values in the group. There is absolutely no reason why the number of values in a group cannot consist of one, meaning the sum of that group, is equal to the single value, which is divided by one, resulting in an average that equals the sole value in the group, or multiple numbers that are added and divided by that same multiple unit. That outcome is dictated by the City code; CBMC 1.04.040(B) specifically requires that plural nouns include the singular." Record 184.[6]

Petitioners argue that the city erred in applying an average setback based on only one building. Petitioners assert that, where there is only one affected building, the 15-foot setback in CBMC 17.42.050(6)(h) applies. Petitioners argue that, because CBMC 17.42.050(A)(6)(c)(iii) requires an "average" of the

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[6] CBMC 1.04.040 provides:

> "The following grammatical rules shall apply in the ordinances of the city of Cannon Beach, unless it is apparent from the context that a different construction is intended.
>
> "* * * * *
>
> "B. Singular and Plural. The singular number includes the plural and the plural includes the singular."

setbacks of "buildings," phrased in the plural, the city's interpretation that it could calculate an average setback from a single building is inconsistent with the express language of that provision.

The city responds, and we agree, that the term "average" can plausibly include a single value, as explained in the city's interpretation quoted above. The term "buildings" includes the singular "building" pursuant to CBMC 1.04.040(B). The city acknowledges that CBMC 1.04.040 does not apply if "it is apparent from the context that a different construction is intended."

Context supports the city's interpretation. CBMC 17.42.050(A)(6)(c)(iii) requires the city to calculate the average setback from the affected buildings within 100 feet of the of the subject parcel's north and south side lot lines. CBMC 17.42.050(A)(6)(d) expands the affected building search area to 200 feet if there are no affected buildings within 100 feet of the of the subject parcel's north and south side lot lines. If the city had intended the average setback in CBMC 17.42.050(A)(6)(c)(iii) to apply only where two or more buildings are within the 100-foot search area, then CBMC 17.42.050(A)(6)(d) would provide that the search area would be extended to 200 feet if only one building is located within the 100-foot search area.

Petitioners argue that the city's interpretation is inconsistent with other code provisions that use the term "average" and require multiple data points to calculate an average. For example, the maximum height for a residential structure in the RL zone is "measured as the vertical distance from the average elevation

of existing grade" to the top of the structure. CBMC 17.10.040(E). Minimum lot size is "determined by * * * the average slope of the property" from which a lot is to be created. CBMC 16.04.310(A). The average slope is calculated using contour intervals. *Id.* Petitioners argue that the calculation for the average building height requires multiple elevation points and the calculation for the average slope requires multiple contour intervals. The city responds, and we agree, that the use of the term "average" in those other code provisions does not provide useful context for the city's interpretation of the term "average" with respect to determining the applicable oceanfront setback.

We affirm the city's interpretation of the term "average." ORS 197.829(1).

B. "Affected Building"

As set out above, the oceanfront setback line depends on the location of affected buildings "on lots abutting the oceanshore in the vicinity of the proposed building site." CBMC 17.42.050(A)(6)(a). Petitioners argue that the city misinterpreted the phrase "affected building" because, according to petitioners, the Oswald West Cabin is not situated on a "lot abutting the oceanshore." As set out above, "'[l]ot abutting the oceanshore' means a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line." CBMC 17.04.320.

The city determined that the Haystack property abuts the ocean shore. Record 6. The city explained that CBMC 17.42.050(A)(6) applies to all lots that

either are adjacent to the beach (*i.e.*, abut the Oregon Coordinate Line) or have no buildable lot between them and the beach.[7] *Id.*

Petitioners argue that the Oswald West Cabin is not an affected building because the Haystack property is not "a lot abutting the oceanshore." Petitioners argue that the Haystack property does not abut the oceanshore because it is separated from the Oregon Coordinate Line by a buildable "plot." CBMC 17.04.315 ("'Lot' means a plot, parcel, or tract of land."). "Plot" is undefined in the CBMC. Petitioners argue that the Haystack property is oversized and underdeveloped and that, based on its size and RL zoning, it could be developed with at least two additional dwellings on a "plot" between the Oswald West Cabin and the undeveloped Ocean Avenue. Petitioners refer to a *Black's Law Dictionary* definition of "plot" as "[a] measured piece of land." *Black's Law Dictionary* 1273 (9th ed 2009). As we understand it, petitioners argue that the Haystack property can potentially be divided; thus, there is a theoretical plot that could separate the Oswald West Cabin site from the ocean shore.

