BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID VANSPEYBROECK,
Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

CAMDEN INNS, LLC and
SLAWOMIR PISKORSKI,
Intervenor-Respondents.

LUBA No. 2007-098

CRAIG SWINFORD, ANNE SWINFORD,
RICHARD BUTLER, SUE BUTLER,
ROBERT STEELE, CARLEEN STEELE, BARBARA RICE,
ROBERT APPERSON, CAROL APPERSON,
FRED PANZER, GAIL PANZER,
WES PRICE and DIANE PRICE,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent,

and

CAMDEN INNS, LLC and
SLAWOMIR PISKORSKI,
Intervenor-Respondents.

LUBA No. 2007-099

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

David VanSpeybroeck, Lake Oswego, filed a joint petition for review.

Edward J. Sullivan, Portland, filed a joint petition for review and argued on behalf of petitioners Craig Swinford *et al.*. With him on the brief was Carrie Richter, David Vanspeybroek and Garvey Schubert Barer.

No appearance by Tillamook County**.**

Bryan W. Cavaness, Portland, represented intervenor-respondent Camden Inns, LLC.

Andrew H. Stamp, Lake Oswego, filed the response brief and argued on behalf of intervenor-respondent Slawomir Piskorski.

BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member, participated in the decision.

REMANDED 02/21/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision that approves (1) a building permit to remodel and expand an existing commercial structure to include five motel units, and (2) a nonconforming use verification and review for an accessory residence on the second floor of the structure.

MOTION TO FILE REPLY BRIEF

Petitioners move for permission to file a reply brief under OAR 661-010-0039, which allows a petitioner to file a reply brief if it is "confined solely to new matters raised in the respondent's brief." The proposed reply brief addresses four alleged "new matters" raised in the response brief. Intervenor-respondent Slawomir Piskorski (intervenor) objects, arguing that the reply is not confined to "new matters" raised in the response briefs.

Three of the issues addressed in the reply brief are allegations of waiver in the response brief. Intervenor argues that waiver is not a "new matter" because the county found that certain issues were waived or were collateral attacks on earlier unappealed decisions, and petitioners devote at least one assignment of error in the petition for review to a direct challenge to those findings. While the response brief responds to those arguments, intervenor argues, the response brief does not raise any "new matter" within the meaning of OAR 661-010-0039, because waiver is already a fully-briefed issue in this appeal.

Waiver asserted in a response brief is generally a subject matter that warrants a reply brief. While the challenged decision includes findings on waiver, and the petition for review assigns error to those findings, the response brief offers elaborate additional justifications for the county's waiver findings. While it is a close question, we believe that it is appropriate in these circumstances to allow a reply brief to respond to the specific waiver assertions made in the response brief, even where the petition for review includes an extensive discussion of the waiver issue.

The fourth alleged new matter is intervenor's observation that petitioners fail to assign error to a potentially dispositive alternative finding regarding a disputed issue. Petitioners respond in the reply brief that the finding is not dispositive and is not an independent basis for the county to reach the conclusion it did on that disputed issue. Intervenor argues that this portion of the reply brief is essentially a new assignment of error, and therefore impermissible in a reply brief. *Shaffer v. City of Salem*, 29 Or LUBA 592, 594 (1995). However, petitioners do not seek reversal or remand based on a new assignment of error or assert a new challenge to the county's decision; instead, they respond to an argument that an unchallenged finding is a dispositive alternative basis for affirming the county's decision, and attempt to explain why it is not. Such an argument is a "new matter" warranting a reply brief.

The reply brief is allowed.

FACTS

This appeal concerns a remodel and expansion of the existing Anchor Tavern in Oceanside, in unincorporated Tillamook County. In 1940, the existing two-story structure was moved to the subject property, a rectangular lot bordered on the west by Pacific Avenue and on the east by Tillamook Avenue. The first floor was used as a tavern, and the second floor as a residence for the owner. The two main first floor doors open onto Pacific Avenue to the west. Access to the second floor was via a deck and stairs north of the structure.

In 1981, the county zoned the subject property Neighborhood Commercial (C-1). In 1998, the property was rezoned to Commercial Oceanside (COS). Both the C-1 and COS zones allow the tavern use ("eating and drinking establishment") as an outright permitted use. Tillamook County Land Use Ordinance (TCLUO) 3.312(2)(e).[1] Both zones also allow

[1] The COS zone replaced the C-1 zone. In all respects relevant to this appeal, the COS zone and the C-1 zone allow the same permitted and conditional uses and impose the same requirements, and for convenience we quote only to the COS zone. The COS zone, at TCLUO 3.312(2), permits the following uses outright:

a "[d]welling unit or units accessory to an active commercial use, located above the first story." TCLUO 3.312(2)(i). A "[m]otel or hotel containing not more than 35 units" is a use permitted conditionally. TCLUO 3.312(3)(e).[2]

Both zones also require that all uses meet off-street parking requirements, at TCLUO 4.030. For an eating and drinking establishment, one parking space is required for each 150 square feet of floor area. TCLUO 4.030(13)(i). For a dwelling, the code requires two parking spaces for the first dwelling unit, and one space for each additional unit. TCLUO 4.030(13)(a). A motel or hotel requires one parking space per unit. TCLUO 4.030(13)(c). The existing tavern structure occupies almost all of the lot on which it sits, and has never provided any off-street parking spots.

"USES PERMITTED OUTRIGHT: In the COS zone, the following small scale low impact commercial uses and their accessory buildings and uses are permitted in a building or buildings not exceeding 4,000 square feet of floor space and are subject to the general provisions and exceptions set forth in the Land Use Ordinance.

"* * * * *

"(e) Eating and drinking establishment, excluding walk-up and/or drive-in services.

"* * * * *

"(f) Single-family residential structure for the owner of an active business on the same lot.

"* * * * *

"(i) Dwelling unit or units accessory to an active commercial use, located above the first story."

[2] TCLUO 3.312(3) provides, in relevant part:

"USES PERMITTED CONDITIONALLY: In the COS zone, the following uses and their accessory uses are permitted subject to the provisions in Article 6 and the requirements of all applicable supplementary regulations contained in this ordinance:

"* * * * *

(e) Motel or hotel containing not more than 35 units."

From 1980 to 1986, the Brousseaus, who then owned the structure, rented the second floor residence to a tenant who had no connection with the tavern. In 1987, the Brousseaus moved into the second floor residence, and since that time the second floor residence has been occupied by the owners of the tavern.

In 2004, intervenor-respondent Camden Inns, LLC (Camden) filed a conditional use application proposing to remodel and expand the existing structure into a 35-foot high, three-story structure. Specifically, Camden proposed expanding the first floor footprint to add a 12 foot by 30 foot area occupied by an outside deck and stair. Further, Camden proposed that the second floor residence be converted to five motel units and a third story be constructed with another five units, for a total of ten units. The proposed expansion of the first floor tavern/restaurant was intended in part to provide room to construct bathrooms that comply with Americans with Disabilities Act (ADA) requirements. To comply with the TCLUO 4.030(13)(c) off-street parking requirements triggered by the proposed motel units, Camden proposed to acquire and develop a parking lot on a lot located some distance from the tavern, in the bordering residential zone.

