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

THE HOME DEPOT, INC.,
Petitioner,

vs.

CITY OF WILSONVILLE,
Respondent.

LUBA Nos. 2024-029/033

FINAL OPINION
AND ORDER

Appeal from City of Wilsonville.

J. Kenneth Katzaroff filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Schwabe, Williamson & Wyatt, P.C.

Amanda Guile-Hinman filed the respondent's brief and argued on behalf of respondent.

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

RUDD, Board Member, did not participate in the decision.

AFFIRMED 10/01/2024

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

In these consolidated appeals, petitioner challenges a city council decision verifying and determining the nature and extent of a nonconforming use and a subsequent city council decision that petitioner's proposed use is not a continuation of the verified nonconforming use.

BACKGROUND

The subject property is approximately 15 acres and developed with a 159,400-square-foot building (the building). The property is within the Wilsonville Town Center. In 1991, the subject property was zoned Planned Development Commercial with a primary use designation of Central Commercial. In 1991, the city approved the building and retail use of the building as part of a larger development (the 1991 approval). The building was used by Fry's Electronics as an electronics store from 1991 to 2021, when that use ceased. The building is currently vacant.

In 2019, the city adopted a new Town Center Plan and rezoned the subject property to Town Center (TC) within the Commercial-Mixed Use (C-MU), Mixed Use (MU), and Main Street (MSD) subdistricts. The majority of the subject property, including the building site, is within the C-MU subdistrict. Permitted uses within the TC zone include "[r]etail sales and service of retail products, under a footprint of 30,000 square feet per use." Wilsonville Code (WC) 4.132(.02)(F). The building exceeds the 30,000-square-foot footprint

limitation for retail uses in the TC zone. The parties agree that the use of the subject property became nonconforming on June 5, 2019, when the new zoning went into effect.

Petitioner sought from the city (1) verification of the nature and extent of the nonconforming use and (2) a determination that petitioner's home improvement warehouse retail use would be a continuation of the nonconforming use. The city bifurcated the issues and processed petitioner's application for the verification of the nonconforming use under a Class I review. At the city's direction, petitioner applied for a continuation determination, which the city processed under a Class II review. *See* WC 4.030(.01)(A)(7) (providing that the planning director is authorized to determine "that an existing use or structure is a non-conforming use or non-conforming structure, as defined in this Code" or choose to process such a determination through a Class II process).

In the Class I review, which sought to verify the nonconforming use, the planning director determined that Fry's Electronics is the legally established nonconforming use. LUBA No 2024-029 Record 1591.[1] Petitioner appealed the director's decision to the Development Review Board (DRB), which, after a public hearing, adopted a resolution determining that the nonconforming use at

[1] We consolidated these appeals after the records were transmitted and we did not order the city to transmit a consolidated record. We refer to the Class I record as LUBA No 2024-029 Record and the Class II record as LUBA No 2024-033 Record.

the subject property is "a 159,400 square-foot electronics-related retail store." LUBA No 2024-029 Record 2381-82 (DRB Resolution 429). Petitioner appealed DRB Resolution 429 and the city council affirmed that resolution. Petitioner seeks review of that decision. Petitioner agrees with the city's conclusion that a 159,400-square foot retail operation is a nonconforming use. However, as amplified below, petitioner objects to and challenges in this appeal the city's characterization and limitation on the type of retail use to only "electronics-related" products and services.

In the Class II review, which sought a city determination that petitioner's home improvement warehouse retail use would be a continuation of the nonconforming use, the planning director referred the application to the DRB. After a public hearing, the DRB adopted a resolution determining that petitioner's proposed use is not a continuation of the verified nonconforming use. LUBA No 2024-033 Record 1361-62 (DRB Resolution 432). Petitioner appealed that decision to the city council, which, after a hearing, affirmed that resolution. Petitioner seeks review of that decision. We consolidated the two appeals.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city misconstrued the applicable law. ORS 197.835(9)(a)(D). WC 4.001.196 defines a nonconforming use, in relevant part, as "[a] legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform." The WC further defines "use" as "[t]he purpose for which land or a building is arranged,

designed or intended, or for which either land or a building is or may be occupied." WC 4.001.344. "A non-conforming use may be continued subject to the requirements of this Section." WC 4.189(.01)(A). "A non-conforming use may not be changed unless the change or replacement is to a use that is determined by the Planning Director to be no less conforming to the regulations for the zone district in which the use is located than the existing use." WC 4.189(.02)(A).

Petitioner argued during the local proceeding, and it maintains on appeal, that the nature and extent of the nonconforming use is determined by the 1991 approval and the 1991 zoning code, which petitioner asserts did not differentiate between electronics-related retail stores and home improvement retail stores. The city disputes petitioner's characterization of the 1991 city code. As explained further below, we conclude that the city did not misconstrue its code by refusing to define the nature and extent of the nonconforming use by reference to the 1991 code. Accordingly, we need not and do not address the disputed characterization of the 1991 code.