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[7] In its response brief, the city argues that CBMC 17.42.050(A)(6)(a) is merely a "prefatory" statement that does not control the calculation and operation of the oceanfront setback in CBMC 17.42.050(A)(6)(c) "and, therefore, whether or not the Oswald West Cabin is on a lot abutting the oceanshore is immaterial to the determination of the [oceanfront setback] for the proposed building." City Response Brief 16. The city council does not express that view in the decision, and we will not address it for the first time here. *Burgess v. City of Corvallis*, 55 Or LUBA 482, 502 (2008).

The city responds, and we agree, that petitioners' argument is unavailing. Petitioners do not identify any "measured piece of land" between the Oswald West Cabin site and the ocean shore; instead, they speculate that a "plot" could be found there sometime in the future.

Petitioners have not established any error in the city finding that there is no buildable lot between the Haystack property and the ocean shore.[8] Accordingly, we conclude that the city did not err in identifying the Oswald West Cabin as an affected building for purposes of the oceanfront setback.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the oceanfront setback standard is not clear and objective, as required by state law for standards regulating the development of housing. ORS 197.307(4) provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing,

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[8] Petitioners also argue that Ocean Avenue is a "buildable lot." Petition for Review 22. That argument is undeveloped in the first assignment of error, and it refers to and relies on arguments in the second assignment of error—that the terms "buildable" and "lot" are not clear and objective—and the fourth assignment of error. We reject the second assignment of error for reasons explained below, and we do not reach the fourth assignment of error because of petitioners' violation of the brief word-count limitation. Accordingly, petitioners' incorporation by reference of those arguments provides no basis for us to sustain the first assignment of error.

including needed housing. The standards, conditions and procedures:

> "(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.
>
> "(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

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

> "In a proceeding before [LUBA] or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner." ORS 197.831.

Approval standards are not clear and objective if they impose "subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P2d 685, *rev den*, 328 Or 594 (1999). We have explained that the term "clear" means "easily understood" and "without obscurity or ambiguity," and that the term "objective" means "existing independent of mind." *Nieto v. City of Talent*, ___ Or LUBA ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6).

Petitioners argue that CBMC 17.42.050(A)(6)(c) cannot be applied to their application because the following terms and phrases are not clear and objective: "Oregon Coordinate Line," "lot," "buildable," and "lots abutting the oceanshore." Petitioners further argue that the oceanfront setback is not clear and objective because it is silent about calculating an average setback when there is only one affected building.

The city responds, generally, by citing *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011), *aff'd*, 249 Or App 309, 275 P3d 1010 (2012), which we agree is instructive and summarize here. In *Rudell*, the petitioners applied to the city for a conditional use permit to construct a single-family dwelling. 64 Or LUBA at 203. A local code provision prohibited the location of any structure on an "identified foredune." *Id.* Elsewhere, the code defined "foredune" as "the dune closest to the high tide line that extends parallel to the beach. The foredune can be divided into three sections: the frontal area (closest to water); the top surface; and the lee or reverse slope (backside)." *Id.* Because that definition did not address where the "lee or reverse slope (backside)" of the foredune ends, the city referenced dictionary definitions for the terms "lee," "slope," and "reverse slope," and interpreted the "lee or reverse slope (backside)" of a foredune to mean "the area that extends from the top surface to the landward point where the slope ends and the ground becomes relatively level (i.e., horizontal)." *Id.* at 206 n 3. The city explained that it used the adjective "relatively" as a modifier that acknowledged that no natural terrain is ever absolutely flat. *Id.* at 207. The city

denied the application based on topographic maps showing that the entire subject property is located on the reverse slope of a foredune under the city's interpretation of the relevant code provisions. *Id.* at 204-05.

The petitioners appealed and argued that "relatively" is a subjective qualifier, which impermissibly granted the city discretion in approving or denying their application for housing. *Id.* at 206.