Members of the nearby residential neighborhood opposed the 2004 CUP application, with most of the opposition focusing on the proposed parking lot. At the second hearing before the planning commission, the applicant's attorney proposed a compromise: instead of 10 motel units, the applicant would agree to limit the motel use to five units if the planning commission would modify or waive the parking requirements for the motel use to zero required spaces. The planning commission voted to approve the CUP based on that compromise, and accordingly denied the proposed off-site parking facility. On October 20, 2004, the planning commission issued its written decision approving the CUP, limiting the height of the remodeled building to 35 feet. No local appeal or appeal to LUBA from the

planning commission's 2004 CUP approval was filed. The scope of what was proposed and approved in that 2004 CUP is a disputed issue in this appeal.[3]

In November 2004, Camden submitted an application for a building permit based on the 2004 CUP approval. The building plans proposed a 35-foot high, three story structure with four rooms on the third floor and four rooms on the second floor. The building plans also proposed expanding and remodeling the first floor tavern.

The county building official approved the building permit on February 7, 2005. Opponents appealed the building permit to the planning commission, which conducted an initial hearing on whether the code provides for an appeal of a building permit decision. The planning commission concluded that the code did provide for such an appeal, and scheduled a *de novo* hearing on the merits of the local appeal, on June 9, 2005. In the meantime, Camden demolished most of the existing structure and constructed a three-story building consistent with the building plans approved by the county building official.

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[3] Because the subsequent procedural history is complex, the following summary may be useful:

October 20, 2004	Planning Commission Approves Conditional Use Permit.
November 2004	Camden submits building permit application.
February 7, 2005	Building Official approves building permit application.
July 14, 2005	Planning Commission denies appeal of building permit.
December 7, 2005	County Commissioners affirm planning commission approval of building permit, but remand that approval for the Planning Commission to determine whether major or minor nonconforming use review is required for residential use.
May 18, 2006	Planning Commission determines that minor nonconforming use review is required
June 2006	Intervenor submits application for minor nonconforming use review
October 26, 2006	Planning Commission approves minor nonconforming use review application
May 2, 2007	County Commissioners issue challenged decision that (1) affirms the Planning Commission approval of minor nonconforming use review application and (2) incorporates its December 7, 2005 decision affirming approval of the building permit.

At the hearing, the opponents argued that the building permit was inconsistent with the 2004 CUP, which many opponents understood to limit the building to five motel rooms on the second floor, with no third floor expansion permitted at all. Further, the opponents also argued that the 2004 CUP approved only single "rooms," not "units" or suites that might have more than one "room." In response to objections that the proposed structure exceeded the five motel rooms allowed by the 2004 CUP, the applicant stated that three of the rooms on the second floor would continue to be used as a residence for the owner. The opponents argued, in turn, that the tavern use and the residential use were nonconforming uses or involved a nonconforming structure, because there were no off-street parking spaces serving either use, as required by TCLUO 4.030(13).

On July 14, 2005, the planning commission issued a decision that determined, in relevant part, that (1) the 2004 CUP did not limit the number of stories but instead set a building height limitation of 35 feet, consistent with the originally proposed 35-foot high three-story structure; (2) the 2004 CUP approved five motel "units," and that those units were not limited to one room, (3) the proposed remodel and expansion of the first floor tavern use is intended to comply with the ADA, and therefore the proposed modifications to the first floor did not trigger the requirement for nonconforming use review; and (4) the proposed remodel of the second floor to continue the pre-existing residential use *did* require nonconforming use review, because the 2004 CUP application did not propose and the county did not approve any residential use, and the existing and proposed structure did not provide the two parking spaces required for a residential use under TCLUO 4.030(13)(a).

Both the applicant and the opponents appealed the July 14, 2005 planning commission decision to the board of county commissioners (BCC). The applicant requested that the matter be heard "on the record," while the opponents sought a full *de novo* hearing. In an e-mail message sent to the parties' attorneys, the planning director conveyed the BCC's determination that the board would hear the appeal "*de novo*" but that the issues under

consideration would be limited to the issues raised before the planning commission. At the September 19, 2005 public hearing, the opponents raised a number of issues, some of which the BCC later concluded were not specified in their notice of appeal and some that went beyond the issues raised before the planning commission.

On December 7, 2005, the BCC issued an order affirming the planning commission decision in all respects. In particular, the BCC affirmed that residential use of the second floor is nonconforming with respect to the lack of off-street parking, and therefore the proposed remodel required non-conforming use review. However, the BCC remanded the decision to the planning commission to determine whether major or minor nonconforming use review is required under the provisions of TCLUO Article 7.[4]

The planning commission held a public hearing on May 11, 2006. Notice of the public hearing was given to the parties, but no public testimony was allowed at the hearing. On May 18, 2006, the planning commission issued a decision concluding that the proposed residential use required minor nonconforming use review under TCLUO 7.020(11), not major nonconforming use review under TCLUO 7.020(12), and requiring the applicant to submit an application for minor review within 42 days of the date of the order. The decision states that it may be appealed to the BCC. The county provided notice of the planning commission decision to the parties, but no parties appealed that decision to the BCC.

Camden thereupon submitted an application for minor nonconforming use review. Shortly thereafter, intervenor Piskorski acquired the subject property. The planning commission conducted a hearing on the application on July 13, 2006. In response to comments received at the hearing, intervenor modified the application to propose a two-room

[4] The December 7, 2005 BCC decision was also appealed to LUBA. We dismissed that appeal, concluding that the BCC decision was not "final" and therefore not a land use decision subject to our jurisdiction, because it remanded the underlying planning commission decision back to the planning commission for further proceedings. *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546 (2006).

residence on the second floor rather than a three-room residence. The third room would be used as an office for the five-unit motel.

On October 26, 2006, the planning commission issued a decision approving the minor non-conforming use review application, concluding in relevant part that it was permissible under TCLUO 7.020(11) to continue the residential use despite the absence of the two required off-street parking places.

The opponents appealed the October 26, 2006 planning commission decision to the BCC, which held an on-the-record hearing on February 21, 2007. On May 2, 2007, the BCC issued the decision challenged in this appeal, which affirms the planning commission decision approving the minor nonconforming use review. The May 2, 2007 decision concluded that a number of issues that the opponents raised at the February 21, 2007 hearing had been "waived" by failure to raise those issues in earlier proceedings or by failure to appeal earlier decisions. The BCC generally declined to revisit any of its determinations made in the December 5, 2005 order affirming the planning commission's initial decision on the building permit, but incorporated that order into the challenged decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The first assignment of error challenges the nonconforming use verification for the second-floor residential use. As noted, the BCC found that the second-floor residential use is a permitted use in the COS and C-1 zones, but was nonconforming because TCLUO 4.030(13)(a) requires two off-street parking spaces and none are provided.