The city council found that the 1991 approval and the 1991 zoning regulations were "irrelevant" to the city's decisions verifying the nature and extent of the nonconforming use and determining whether petitioner's proposed use is a continuation of the nonconforming use. LUBA No. 2024-029 Record 28. The city determined that the nature and extent of the nonconforming use is defined by the use at the time that it became nonconforming, which, in this

matter, was 2019. The city determined that, in 2019, the use was an electronics-related retail use. The city further determined that petitioner's use is not a continuation of the nonconforming use because petitioner had not satisfied its burden to establish that all of the aspects of petitioner's proposed home improvement retail use were part of the retail use in 2019. The city found that petitioner proposes to engage in activities that there is no evidence were part of the prior use, including (1) selling tools and construction products; (2) garden center construction, maintenance, and sales; (3) operations outside the existing building, including loading and a lumber pad; and (4) significant sales to contractors and home improvement professionals. LUBA No 2024-033 Record 86-88. Petitioner argues that the city council erred in concluding that the nature and extent of the nonconforming use is determined solely by the use that existed in 2019.

The parties dispute the applicable standard of review. We must defer to the city's interpretation of its own regulations if that interpretation is not "inconsistent with the express language of the comprehensive plan or land use regulation," inconsistent with the underlying purposes and policies of the plan or regulation, or contrary to a statute, land use goal, or rule that the comprehensive plan or regulation implements. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)). In order for that deferential standard to apply, the local government's interpretation must be

explicit or implicit in the challenged decision. *Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355 (2011).

> "[T]he plausibility determination under ORS 197.829(1) is not whether a local government's code interpretation best comports with principles of statutory construction. Rather, the issue is whether the local government's interpretation is plausible because it is not expressly *inconsistent* with the text of the code provision or with related policies that 'provide the basis for' or that are 'implemented' by the code provision, including any ordained statement of the specific purpose of the code provision at issue." *Kaplowitz v. Lane County*, 285 Or App 764, 775, 398 P3d 478 (2017) (emphasis in original).

LUBA does not defer to the governing body's interpretation of a local provision that implements and adopts state statutory language *Kenagy v. Benton County*, 115 Or App 131, 134-36, 838 P2d 1076, *rev den*, 315 Or 271 (1992).

Petitioner argues that the "applicable law" includes "state law governing the determination of a lawfully established nonconforming use of property and state and federal law governing takings claims." Petition for Review 17-18. Thus, according to petitioner, we do not defer to the city council's interpretation of the city code. Petition for Review 18-20 (quoting *Morgan v. Jackson County*, 290 Or App 111, 114, 414 P3d 917, *rev den*, 362 Or 860 (2018) ("To summarily prohibit a lawfully established use of land 'would constitute a taking without compensation.'" (quoting *Bergford v. Clack. Co./Trans. Serv.*, 15 Or App 362, 367, 515 P2d 1345 (1973))). Petitioner also argues that the city council did not interpret any city code provision in concluding that the 1991 approval and zoning regulations are irrelevant to the city's nonconforming use decision.

The right to continue a nonconforming use may, generally, have originated in state and federal constitutional property protections. However, petitioner does not identify any federal law that applies to the city's determination or interpretation of the WC. The city's nonconforming use regulations do not implement any state law. No state statute requires or authorizes *cities* to regulate nonconforming uses or permit nonconforming uses to continue. Moreover, as explained below, the city's interpretation of its code relies on and is consistent with case law implementing ORS 215.130, which governs nonconforming uses within *county* land use jurisdiction. Petitioner does not develop any argument that that ORS 215.130 and related case law are unconstitutional or that a different, more protective standard applies to city regulation of nonconforming uses.

The city responds, and we agree, that the city's decision implicitly interprets the WC provisions governing nonconforming uses. *See Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 267, 942 P2d 836 (1997), *rev dismissed as improvidently allowed*, 327 Or 555 (1998) (explaining that a reviewable interpretation may be "inherent in the way that [the local government] applied the standard"). We agree with the city that the city council interpreted its code in deciding the nonconforming use is defined by the use in 2019 and not 1991. If the city council's interpretations are plausible, then those interpretations are entitled to deference. *Kaplowitz*, 285 Or App at 774.