We concluded that the city's interpretation of the definition of "foredune" was sufficiently clear and objective, reasoning that the slope of a property is an objectively determinable fact. *Id.* at 208 (citing *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 410-11 (2002) (rejecting an argument that a standard prohibiting development on land that meets or exceeds 20 percent slope is not clear and objective, because "the slope of a property is an objectively determinable fact")). We explained that, "[u]nder the city's interpretation, the foredune ends where the slope leading down from the top of the foredune ceases to incline downward, at the point where there is no longer any measureable downward slope. That is about as clear and objective as a non-numeric standard can get." *Id.*

We contrasted that conclusion with our prior conclusion that a different city code provision requiring that the property be "safe to build" is not clear and objective. *Id.* at 209 (citing *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010)). In contrast to "safe to build," the definition of "foredune," as interpreted by the city,

> "does not involve a subjective, value-laden analysis designed to balance or mitigate impacts of development * * *. It involves an objective determination of basic topography and elevation, whether the proposed building site is located on a slope inclining from the top of a foredune. With modern surveying equipment and technology, determining whether a building site is located on a 'slope' or not involves little subjectivity or value-laden judgment." *Id.*

The Court of Appeals agreed with our conclusion that the definition of "foredune," as interpreted by the city, "is sufficiently clear and objective to pass muster." *Rudell*, 249 Or App at 319.

For the reasons explained below, we agree with the city that the oceanfront setback standard is clear and objective.

A. "Oregon Coordinate Line"

"The location of the oceanfront setback line for a given lot depends on the location of buildings on lots abutting the oceanshore in the vicinity of the proposed building site and upon the location and orientation of the Oregon Coordinate Line." CBMC 17.42.050(A)(6)(a). "Oregon Coordinate Line" is not defined in the CBMC. In its decision, the city rejected petitioners' argument that that phrase is not clear:

> "[Petitioners] argue that the meaning of the phrase 'Oregon Coordinate Line' is not clear. This term, however, could not be more precise. The Oregon Coordinate Line is set forth in ORS 390.770.[6] Oregon Coordinate Line may be one of the most precise measurements in Oregon statutory law. As recognized by the Oregon Court of Appeals and LUBA, the line establishes the western boundary of all lots abutting the ocean shore. *Save Oregon's Cape Kiwanda Org. v. Tillamook Cty.*, 177 Or App 347, 349, 34 P3d 745 (2001) ('The western property boundary is the Oregon

> Coordinate Line (OCL), the boundary line between public and private ownership of Oregon beaches.'); *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576, 583 (1997) ('There is no dispute * * * that the grading would occur west of the Oregon Coordinate Line.').
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> "[6] The coordinate line is also known as the statutory vegetation line. *State Highway Comm'n v. Bauman*, 16 Or App 275, 277, 517 P2d 1202 (1974) ('The entire property also abuts and lies immediately eastward and upward of the vegetation line or coordinate line established by and described in ORS 390.605 et seq.'). The reason the line is referred to under both names is because the 'vegetation line' is established 'through detailed descriptions following the Oregon Coordinate System.' *Hay v. Oregon Dep't of Transp.*, 301 Or 129, 132, 719 P2d 860 (1986) (internal citations omitted). This coordinate-vegetation line is set forth in ORS 390.770, including 27 coordinate points in Cannon Beach (i.e., between '[a] point on the south side of Tillamook Head near the south boundary of Ecola State Park' and 'the north boundary of Tolovana Beach State Wayside.'). [Petitioners] suggest that the term is ambiguous because the term 'ocean shore' is defined in ORS 390.770 to be demarcated by either the statutory vegetation line or by 'the line of established upland vegetation.' However, the [CBMC] requires the determination to be made from the 'Coordinate Line,' which, as noted above, is physically surveyed and described." Record 9-10.

Petitioners argue that the city's finding that the Oregon Coordinate Line is a precise phrase is wrong because the phrase "Oregon Coordinate Line" is not used or defined in ORS 390.770 or anywhere else in ORS chapter 390. Petitioners concede that the coordinate line surveyed and described in ORS 390.770 is objectively ascertainable. However, petitioners argue that a reasonable person reading the CBMC would have no way of knowing that the Oregon Coordinate

Line is the line surveyed and described in ORS 390.770. As we understand it, petitioners argue that the phrase "Oregon Coordinate Line" is not "clear" because it is not "easily understood" or "without obscurity or ambiguity." *Nieto*, ___ Or LUBA at ___ (slip op at 9 n 6).

The city responds that "Oregon Coordinate Line" is a "shorthand" for the surveyed line described in ORS 390.770 that divides private property from public beaches. The city contends that a reasonable person reading CBMC 17.42.050, which is in the CBMC chapter governing the OM overlay zone, would understand that "Oregon Coordinate Line" is the only statewide surveyed line that crosses the state of Oregon from north to south along the state's oceanfront. We agree.