Petitioners argue, however, that the residential use is "unlawful," because the nature of the residential use changed in 1987, without complying with the off-site parking space requirement, as required under the ordinance in effect in 1987. As noted above, the COS and C-1 zones allow as a permitted use a "[d]welling unit or units accessory to an active commercial use, located above the first story." TCLUO 3.312(2)(i). Petitioners contend that

occupation of a second-floor residential unit under TCLUO 3.312(2)(i) is limited to the owner or an employee of the "active commercial use" on the first floor. Occupation of the dwelling by other persons is not permitted, petitioners argue. Petitioners note that between 1980 to 1986 the second floor residence was rented to a tenant who had no connection with the tavern. Petitioners contend that in 1987 when the owners the Brousseaus moved into the second floor residence, a "change" in the use occurred that triggered the obligation to comply with the off-street parking requirements, under the then applicable zoning ordinance. Because no such compliance occurred, petitioners argue, the second floor residential use became "unlawful" in 1987, and therefore the county has no basis to authorize an alteration of that unlawful nonconforming use.

As intervenors note, the premise to petitioners' argument is that the "[d]welling unit or units accessory to an active commercial use" permitted under TCLUO 3.312(2)(i) may only be occupied by the owner or employees of the commercial use. The BCC adopted an interpretation to the contrary.[5] Petitioners do not acknowledge that interpretation, or explain why it is reversible under the somewhat deferential standard of review we must apply to a governing body's interpretation of a local land use regulations. ORS 197.829(1); *Church v.*

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[5] The BCC's findings state, in relevant part:

> "The opponents argue that the term 'dwelling unit' in TCLUO 3.312(2)(i) does not include rental occupancy. Rather, the opponents believe that the owner of the primary use must reside in the residence located on the second floor. According to opponents, by renting the residence out between 1980 and 1986, the Brousseaus' use of the residence from 1986 to 1989 triggered a 'change in use,' and made residential use without two parking spaces illegal. Apparently, the opponents believe that [Ms.] Brousseau's failure to obtain a non-conforming use permit (and her subsequent alleged illegal use of the second floor) should be used as a fact that bodes against the current owner.
>
> "However, there is simply no support in the code for the opponents' interpretation. The [BCC] interprets TCLUO 3.312(2)(i) as follows: the use of a residence as a rental unit constitutes a 'dwelling unit or units accessory to an active commercial use, located above the first story,' even if the tenants residing in the residence have no connection to the active commercial use. The use of the word 'accessory' in this context does not mean 'related' or 'associated with,' as the opponents seem to argue. Rather, the term accessory means 'incidental and subordinate' to the established primary use. TCLUO 1.030 (definition of accessory)." Record 32-33.

Grant County, 187 Or App 518, 524, 69 P3d 759 (2003). We do not see that the BCC's interpretation is inconsistent with the text or context of TCLUO 3.312(2)(i).[6]

Accordingly, the first assignment of error is denied.[7]

SECOND ASSIGNMENT OF ERROR

As noted above, on remand from the BCC's initial December 7, 2005 decision, the planning commission conducted a hearing at which no public testimony was allowed, and in an order dated May 18, 2006, (1) determined that the second floor residential use required minor non-conforming use review, not major non-conforming use review, and (2) ordered the applicant to file a minor nonconforming use review application within 42 days. The May 18, 2006 order stated that it could be appealed to the BCC, but no appeal of that May 18, 2006 decision was filed.

Subsequently, intervenor filed a minor nonconforming use review application, which the planning commission approved on October 26, 2006. During the proceedings before the planning commission, petitioners argued that major rather than minor nonconforming use review was required.[8] Petitioners appealed the planning commission minor review approval

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[6] As intervenors note, TCLUO 3.312(2)(f) allows in the COS zone a "[s]ingle family residential structure for the owner of an active business on the same lot." *See* n 1. The BCC decision found that this context is significant, indicating that in drafting the COS zone the county knew how to expressly limit occupation of a dwelling to the owner of a commercial use, but chose not to impose such an express limitation under TCLUO 3.312(2)(i). Record 33. Petitioners do not challenge that finding, either.

[7] Near the end of the first assignment of error, petitioners argue, briefly, that intervenor "altered" the second floor residence in 2006, by converting one of the three rooms of the residence to an office for the motel use. The county found, and petitioners do not dispute, that the office use is a permitted accessory use to the motel. Record 42. However, petitioners argue that the resulting "alteration" in the residential use requires non-conforming use verification and review. We do not understand the argument. Even assuming that using one of the three residential rooms as an office is an "alteration" of the residential use, the county conducted a non-conforming use verification and review of the two-room residential use. *See, e.g.*, Record 46, 54 (discussing and approving a two-room residence under the minor nonconforming use review standards). If there is some error or inadequacy in that review stemming from the office conversion, petitioners do not explain what it is. We also note that the county rejected a similar argument petitioners made below, that conversion of the office triggers non-conforming use review of the restaurant use. Record 42.

[8] Major nonconforming use review requires compliance with minor review standards, plus one of two additional standards. TCLUO 7.020(12)(1) allows the county to approve a major review for a proposed alteration/expansion of a nonconforming use, where:

to the BCC, and raised the major versus minor review issue in the notice of appeal. The BCC rejected that argument, concluding that it is a collateral attack on the unappealed and final May 18, 2006 order. In the alternative, the BCC adopted findings that it is "manifestly obvious" that the residential use would comply with the additional major nonconforming use review standards.[9]

"(a) The alteration/expansion meets the Minor Review criteria; and

"(b) Either:

"(i) The nonconforming structure or use, including the proposed alteration/expansion, is consistent with the purposes of relevant development standards as enumerated in Section 4.005 and preserves the rights of neighboring property owners to use and enjoy their land for legal purposes; or

"(ii) The applicant demonstrates that bringing the structure or use into compliance is either physically impracticable or financially onerous, and that mitigation will be implemented and maintained which will substantially offset the impact(s) to neighboring property owners."

[9] The BCC findings state, in relevant part:

"In accepting the case back on remand, the Planning Commission first determined that the minor review process was the applicable process for this case. The Planning Commission issued a written order on May 18, 2006. The Planning Staff mailed that Order to the parties. The Order clearly set forth appeal rights, and provided notice that such an appeal would be required to preserve error on that issue. None of the parties to the proceeding appealed the Order to the [BCC].

"Despite this omission, the opponents continued to argue that the major review process was the correct process under the facts of this case, and alleged that the Planning Commission erred by not holding a public hearing on the matter. For its part, the applicant also continued to express concerns on this issue, and asked that the [BCC] hold a *de novo* hearing on the issue of whether the major review criteria should have been applied. The applicant apparently believed that it could easily meet the additional criteria associated with the major review (*i.e.*, that it would be physically impracticable or financially onerous to add two on-site parking spaces), and wished to simply reach the merits rather than argue over process. Despite these objections and concerns, the Board finds that the issue was waived by both parties.

"The [BCC] remanded the case to the Planning Commission and the Planning Commission made a final, appealable order on that issue. That Order was not appealed. TCLUO 10.030 states that '[a]n action or ruling of the Commission pursuant to this Ordinance may be appealed to the Board within 12 days after the Department's notification of the Commission's actions to the applicant.' This provision further states that if an appeal is not timely filed, 'the Commission's decision shall be final.' *Id.* The Board determines that the Planning

Under the second assignment of error, petitioners challenge, first, the BCC's determination that failure to appeal the planning commission's May 18, 2006 decision precludes any substantive or procedural challenge to that decision, in a subsequent appeal of the planning commission's October 26, 2006 order approving the minor review application.

Second, petitioners challenge the BCC's alternative conclusion that it is "manifestly obvious" that the applicant "could prove" compliance with the major nonconforming use review standards. According to petitioners, no evidentiary hearing was held addressing compliance with the major review standards.

Turning to the first issue, petitioners contend that the BCC erred in concluding that petitioners' failure to appeal the May 18, 2006 decision to the BCC as provided under the county's code precludes petitioners from challenging that decision before the BCC. According to petitioners, the May 18, 2006 decision was an intermediate or interlocutory decision in a larger, multi-step proceeding involving the issuance of the building permit, not a separate decision that must be appealed in order to preserve the right to challenge any errors in that decision. Petitioners argue that any such errors can be challenged in an appeal of a later, related decision in that larger, multi-step proceeding.

Alternatively, petitioners argue that the county cannot give preclusive effect to petitioners' failure to appeal the May 18, 2006 decision, because the county failed to provide

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> Commission's decision became final by virtue of the fact that no timely appeal was filed by either party. The failure to file an appeal is a jurisdictional defect, and so the [BCC] never obtained jurisdiction over this issue, and must accept the Planning Commission's decision on this point as final.
>
> "Nonetheless, the [BCC] believes it is manifestly obvious that the applicant could prove that adding two on-site parking spaces would be both physically impracticable and financially onerous. TCLUO 7.020(12). There is simply no room in the Anchor structure to add two additional parking spaces. Furthermore, the conditions of approval required by the Planning Commission in both this proceeding and in the 2004 CUP will substantially offset the impact of the missing two parking spaces on the neighboring property owners. Given that the applicant's application would easily pass muster under the major review criteria, the opponents' process-related arguments would ultimately be futile anyway." Record 35-36.

notice of the May 18, 2006 decision to petitioners' counsel, and therefore failed to provide petitioners with an opportunity to file a timely local appeal of that decision.

Intervenor responds that by its terms and pursuant to the county's code the May 18, 2006 decision could have been appealed to the BCC, and failure to do so precludes any party from challenging that decision, before the BCC or LUBA. In addition, intervenor notes that in response to intervenor's offer before the BCC to undergo major review if needed, petitioners' counsel objected that the May 18, 2006 decision was final and appealable and intervenor's failure to appeal that decision means that it is too late to argue that major review standards should apply.[10] Supplemental Record 27. Intervenor argues that petitioners' position is a judicial admission that the May 18, 2006 decision was appealable.

Further, intervenor disputes petitioners' view that the May 18, 2006 decision was an intermediate element in a larger proceeding. Intervenor contends that the May 18, 2006 decision did not force the applicant to file a minor review application; the applicant had the option of not filing a minor review application, in which case the BCC presumably would have denied the underlying building permit application. In that event, intervenor argues, the planning commission's "major versus minor" determination would have been the county's final pronouncement on that issue. Finally, intervenor disputes petitioners' alternative contention that the county failed to provide notice of the May 18, 2006 decision to petitioners' counsel.

As petitioners note, we have held in a number of cases that a decision on a land use application that (1) purports to be a final decision appealable to LUBA with respect to some

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[10] In a December 15, 2006 letter to the BCC, petitioners' counsel argued:

> "The applicant now complains that the proceedings before the Planning Commission should have been a major review and that there should have been a hearing on the determination of the type of hearing held. We note that the applicant had every opportunity to object to the procedure used to determine the type of hearing before that decision was made at that hearing itself. He did not do so. He could have appealed from the Planning Commission decision. He did not do so. It is now too late to raise this issue." Supplemental Record 27.

parts of the application but (2) remands other aspects of the application for further local decision making is not a "final" decision that may be appealed to LUBA. *Siporen v. City of Medford*, __ Or LUBA ___, LUBA No. 2006-124, September 7, 2007); *Bessling v. Douglas County*, 39 Or LUBA 177, 179-80 (2000); *Tylka v. Clackamas County*, 20 Or LUBA 296, 302 (1990). Indeed, in an earlier decision involving the present case, we held that the BCC's December 7, 2005 decision was not a final decision appealable to LUBA, because the decision remanded the underlying planning commission decision back to the planning commission to resolve the question of whether the residential use component of the proposed use required minor or major nonconforming use review. *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546 (2006).

However, all of the above cases concerned whether a decision by the highest local decision-maker is "final" for purposes of appeal to LUBA. In our view, the present circumstances concern different principles, that of exhaustion of remedies, and collateral attack on a decision that could have been appealed to the county's highest decision maker, but was not. ORS 197.825(2)(a) limits the Board's jurisdiction to "those cases in which the petitioner has exhausted all remedies available by right" before appealing to LUBA. Petitioners do not challenge the county's determination that, under the county's code, an appeal of the planning commission's May 18, 2006 order was "available," or the interpretation that under the code the BCC lacked jurisdiction to consider any challenges to the unappealed May 18, 2006 order. Indeed, as intervenor notes, petitioners took the position below that intervenor's failure to appeal the May 18, 2006 decision to the BCC precluded intervenor from challenging that decision.

In our view, where the local code makes available an appeal of a lower body's decision to a higher local decision maker, the ORS 197.825(2)(a) exhaustion principle requires that a petitioner exhaust that available local remedy, even if the lower body's decision is part of a larger, multi-step and procedurally complex proceeding, as in the present

case. As a corollary, the petitioner cannot *instead of* filing a local appeal of that lower body's decision attempt to challenge the decision in an appeal of a later, related decision in that larger, multi-step proceeding. *See Jones v. Lane County*, 28 Or LUBA 193, 204 (1994) (where the petitioner submits applications for mobile home permits instead of filing a local appeal of a decision imposing civil penalties for placement of unauthorized mobile homes, LUBA does not have jurisdiction to consider petitioner's challenges to the civil penalty decision, in the context of an appeal of the decision denying the mobile home permit applications). Accordingly, we agree with the county and intervenor that we lack jurisdiction to address petitioners' challenges to the May 18, 2006 order, and the BCC did not err in concluding that petitioners' failure to appeal the planning commission's May 18, 2006 decision precludes petitioners from challenging that decision before the BCC. Whether the May 18, 2006 decision was right or wrong, the planning commission's unappealed determination that the proposed residential use requires minor and not major nonconforming use review .[11]

With respect to petitioners' argument that the county failed to provide notice of the May 18, 2006 order to petitioners' counsel, intervenor cites to notices in the record indicating that the county mailed notice of the planning commission hearing and the planning commission decision to both of petitioners' co-counsel. Record 838, 843, 848, 924. We agree with intervenor that petitioners' allegations on this point appear to be unfounded.