As explained in *Rudell*, the fact that a term requires some level of interpretation does not make it not "clear and objective." The phrase "Oregon Coordinate Line" refers to a specific and ascertainable surveyed line. The city standard that refers to that phrase is clear and objective.

B. "Lots abutting the oceanshore"

The oceanfront setback applies only to "lots abutting the oceanshore" and CBMC 17.04.320 defines "lot abutting the oceanshore" to mean "a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line." The city rejected petitioners' argument that the subject property and the Haystack property do not abut the ocean shore because Ocean Avenue is a "buildable lot."

The term "lot" refers to an existing unit of land that has been created through a partition, subdivision, or historic legal transfer. CBMC 17.04.315. The city found that a lot is distinct from a right-of-way or street, as those terms are used in the CBMC. CBMC 17.04.315 ("'Lot' means a plot, parcel, or tract of land."); CBMC 17.04.535 ("'Street' means the entire width between the right-of-way lines of every way for vehicular and pedestrian traffic and includes the terms 'road,' 'highway,' 'lane,' 'place,' 'avenue,' 'alley' and other similar designations."). The OM overlay zone regulations setting out permitted uses and activities, CBMC 17.42.030, refer to "lots or right-of-way," from which the city reasoned that "right-of-way does not fall within the definition of 'lots' because if it did, the second half of the phrase, 'or right-of-way,' would be unnecessary and superfluous (the code could just say 'for lots' and cover both)." Record 7. Thus, the city concluded that Ocean Avenue is not a "lot."

Petitioners argue that the term "lot" does not exclude rights-of-way in a manner that is clear and objective on the face of the CBMC. The fact that some interpretation is required does not make a term not clear and objective. Instead, a standard is not clear and objective if it is capable of being applied in multiple ways in a manner that allows the city to exercise significant discretion in choosing which interpretation it prefers. *See* ORS 197.831 (placing the burden of proof on the local government to demonstrate that the approval standards "are capable of being imposed only in a clear and objective manner"); *Walter v. City of Eugene*, 73 Or LUBA 356, 360-64 (2016) ("The multiple possible

interpretations of the ambiguous language * * *, coupled with the lack of a clear purpose, allow the city to exercise significant discretion in choosing which interpretation it prefers to serve one or more unstated purposes, in order to approve or deny needed housing development."); *see also Nieto*, ___ Or LUBA at ___ (slip op at 10-13).

The city responds, and we agree, that the issue presented is not whether the term "lot" is ambiguous, but whether the phrase "buildable lot" is unclear in that it could include a right-of-way such as Ocean Avenue. Because the undeveloped Ocean Avenue right-of-way separates petitioners' lot from the ocean shore, if Ocean Avenue is "buildable," then petitioners' lot does not abut the ocean shore and is not required to comply with the oceanfront setback. Similarly, if Ocean Avenue is "buildable," then the Oswald West Cabin is not an affected building because Haystack's lot is not a lot abutting the ocean shore. CBMC 17.42.050(A)(6)(a) ("The location of the oceanfront setback line for a given lot depends on the location of buildings on lots abutting the oceanshore * * *.").

The term "buildable" is not defined in the CBMC. The city interpreted "buildable" to mean "a lot that qualifies for construction of a residence under both local and state law (e.g., pursuant to its zoning, plat restrictions, state law limitations, ability to meet minimum development standards, etc.)." Record 6 (citing CBMC 17.10.040(A) (providing the minimum lot size in the RL zone necessary to be "buildable")). The city found that Ocean Avenue does not qualify for the siting of a dwelling because it is permanently dedicated to the public as a

thoroughfare in the Tolovana Park plat. The city concluded that, even if Ocean Avenue was designated in the plat as a lot or tract, the land could not satisfy the minimum development standards for construction of a residence in the RL zone, as well as other code provisions that would apply based on the location and characteristics of the land. Further, Statewide Planning Goal 18 (Beaches and Dunes) and rules of the Oregon Parks and Recreation Department and the Department of State Lands prohibit new homes and protective structures on beach locations such as the Ocean Avenue right-of-way. Thus, the city concluded that Ocean Avenue is not "buildable." Record 7.