[11] The planning commission may well have been wrong on that point. The planning commission decision does not explain the basis for its conclusion that minor rather than major nonconforming use review is applicable. Notably, neither the BCC decision nor intervenor attempts to defend that conclusion. Petitioners argue that TCLUO 7.020(4) makes it clear that major nonconforming use review is required. TCLUO 7.020(4) provides that alteration of a structure devoted to a nonconforming use that exceeds the 100 percent market value threshold as defined in TCLUO 7.020(1)(h) requires major review. We need not address or resolve that issue, but note that it is a plausible argument and one that is likely to arise on remand under the third assignment of error below, with respect to nonconforming use review of the first floor tavern expansion/alteration.

Because we reject petitioners' challenge to the county's primary conclusion, we need not address petitioners' challenges to the county's alternative finding that the applicant "could prove" compliance with the major nonconforming use review standards.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under the third assignment of error, petitioners argue that the county erred in failing to require a nonconforming use verification for the first floor tavern/restaurant expansion and remodel, pursuant to TCLUO 7.020. As noted above, the tavern/restaurant is a permitted use in the COS zone, but like the residence it is nonconforming with respect to offsite parking requirements. According to petitioners, the building permit proposed and the county approved expanding and remodeling the first floor, and therefore the expansion and alteration of the tavern/restaurant use requires nonconforming use review.

The BCC's findings set out four reasons why the county was not required to conduct a nonconforming use verification for the first floor tavern/restaurant remodel, in the context of rendering the challenged building permit decision. Three of those reasons involve waiver of one type or another. Specifically, the county found that (1) the county limited the issues on appeal of the building permit to those raised before the planning commission, and petitioners failed to raise this issue before the planning commission; (2) petitioners' attorney affirmatively waived any issue regarding the first floor at the planning commission public hearing on June 9, 2005; and (3) this issue could have been raised, but was not, during the proceedings on the 2004 CUP, because the plan submitted in that proceeding proposed expanding and remodeling the first floor tavern/restaurant.[12]

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[12] On the last point, the BCC found, in relevant part:

> "* * * All parties to a quasi-judicial land use proceeding have the obligation to raise any issue that could properly be adjudicated as part of that proceeding. The [BCC] interprets its code as follows: issues related to a non-conforming aspect of a use, under TCLUO 7.020, are relevant to a CUP proceeding being adjudicated under Article VI of the code. Thus, had the

Finally, the BCC addressed the merits and concluded that no nonconforming use review was required because the expansion and remodel of the first floor, as proposed both in the 2004 CUP proceedings and the building permit application, was justified in order to comply with ADA requirements. The BCC found that expansions or alterations necessary to comply with ADA requirements are not subject to nonconforming use review, pursuant to TCLUO 7.020(10).[13]

Petitioners challenge each of those four reasons for concluding that the issue is waived or that no nonconforming use review is required for the first floor expansion and remodel.

A. Issues Raised Before the Planning Commission

The BCC found that the issue of whether the alterations to the first floor required nonconforming use review was waived, because the BCC limited the issues on appeal of the planning commission's July 14, 2005 decision approving the building permit to issues raised before the planning commission, and petitioners failed to raise that issue before the planning commission. Record 36, 39.

> opponents come forward at the CUP proceeding with the issue of whether the first-floor tavern use is non-conforming due to the lack of parking, the Board finds that the Planning Commission would have been obligated under the code to hear that issue. The lack of notice regarding the non-conforming use issue may have been relevant had that issue been appealed in a timely manner. However, any prejudice to the opponents is now far outweighed by the prejudice to the applicant were the matter to be reheard at this time."
>
> "* * * * *
>
> "None of the opponents made an issue over that first floor remodel or the ADA-related expansion during the 2004 CUP proceedings. Even so, the [BCC] has previously ruled [in the December 6, 2005 decision] that the expansions and alterations to the first floor are exempt from non-conforming use review because they were done for the purposes of complying with the ADA, and stands by that ruling. TCLUO 7.020(10)." Record 36-37.

[13] TLCUO 7.020(10) provides:

> "Notwithstanding the provisions of this section, alteration or expansion of a NONCONFORMING USE OR STRUCTURE shall be allowed if necessary to comply with any lawful requirement."

Petitioners argue that they raised the issue both before the planning commission and in their notice of appeal to the BCC. In the reply brief, petitioners cite to a transcript of the June 9, 2005 planning commission hearing, at Transcript pages 196-97, 208, where their attorney argued that the tavern use is a nonconforming use and requires nonconforming use review.[14] Petitioners appear to be correct that they raised the issue of whether the alterations to the first floor tavern use required nonconforming use review at the June 9, 2005 planning commission hearing. Accordingly, the county erred in concluding to the contrary.

B. Affirmative Waiver

The county also found that petitioners' attorney "affirmatively waived" the issue of nonconforming use review for the first floor remodel, citing *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369, *modified* 94 Or App 33, 764 P2d 927 (1988). The apparent basis for that conclusion, intervenor argues, is a statement by petitioners' counsel before the planning commission that "[n]obody's saying the Anchor Tavern has to go away. We think the Anchor Tavern is entitled to stay." Transcript 208.

Petitioners argue, and we agree, that the above-quoted statement falls far short of affirmatively waiving the issue of whether the remodel to the first floor tavern use requires nonconforming use review. A statement that the tavern use does not have to "go away" says nothing about whether the remodel requires nonconforming use review. Indeed, in the next paragraph of the testimony intervenor cites to, petitioners' counsel repeats his argument that the first floor remodel requires nonconforming use review. *Id*. The county erred in concluding that petitioners had affirmatively waived this issue.

C. Failure to Appeal the 2004 CUP

The BCC also concluded that the issue of whether expansion of the first floor requires nonconforming use review could have been raised during the 2004 CUP proceedings or made

[14] Transcripts of the various county proceedings are collected in a separate binder from the record and paginated separately.

the subject of an appeal of that decision, and therefore petitioners failure to raise that issue or appeal the 2004 decision precludes them from raising it in an appeal of the building permit to expand and remodel the first floor. [15]

As the county found, the 2004 CUP application included a set of site plans that showed the elevations of the proposed three story structure, typical room layouts for the second and third floor motel units, as well as a remodeling plan of first floor, a copy of which is found at Record 2685. Further, the application narrative discusses, briefly, the proposed expansion of the first floor to the north, explaining that the expansion is required to provide additional space to construct bathrooms that comply with ADA requirements. Record 2889. The narrative does not discuss the other remodeling features depicted on the site plan, such as the expanded kitchen area or the new lottery games area.

Petitioners argue that the CUP application sought *conditional use* approval of the second and third floor motel units, and the off-site parking lot, and did not seek approval of the first floor expansion/alteration, which did not require *conditional use* review. Further, petitioners note that none of the notices the county provided for the 2004 proceedings mentioned the first floor remodel, and nothing in the staff report or the planning commission's 2004 decision mentions or purports to authorize expanding or remodeling the first floor. Therefore, petitioners argue, there is no basis to conclude that the 2004 CUP decision approved the first floor expansion/alteration or that petitioners otherwise waived the

[15] The BCC found, in relevant part:

> "Finally, with regard to the merits of this issue, the Planning Commission clarified at the June 10, 2005 public hearing that the 2004 CUP proceeding encompassed the expansion of the first floor. As discussed above, the CUP application clearly discusses the expansion of the first floor tavern/restaurant use. Staff testimony at the Sept. 14th public hearing noted that the expansion was needed for ADA purposes. The code allows expansion needed for ADA compliance without bringing the non-conforming aspects of the use 'up to code.' *See* TCLUO 7.020(10). Thus, the opponents' appeal is denied on this issue." Record 37.

issue of whether the first floor expansion/alteration proposed in the 2005 building permit application require nonconforming use review.

Intervenor responds that petitioners do not challenge the county's interpretation that the issue of nonconforming use review for the first floor could have been raised in the 2004 CUP proceedings and, if raised, the planning commission would have been obligated to address that issue. *See* finding quoted at n 12. While petitioners do not directly challenge that interpretation, we do not see that the interpretation assists the county much. First, it addresses only the physical *expansion* of the first floor to the north, not interior alterations proposed in the 2004 plan or the 2005 building permit plan. Second, even if the issue of nonconforming use review could have been raised and, if raised, the planning commission would have been obligated to address that issue, it does not follow that that issue cannot be raised in the building permit proceeding. Had the issue been raised and addressed in the 2004 proceeding, the planning commission might well have concluded that the CUP application does not seek authorization of the first floor expansion/alteration of the tavern use, and the proper time and place to raise and address that issue is when the applicant files a building permit application proposing to expand and remodel the first floor.

As a general matter, local land use proceedings do not necessarily have the same preclusive and final effect of judicial proceedings where claim and issue preclusion are applied. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 518-19 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002). In our view, to give preclusive effect to an earlier unappealed land use decision and thus bar raising issues in a subsequent decision on a related, but separate permit proceeding, the issue must concern particular development that was proposed, considered and approved in the earlier unappealed decision. Here, in relevant part the 2004 CUP application sought only conditional use approval for the second and third floor construction. The applicant did not request planning commission approval for the first floor expansion/alteration, the staff report and the planning commission apparently did not

consider whether to approve the first floor expansion/alteration, and the planning commission's decision makes absolutely no mention of it. As far as we can tell, the first and only time the applicant sought county approval to expand and remodel the first floor was in filing the building permit application.

Further, even if the 2004 decision implicitly approved the expansion/alteration depicted in the 2004 plan of the first floor, or otherwise precludes petitioners from challenging first floor construction as proposed in the 2004 plans, petitioners argue and we agree that the building plans submitted for the building permit differ significantly from the 2004 site plan. Petitioners contend that the 2005 building permit plan appears to propose a larger expansion to the north and east than the expansion depicted in the 2004 plan. Further, the interior alterations differ significantly. The 2004 first floor plan proposed two bathrooms in the south-center portion of the structure, and what appears to be a lottery games area in the northwest. The 2004 plan retains the existing U-shaped bar counter in the center of the structure and expands an open seating area in the south end of the structure. Record 1949 (existing), 1950 (proposed). However, the 2005 building permit plan relocates the bathrooms to the northwest corner and the lottery games area to the southeast portion, relocates the bar from the center of the structure to the south end, and converts it to a linear bar, and relocates the restaurant seating area from the south end to the center, among other changes. *See, e.g.,* Oversize Exhibit K1. Neither the county nor intervenor attempt to explain why failure to appeal the 2004 CUP precludes petitioners from arguing that these additional or significantly different interior alterations trigger the requirement for nonconforming use review.

D. Necessary to Comply with ADA Requirements

Finally, citing TCLUO 7.020(10), the county concluded that the proposed expansion of the first floor is permitted notwithstanding the requirement for nonconforming use review. As noted, TCLUO 7.020(10) provides that "alteration or expansion of a

NONCONFORMING USE OR STRUCTURE shall be allowed if necessary to comply with any lawful requirement."

Petitioners argue that TCLUO 7.020 *allows* expansions or alterations that are necessary to comply with ADA requirements, but does not exempt proposed expansions or alterations from nonconforming use *review*. According to petitioners, proposed expansions or alterations based on ADA requirements must still undergo nonconforming use review, which will entail establishing the lawful existence, continuity, nature and extent of the nonconforming use. As part of that review, we understand petitioners to argue, the county may *approve* any proposed expansions or alterations that the county concludes are necessary to comply with lawful requirements, notwithstanding that such proposed expansions or alterations do not comply with the criteria that apply to expansions or alterations of nonconforming uses, such as the "no greater adverse impact" standard. But petitioners contend that TCLUO 7.020 does not exempt such proposed expansions or alterations from nonconforming use review, or purport to allow the county to approve expansions and alterations that are not necessary to comply with ADA requirements without applying the nonconforming use criteria.

On that latter point, petitioners argue that the expansions and alterations proposed in the 2005 building permit plans exceed anything required by the ADA. Nothing in the ADA, petitioners argue, requires a remodeled and relocated bar area, a lottery games area, or an expanded kitchen area. Petitioners also cite to testimony by their expert that the existing bathrooms in the old tavern appear to have been large enough to make them compliant with ADA requirements without expanding the remainder of the first floor, and argues that there was no need to remodel the entire first floor in order to construct ADA compliant bathrooms.

We agree with petitioners that TCLUO 7.020(10) does not appear to operate as a wholesale exemption from review under TCLUO 7.020. Rather, it provides that expansions or alterations that are necessary to comply with any lawful requirement are "allowed,"

notwithstanding the provisions of TCLUO 7.020. More importantly, TCLUO 7.020(10) does not purport to allow expansions or alterations that are in fact *not* necessary to comply with a lawful requirement, merely because some other expansion or some other alteration that is necessary to comply with a lawful requirement is proposed at the same time. Under the county's apparent view, adding an ADA required ramp to a structure would also allow that structure to be significantly expanded, without any nonconforming use review or determination of whether the expansion complies with review criteria, such as the minor nonconforming use review standard that the proposed expansion or alteration "have no greater adverse impact on neighboring areas." Intervenor does not explain why that apparent view is consistent with TCLUO 7.020, and we do not see that it is.

That said, intervenor argues, and we agree, that the county properly rejected petitioners' argument that no expansion or alteration *at all* was necessary to convert the existing bathrooms to ADA compliant condition. The county relied on testimony from the applicant that expansion to the north and relocation of the bathrooms was necessary to get direct access to the bathrooms, to comply with ADA requirements. Record 40. Petitioners do not challenge that finding, and their expert testimony does not address that point.