Petitioners argue that the term "buildable" is not limited to dwellings and includes any "man-made assemblage of materials," quoting the CBMC definitions of "building" and "structure." Petition for Review 36; CBMC 17.04.085 ("'Building' means a structure built for the support, shelter or enclosure of persons, animals or property of any kind."); CBMC 17.04.540 ("'Structure' means any man-made assemblage of materials extending above the surface of the ground and permanently affixed or attached, or where not permanently affixed or attached to the ground not readily portable, but not including landscape improvements such as rock walls, retaining walls less than four feet in height, flag poles, and other minor incidental improvements similar to those described above.").

While the CBMC definition of the term "building" includes the more general term "structure," the definition of "building" is more limited than

"structure" and, we think, not so broad as to encompass a road surface or any assemblage of man-made materials above a road surface. More importantly, we agree with the city that petitioners' argument that the term "buildable" is not clear and objective isolates the term "building" from the context and purpose of the oceanfront setback. The purpose of the oceanfront setback standard is to require that new buildings be set back from the ocean by generally the same distance as other nearby buildings. The required setback is determined using an objective method based on the location of existing "affected buildings" and the Oregon Coordinate Line. If a "buildable lot" lies between a building and the Oregon Coordinate Line, then that building is not an "affected building" and does not factor into the calculation of the required oceanfront setback. Even if the term "buildable" in isolation might be subject to multiple interpretations, in the context of the operation of the oceanfront setback, it is clear that "buildable" means that the lot qualifies for the construction of a residential or commercial structure.[9] That standard is not "subjective" or "value-laden."

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[9] Petitioners do not argue that the city erred by focusing on whether a lot qualifies for building a residential structure, as opposed to a residential or commercial structure. *See* CBMC 17.42.050(A)(6)(b) ("For the purpose of determining the oceanfront setback line, the term 'building' refers to the residential or commercial structures on a lot. The term 'building' does not include accessory structures."). We assume that the OM overlay zone and the oceanfront setback apply to residentially and commercially zoned property and that the oceanfront setback can be determined with reference to affected buildings that are not residential buildings. Because the parties to not discuss this distinction, we do not address it further.

The city has established that the oceanfront setback is capable of being imposed only in a clear and objective manner.[10]

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that ORS 227.175 prohibits the city from applying the oceanfront setback because it reduces housing density. ORS 227.175(4) provides, in part:

> "(c) A city may not condition an application for a housing development on a reduction in density if:
>
> "(A) The density applied for is at or below the authorized density level under the local land use regulations; and
>
> "(B) At least 75 percent of the floor area applied for is reserved for housing.
>
> "* * * * *
>
> "(e) Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a

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[10] The city argues that the disputed development permit is not a discretionary permit and, thus, ORS 227.175 and ORS 227.173 do not apply. We do not understand the city to dispute that it may apply only clear and objective standards to petitioners' application to develop housing. Our resolution of petitioners' arguments applies with equal force under both ORS 197.307(4) and ORS 227.173(2). *Rudell*, 249 Or App at 320 ("[W]e conclude that our resolution of petitioners' arguments related to ORS 197.307(6) (2009) apply with equal force to their claims under ORS 227.173.").

statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction.

"(f) As used in this subsection:

"(A) 'Authorized density level' means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations."

The RL zone regulations provide that the maximum floor area for petitioners' 5,394-square-foot lot is 3,000 square feet (a floor area ratio of approximately 0.56). CBMC 17.10.040(D); CBMC 17.04.245 ("'Floor area ratio' means the gross floor area divided by the lot area and is usually expressed as a decimal fraction.").[11] Petitioners' proposed dwelling is 2,712 square feet. As explained above, the required oceanfront setback cuts through approximately the center of petitioners' proposed dwelling. Record 378. Petitioners argue that ORS

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[11] CBMC 17.10.040(D) provides:

"Floor Area Ratio. The floor area ratio for a permitted or conditional use on a lot of six thousand square feet or more shall not exceed 0.5. The maximum gross floor area for a permitted or conditional use on a lot of more than five thousand square feet, but less than six thousand square feet, shall not exceed three thousand square feet. The floor area ratio for a permitted or conditional use on a lot with an area of five thousand square feet or less shall not exceed 0.6."