In sum, remand is necessary for the county to (1) conduct a nonconforming use review of the first floor expansion/alterations proposed in the 2005 building plans, (2) determine which expansions or alterations are "necessary to comply with" ADA requirements, and (3) apply the appropriate nonconforming use review standards to any expansion or alteration that is not necessary to comply with ADA standards.[16]

The third assignment of error is sustained, in part.

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[16] We note that the 2005 building plan includes several features that are marked with ADA references, including the main entrance, the bathrooms, video poker seating, and a portion of the bar with low counter height. *Id.* It seems likely that at least those aspects of the interior remodel are required by ADA standards.

FOURTH ASSIGNMENT OF ERROR

TCLUO 3.312(2) states that in the COS zone "commercial uses and their accessory buildings and uses are permitted in a building or buildings not exceeding 4,000 square feet of floor space." *See* n 1. Apparently, the three-story structure approved under the building permit has 4,353 square feet of floor space. Petitioners argue therefore that the structure cannot be used to house any use permitted in the COS zone.

The county found, first, that petitioners affirmatively waived this issue by raising it at the initial planning commission hearing, but failing to raise it in the notice of appeal to the BCC, or in pre-hearing memoranda, and finally raising the issue again only at the hearing before the BCC. The county concluded that this course of conduct led the applicant to believe that the issue had been abandoned.[17] In the alternative, the county interpreted TCLUO 3.312(2)'s 4,000 square foot limitation to apply to structures that only house permitted commercial uses and accessory uses, not structures that also house conditional uses, to which no maximum square footage limit applies.

Petitioners dispute that the 4,000 square foot issue was affirmatively waived or abandoned. On the merits, petitioners argue that the square footage limitation applies to the

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[17] The county findings state, in relevant part:

> "The 4000 s.f. building size issue was originally raised in the opponents' February 14, 2005 Notice of Appeal to the Planning Commission. The Planning Commission heard oral argument on the issue on June 10, 2005, but did not address the issue in its Order dated July 21, 2005. The opponents did not appeal that issue in their Notice of Appeal to the [BCC], nor did they discuss the issue in their 'Pre-Hearing Memorandum' filed with the Board on September 15, 2005. The issue was again not raised at the public hearing held on September 19, 2005. As such, that issue must be considered to have been abandoned. *Newcomer v. Clackamas County*, 92 Or App 174 (A party may not lure another party into an abbreviated presentation through the pretense of abandoning an issue). In this regard, note that the applicant specifically noted in his Hearings Memorandum that 'the opponents gave up on the argument that structure exceeds the 4000 s.f. limitation set forth in TCLUO 3.312(2).
>
> "Finally, on the merits, the Board interprets the 4000 s.f. limitation in TCLUO 3.312(2) as being a limitation on the size of the use sought to be permitted outright or its 'accessory building or uses,' and not a limitation on the overall size of the structure containing both a use permitted outright and another conditional use such as a motel." Record 38.

structure, not the use, and it plainly prohibits any permitted commercial use, such as the tavern/restaurant, in any structure that exceeds 4,000 square feet of floor space.

We need not resolve whether petitioners affirmatively waived the issue of the 4,000 square foot limitation, because we agree with intervenor that petitioners have not established that the county's interpretation of TCLUO 3.312(2)—that it does not apply to commercial structures housing both permitted uses and conditional uses—is reversible under ORS 197.829(1). As intervenor notes, TCLUO 3.312(4)(j) imposes an 8,000-square foot size limitation on "commercial buildings."[18] Intervenor argues that code thus allows conditional uses, such as a hotel with up to 35 units, in commercial buildings up to 8,000 square feet in size. According to intervenor, the code imposes a 4,000 square foot limitation on outright permitted uses but an 8,000 square foot limitation on conditional uses because that the former are not subject to the same type of rigorous conditional use "compatibility" evaluation as the latter. Intervenor argues that the intent of TCLUO 3.312(2) is to limit the size of permitted commercial uses, not the size of structures that house both permitted and conditional uses.

The relevant code sections are silent as to what limits apply to a structure that houses both permitted uses and conditional uses. While petitioner's preferred interpretation of TCLUO 3.312(2) is reasonable and the BCC might well have adopted it, we cannot say that the BCC's contrary interpretation is inconsistent with the relevant text, construed in context. Accordingly, we must affirm that interpretation. ORS 197.829(1)(a).

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[18] TCLUO 3.312(4) provides, in relevant part:

> "STANDARDS: Land divisions and development in the COS zone shall conform to the following standards, unless more restrictive supplemental regulations apply:
>
> "* * * * *
>
> "(j) A commercial building shall not exceed 8000 square feet, motels are exempt from this limit."

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

TCLUO 7.020(5)(a) provides that "if a nonconforming structure is replaced, the new structure shall conform to the current requirements of this ordinance." TCLUO 7.020(1)(g) defines "replacement of a structure" as a "[r]emoval that exceeds 80 percent of an existing structure and placement of a new structure." Citing to photographs in the record, petitioners argue that during construction of the present three-story building more than 80 percent of the existing structure was removed. Therefore, petitioners argue, TCLUO 7.020(5)(a) mandates that the structure conform to the current requirements of the ordinance, specifically provision of the required off-street parking spaces.

The county found that petitioners waived this issue by not raising it in their notice of appeal to the planning commission. On the merits, the county relied on evidence submitted by the applicant's engineer to conclude that less than 80 percent of the existing structure was removed. The county also adopted two alternative findings. First, the county concluded that TCLUO 7.020(5)(a) applies only to nonconforming *structures*, and as the code defines the relevant terms, the tavern and residence are nonconforming *uses* with respect to the off-street parking requirement. Second, the county concluded that even if TCLUO 7.020(5)(a) applies and more than 80 percent of the existing structure was removed, the 80 percent threshold does not apply to the first floor remodel because that remodel was necessary to comply with the ADA.

Petitioners challenge the county's assertion of waiver, and the county's reliance on the applicant's engineer, and further dispute the county's view that the existing structure is not a nonconforming structure, within the meaning of TCLUO 7.020(5)(a).