227.175 prohibits the city from applying the oceanfront setback because it effectively reduces the allowed floor area for petitioners' lot.[12]

The city council concluded that ORS 227.175 does not apply to petitioners' application. On appeal, the city again argues that ORS 227.175(4)(c) does not apply, relying on two related premises: (1) ORS 227.175 is limited to applications for zone changes and "permits," as defined in ORS 227.160, and (2) the development permit at issue in this appeal is not a "permit," as defined in ORS 227.160. ORS 227.160(2)(a) supplies the definition of "permit" for purposes of ORS 227.175 and provides, in part, that "'[p]ermit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation." The city argues that petitioners' development permit is not a discretionary approval; instead, the development of a residence on petitioners' property is allowed "as of right" so long as the development complies with the terms of the CBMC, including the oceanfront setback.[13]

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[12] Petitioners argue that the city's application of the oceanfront setback reduces the buildable floor area of a dwelling on the subject property to approximately 600 square feet. Petition for Review 40. The city did not make any findings on that point in the challenged decision. However, the city does not dispute that assertion in this appeal. Accordingly, we assume for purposes of this decision that petitioners' assertion is accurate.

[13] The city points to ORS 227.215(3), which lists the types of development that city development ordinances can regulate and which contrasts "[d]evelopment for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173" with "[d]evelopment for

We agree with the city that the overall context of ORS 227.175 suggests that, in enacting the limitations in ORS 227.175(4)(c), the legislature was focused on applications for zone changes and permits needed for a development project. *See* ORS 227.175(1) (providing that an owner of land may apply to a city "for a permit or zone change"); ORS 227.175(2) (requiring a city to "establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project").

Nevertheless, we agree with petitioners that ORS 227.175(4)(c) does apply to the development permit at issue in this appeal. The language of ORS 227.175(4)(c) does not limit that provision to applications for zone changes and "permits," as defined in ORS 227.160, and we are not convinced that context overrides the express language of that provision such that we could conclude that the legislature intended to so limit its operation.[14]

The city concluded that the decision does not violate ORS 227.175(4)(c) because the city denied the application outright and did not condition approval on a reduction of floor area.

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which a permit is granted as of right on compliance with the terms of the ordinance."

[14] Because we conclude that the application of ORS 227.175(4)(c) is not limited to "permits," as defined in ORS 227.160, we need not resolve the parties' arguments regarding whether the development permit at issue in this appeal is a "permit," as defined in ORS 227.160.

Petitioners argue that the city misinterpreted ORS 227.175(4)(c) as prohibiting only conditions of *approval* because ORS 227.175(4)(c) provides that "[a] city may not condition *an application* for a housing development on a reduction in density." (Emphasis added.) Petitioners argue that the use of the term "application" is unique and evidences the legislature's intent to prohibit the city from applying any standard to an *application* for housing development that would require the floor area of a dwelling to be reduced below the floor area allowed by the zoning code. In petitioners' view, in enacting ORS 227.175(4)(c), the legislature intended to override any regulation that would require a reduction of the floor area of a dwelling, such as setbacks. Here, while the maximum floor area allowed by the CBMC is 3,000 square feet, the oceanfront setback confines the buildable footprint to approximately 600 square feet.

The city responds that ORS 227.175(4)(c) does not prohibit denial of an application based on non-compliance with a clear and objective standard, even if that standard indirectly reduces the proposed floor area of a dwelling. We agree.

Petitioners correctly observe that the phrase "condition an application" is unique to ORS 227.175. Conditions are usually imposed as requirements for a land use approval to bring the proposed use into compliance with land use regulations. *See, e.g.*, ORS 227.175(4)(a) ("A city may not approve an application unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are

authorized by ORS 227.215 or any city legislation."); ORS 197.522(3) ("If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to making a final decision on the application, shall allow the applicant to offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations."); ORS 197.522(4) ("A local government shall deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through amendments to the application or the imposition of reasonable conditions of approval."). However, we do not agree with petitioners' conclusion that, by using the phrase "condition an application," the legislature intended to prohibit any land use regulation that would require a floor area reduction, such as setbacks.

In interpreting ORS 227.175(4)(c), 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 are independently responsible for correctly construing statutes. *See* ORS 197.805 (providing the legislative directive that LUBA "decisions be made consistently with sound principles governing judicial review"); *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) ("In construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information

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

A. Text

Petitioners' interpretation is not supported by the text of ORS 227.175(4)(c). The phrase "condition an application" is not so broad as to prohibit the application of any land use standards that may result in a reduced floor area.

B. Context

We proceed to context, which includes other provisions of the same statute. *See Hale v. Klemp*, 220 Or App 27, 32, 184 P3d 1185 (2008) ("When we examine the text of the statute, we always do so in context, which includes, among other things, other provisions of which the disputed provision is a part.").

ORS 227.175(4)(a) provides that "[a] city *may not approve* an application *unless* the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions." (Emphases added.) An approval may include conditions that would bring the application into compliance with applicable regulations. *Id.* Conversely, ORS 227.175(4)(b)(A) provides that "[a] city *may not deny* an application for a housing development located within the urban growth boundary *if the development complies with clear and objective standards*, including clear and objective design standards contained in the city comprehensive plan or land use regulations." (Emphases added.) We conclude above that the oceanfront

setback is a clear and objective standard. Based on the context provided by other subsections of ORS 227.175(4), we agree with the city that ORS 227.175(4) allows the city to deny an application for a housing development if the application does not comply with applicable clear and objective standards, including the oceanfront setback standard.

We agree with the city's conclusion that, in enacting ORS 227.175(4)(c), the legislature prevented cities from reducing housing density on an *ad hoc* basis by applying subjective standards to applications for housing developments. However, ORS 227.175(4)(c) does not prohibit a city from applying clear and objective standards that may incidentally reduce floor area below the maximum floor area that is allowed in the relevant zone.

As explained, ORS 227.175(4)(c) and (d) confine the city's authority to impose *ad hoc* reductions in density and height. ORS 227.175(4)(e) provides:

> "Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction."

Petitioners argue that a city may require a reduction in floor area only if the city proves that such a reduction is "necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal."

The city found that the setback is a protective measure expressly allowed under ORS 227.175(4)(e), citing the purpose statement for the OM overlay zone, which provides, in part, that one of the purposes of the OM overlay zone is "to reduce the hazards to property and human life resulting from both natural events and development activities." CBMC 17.42.010. The city explained that the city's oceanfront "is subject to substantial hazards from ocean currents, winter storms, dramatic shoreline regression, erosion, and related forces," and that petitioners' property is at particular risk due to its steep slopes. Record 7-8, 12. The city found that, "[b]y preventing development westward of nearby development, the Oceanfront Setback is necessary to mitigate the risks to oceanfront development generally and on the [subject] Property specifically." Record 12.

Petitioners argue that the city failed to identify a health or safety issue that must be resolved by reducing the floor area of petitioners' proposed residence. Further, to the extent that the site conditions such as slope and aspect could raise safety concerns, those concerns are fully addressed in petitioners' geotechnical report, which demonstrates that there are no geologic hazards at the site and that the residence is safe to be built as proposed. Petition for Review 47-49.

Petitioners argue that any site-specific safety concern would be addressed under other OM overlay zone standards, which include compliance with geologic hazard areas requirements, CBMC 17.42.050(A)(2), and which specifically allow the building official to "require a greater oceanfront setback where information in a geologic site investigation report indicates a greater setback is required to

protect the building from erosion hazard," CBMC 17.42.050(A)(6)(i).[15] The city did not impose a greater oceanfront setback due to any site-specific geologic issues.

We tend to agree with petitioners that, contrary to the city's conclusion, the "averaging" oceanfront setback in CBMC 17.42.050(A)(6)(c) is not a standard that is "necessary to resolve a health, safety or habitability issue," as applied generally or as applied to petitioners' property specifically. First, it appears that the only evidence in the record is that there are no such "issues" on petitioners' property that would require resolution by imposing a 119-foot setback. Second, the types of concerns that the city articulated in concluding that the averaging oceanfront setback is allowed under ORS 227.175(4)(e) appear to us to be addressed in CBMC 17.42.050(A)(2) and CBMC 17.42.050(A)(6)(i). Third, the averaging oceanfront setback is not based on the physical characteristics of a specific site. Instead, the averaging setback is based on existing development and the location of the Oregon Coordinate Line. Fourth, and finally, we agree with petitioners that the default 15-foot oceanfront setback indicates that the city concluded that, in some circumstances, a relatively small setback can achieve all of the purposes expressed in the OM overlay zone purpose

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[15] CBMC 17.42.050(A)(2) provides that the uses and activities permitted in all areas contained in the OM overlay zone are subject to the geologic hazard areas requirements in CBMC chapter 17.50.

statement, including reducing hazards to property and human life resulting from natural events and development activities.