We need not resolve the waiver issue, as we agree with intervenor that the evidence the county relied upon to conclude that less than 80 percent of the structure was removed is substantial evidence. Petitioners' critique of that evidence falls short of demonstrating that

no reasonable decision maker could rely on it. In addition, we agree with intervenor that the BCC's interpretation that it is the tavern and residential uses that are nonconforming, not the existing structure, and that TCLUO 7.020(5)(a) does not apply to nonconforming uses, is not reversible. As intervenor points out, the off-street parking requirements at TCLUO 4.030(13) are clearly linked to the various types of uses, not the structure itself. The number of required parking spots differs, depending on the specific use involved and the size of that use.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Under the sixth assignment of error, petitioners challenge the county's conclusion that the second floor two-room residential use "will have no greater adverse impact on neighboring areas than the existing use or structure," under the factors set forth in TCLUO 7.020(11)(1).[19]

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[19] TCLUO 7.020(11)(1) allows a nonconforming use to be altered or expanded, if the county finds:

> "The request will have no greater adverse impact on neighboring areas than the existing use or structure when the current zoning went into effect, considering:
>
> "(A) A comparison of existing use or structure with the proposed change using the following factors:
>
> "(1) Noise, vibration, dust, odor, fumes, glare, or smoke detectable at the property line or off-site;
>
> "(2) Numbers and kinds of vehicular trips to the site;
>
> "(3) Amount and nature of outside storage, loading and parking;
>
> "(4) Visual impact;
>
> "(5) Hours of operation;
>
> "(6) Effect on existing vegetation;
>
> "(7) Effect on water drainage and water quality;
>
> "(8) Service or other benefit to the use or structure provides to the area; and

Petitioners first allege two overarching errors regarding the TCLUO 7.020(11) factors. Petitioners contend that the county erred in confining its minor nonconforming use review solely to the alteration of the second story residential use, and by not analyzing either the tavern/restaurant use or the non-conforming structure itself. Petitioners also argue that the county erred in finding that some of the TCLUO 7.020(11) factors are not relevant in evaluating the impacts of a nonconforming residential use on neighboring residential areas, because "one residence is essentially equal to another residence" in terms of impacts created.[20] Petitioners contend that the "no greater adverse impact" standard implements ORS 215.130(5) and (9) and represents a statutory hostility to nonconforming uses and alterations to such uses that increase adverse impacts. Nothing in the code or statute, we understand petitioners to argue, allows a nonconforming residential use to be altered to increase adverse impacts, merely because the "neighboring area" is also residential.

We remanded the decision under the third assignment of error, above, to require the county to evaluate the first floor tavern expansion/alteration under the applicable

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"(9) Other factors relating to conflicts or incompatibility with the character or needs of the area.

"(B) The character and history of the use and of development in the surrounding area."

[20] The BCC findings explain, in a prefatory or "overview" section:

"In considering the criteria set forth in the code for a minor review, it becomes clear that the criteria were intended to judge a broad variety of land uses, including commercial and industrial uses. As such, the [BCC] finds that some of the criteria are simply not relevant to an evaluation of a residence, because one residence is essentially equal to another residence in terms of the amount of 'impact' it creates. For example, the 'hours of operation' is not germane to a residence because all residences are presumed to be used 24 hours a day. So one could not say that one residence has 'longer' hours of operation (and hence, additional impact) than any other residence. The issue of 'noise, vibration, dust, odor, etc.' is also not a particularly relevant criterion because all residences are presumed to have similar impacts and neighbors must generally accept those impacts as a part of urban life. * * *

"So, in reviewing these criteria, the [BCC] determines that some of these criteria are either not applicable in the context of a residence or, as an alternative, are met in this case by virtue of the fact that residences are presumed to have similar and acceptable impacts on one another." Record 43.

nonconforming use standards. Petitioners' arguments under this assignment of error add nothing to that disposition. Under the fourth assignment of error, we rejected petitioners' challenge to the county's finding that the structure itself is conforming. Accordingly, we confine our analysis under this assignment of error to petitioners' challenges to the county's findings that the alterations to the second-floor residential use comply with TCLUO 7.020(11).

Turning first to the finding that some TCLUO 7.020(11) factors are either irrelevant when evaluating the impacts of a residential use on neighboring residential uses, or are met by virtue of the equivalency between residential uses, we note that that finding occurs in an "overview" section the prefaces the county's findings addressing the minor review factors. The county in fact adopted extensive findings evaluating each of the factors, examined each of the alleged impacts, and concluded in general and with respect to each factor that the altered residential use has "no greater adverse impact on neighboring areas" than the existing residential use. Record 43-53. Thus, whatever the "overview" might suggest, the county did not actually find that any factor is "irrelevant," or decline to consider any factor.

We generally agree with petitioners that the county may have erred to the extent it interpreted the "no greater adverse impact" standard to allow a nonconforming residential use to be altered to increase adverse impacts, merely because the "neighboring area" is also residential. However, petitioners have not established that any such interpretative error warrants reversal or remand in the present case. First, as noted above, the county adopted extensive findings that address each factor and conclude that there is no increase in adverse impacts. Petitioners identify no findings addressing any factor in which the county concluded that the factor was met based on some kind of "residential uses cannot impact residential uses" rationale. To the extent such reasoning is present in the findings addressing

any factor, it appears as an alternative basis that is at most harmless error if the primary basis is affirmed.[21]

Turning to the challenges to the findings addressing each factor, we see no point in addressing petitioners' arguments in detail. Some of those challenges relate to structural components or uses that were approved as part of the 2004 CUP, or relate to the tavern/restaurant use, which the county must address on remand. Others simply argue that the opponents' evidence should be believed over the evidence the county chose to rely upon. For example, petitioners challenge the county's findings regarding alleged increased impacts from the relocated second floor exterior door on the east side of the structure, that serves both the residential use and the motel use. The county found that there was no substantial evidence that the new exterior door creates more noise at the property line than the previous exterior door, and noted further that the exterior door location was approved in the 2004 CUP.[22] Further, the findings note that the door to the residential unit is actually located on

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[21] For example, after explaining why the new door to the residential unit causes no increased noise impacts on the neighborhood compared to the old door, the county found, apparently as an alternative, that the sound of doors opening and closing are not "impacts" within the meaning of the minor review criteria, but rather simply "one of the many aspects generally associated with life in an urban residential zone." Record 45 (quoted below in n 22).

[22] The BCC findings state, in relevant part:

> "The opponents argue that the doors to the residence will make more noise when they open and close. * * * The Board finds that the opponents' testimony is unconclusive, as they have not demonstrated that the noise of the door opening and shutting is detectable at the property line, or that it is of such a nature and extent as to constitute an 'impact'—particularly one that is atypical in the COS zone.
>
> "Furthermore, the door to the residence is now located inside the hallway of the structure, where it likely cannot be heard from the outside. The exterior door to which [opponents refer] was approved as part of the motel use in 2004. * * * Moreover, the door has simply been moved from the North side of the building to the [east] side of the building, so there is no *increase* in impact—merely a change in the direction of the alleged impact. * * *
>
> "The Board finds that noise associated with doors opening and closing is not an 'impact' within the meaning of the minor review criteria, particularly where, as here, the underlying use (a residence) is a permitted use in the COS zone. Rather than constituting an impact, noise from doors is simply one of the many aspects generally associated with life in an urban residential zone. * * *" Record 44-45 (emphasis in original).

an interior hallway. Petitioners argue that the new location of the exterior door causes increased impacts, without acknowledging the finding that the exterior door location was approved in the 2004 CUP, and that the new door to the residential unit is actually inside the structure, unlike the old residential door.

Petitioners' other challenges to the county's remaining findings regarding the residential use suffer from similar flaws, and we reject them without further discussion.

The sixth assignment of error is denied.

The county's decision is remanded.