However, the city's erroneous interpretation of ORS 227.175(4)(e) does not mean that the averaging oceanfront setback is prohibited by ORS 227.175(4)(c). The city's findings regarding ORS 227.175(4)(e) are in addition and in the alternative to the city's conclusion, which we affirm, that ORS 227.175(4)(c) does not prohibit the city from applying clear and objective standards that may incidentally reduce floor area below the maximum floor area that is allowed in the zone. In addition to any clear and objective standards that may incidentally reduce floor area, ORS 227.175(4)(e) allows the city to exercise discretion and apply "subjective, value-laden analyses" that result in floor area reduction if the city establishes that such a reduction is necessary to resolve a health, safety, or habitability issue on the property to be developed, on adjoining properties, or in the community. *Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 158.

C. Legislative History

The legislative history supports a conclusion that ORS 227.175(4)(c) does not prohibit the indirect reduction of floor area through the application of clear and objective standards for housing development. ORS 227.175(4) was introduced in House Bill (HB) 2007 (2017) and enacted in Senate Bill (SB) 1051 (2017). ORS 227.175(4) was adopted in concert with amendments to ORS 197.307, which, as explained above, provides that a local government may adopt

and apply only clear and objective standards, conditions and procedures regulating the development of housing. Those measures were aimed at ameliorating Oregon's housing crisis by increasing the supply of both market-rate and affordable housing. Testimony, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017 (statement of Rep Tina Kotek); Record 1250. One of the bill's chief sponsors, Speaker of the House Tina Kotek, observed that HB 2007 would "require cities and counties to approve applications that meet clear and objective standards as outlined in local zoning or planning codes within urban growth boundaries," and, while some cities expressed "concerns about having to state clear and objective standards, * * * [i]t is possible to have a permitting process that allows for local control regarding design and clear and objective standards related to those design preferences." Record 1251.

Petitioners emphasize that Speaker Kotek also stated that HB 2007 "requires local jurisdictions to let developers build housing with density that is permitted in the local zoning code." *Id.* Petitioners' interpretation of ORS 227.175(4)(c) treats the right to build at maximum floor area as an unqualified right. That position fails to recognize that the legislation also allows local governments continued authority to regulate the development of housing, so long as the applicable standards and procedures are clear and objective.

As noted, although ORS 227.175(4)(c) was introduced in HB 2007, it was enacted in SB 1051. Or Laws 2017, ch 745, § 3. SB 1051 also amended ORS 197.307(4) to clarify that clear and objective standards regulating the

development of housing "[m]ay include, but are not limited to, one or more provisions regulating the *density* or height of a development." Or Laws 2017, ch 745, § 5 (emphasis added). That is, so long as the regulations are clear and objective, city regulations may limit the density or height of housing developments. *See State v. Ortiz*, 202 Or App 695, 699-700, 124 P3d 611 (2005) (explaining that the "same statute" can refer to other provisions of the bill originally approved by the legislature, although codified in different chapters or sections of the Oregon Revised Statutes).

One summary of HB 2007, submitted to the House Committee on Human Services and Housing by Speaker Kotek's office, demonstrates that the legislation was intended to prohibit local governments from reducing housing density through the application of discretionary design review standards, not to prohibit local governments from adopting and applying clear and objective standards that could incidentally reduce density. Record 1252; Testimony, House Committee on Human Services and Housing, HB 2007, Apr 13, 2017 (summary prepared by Taylor Smiley Wolfe) (explaining that HB 2007 would prohibit local governments from denying an application for housing within an urban growth boundary if the development complies with clear and objective standards contained in the comprehensive plan or zoning ordinances and if the local government "would have approved the application but for a finding that the development is inconsistent with any discretionary design review standards").

The city's conclusion that ORS 227.175(4)(c) does not prohibit the application of the oceanfront setback is consistent with the text, context, and legislative history of that provision.

The third assignment of error is denied.

CROSS PETITION FOR REVIEW

In a cross petition for review, Haystack raises contingent cross-assignments of error arguing, generally, that the city erred by not addressing additional arguments in opposition and alternative asserted bases for denial. *See* OAR 661-010-0030(7) ("A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such."). We affirm the city's denial. Accordingly, we do not reach or decide the contingent cross-assignments of error.

The city's decision is affirmed.