We conclude that the city council plausibly interpreted and applied its own code. Again, WC 4.001.196 defines a nonconforming use, in relevant part, as "[a]

legally established use, which was established prior to the adoption of the zoning use requirements for the site with which it does not conform." The city reasoned that a use is "legally established" with reference to the land use regulations applicable at the time that the use was established. There is no dispute that the use was initially legally established in 1991. The city reasoned that the nature and extent of the "use" is determined by the nature and extent of the use at the time that is becomes nonconforming. Thus, the city referred only to the "use" that existed in 2019, when the zoning changed for the subject property. This is consistent with the WC 4.001.344 definition of "use" as "[t]he purpose for which * * * a building is * * * occupied."

The city implicitly reasoned that the purpose of the nonconforming use regulations is to protect legally established uses only to the nature and extent of the use at the time that it becomes nonconforming, so that ongoing nonconformity is minimized. That purpose is reflected in WC 4.189(.02)(A), which allows a nonconforming use to be changed or replaced only where the change or replacement results in a use that is "no less conforming."

In construing the applicable WC provisions, the city referred to LUBA and appellate case law that interpreted or applied ORS 215.130. The city correctly acknowledges that ORS 215.130 is not controlling on the city. However, the city referred to the cases concerning counties' application of that statute to support the city's conclusion that whether a use is legally established is a distinct inquiry from the nature and extent of the protected nonconforming use, which is

determined at the time that the use becomes nonconforming, that is, when restrictive zoning is applied. *See* LUBA No 2024-033 Record 179 (staff report stating that ORS 215.130 does not apply to the city, but related case law provides a useful example of local government distinctions between uses). The city council referenced with approval a May 17, 2024, staff report. LUBA No. 2024-033 Record 88. The staff report contained the following paragraph describing the limitations on continuation of a nonconforming use:

> "'Nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan. * * * Accordingly, provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible.' *Parks v. Tillamook Co[. Comm./SPLIID]*, 11 Or App 177, 196-97[, 501 P2d 85] (1972) (internal citation omitted). '[T]he law of nonconforming uses is based on the concept, logical or not, that uses which contravene zoning requirements may be continued only to the extent of the least intensive variations—both in scope and location—that preexisted and have been continued after the adoption of the restrictions.' *Clackamas C[ou]nty v. Gay*, 133 Or App 131, 135[, 133 P2d 444], *rev den*, 321 Or 137 (1995)[; *Clackamas County v. Gay*,] 146 Or App 706[, 934 P2d 551, *rev den*, 325 Or 438] (1997)." LUBA No. 2024-033 Record 177.

We conclude that the city plausibly interpreted its code in concluding that 2019 is the reference point for determining the nature and extent of the nonconforming use.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In two subassignments of error with combined supporting arguments, petitioner argues that that the city erred in the Class I proceeding by verifying the nature and extent of the use only as an "electronics-related retail store" and that error resulted in an erroneous conclusion in the Class II proceeding that petitioner's use is not a continuation of the nonconforming use.

A. Continuation

In arguments that are largely derivative of the first assignment of error, petitioner argues that the city's decision that its proposed use is not a continuation of the nonconforming use misconstrues the applicable law and is not supported by substantial evidence. Petitioner argues that the "use," as approved in 1991, was a general commercial retail use of the subject property and building. Petitioner argues that any commercial retail use is a continuation of the nonconforming use, irrespective of the products sold and operating characteristics. Petitioner's continuation misconstruction argument depends on the premise that the "use" is defined by the 1991 approval and not the actual use in existence in 2019, which we reject above. Thus, we also reject this argument.

Petitioner further argues that "[t]he evidence and testimony in the record also established that the scope and nature of the commercial retail use that was occurring on June 5, 2019[,] is consistent with that of [petitioner's] proposed retail operations, even down to the layout and style of the respective stores." Petition for Review 36. We consider this argument as a mixed misconstruction,

inadequate findings, and substantial evidence challenge. The city responds that the city found that petitioner's proposed retail operation is different from the demonstrated nature and extent of the prior nonconforming use. The city found that petitioner had not satisfied its burden of proof that the proposed use is a continuation of the prior use. The city found that petitioner proposes to engage in activities that there is no evidence were part of the prior, nonconforming use, including (1) selling construction tools and products; (2) garden center construction, maintenance, and sales; (3) operations outside the existing building, including loading and a lumber pad; and (4) significant sales to contractors and home improvement professionals. LUBA No 2024-033 Record 86-88.

Petitioner does not challenge those findings, other than to argue that the proposed retail uses are similar. We will not reweigh the evidence, particularly where dispositive findings are unchallenged. The city did not err in concluding that the proposed use is not a continuation of the verified nonconforming use.

B. Codification

Petitioner argues that the city's decision limiting the nonconforming use to an electronics-related retail store violates the codification requirement in ORS 227.173(1), which provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive

plan for the city as a whole."[2]

In *Lee v. City of Portland*, the court explained:

> "Reduced to its essentials, ORS 227.173(1) requires that development ordinances set forth reasonably clear standards for discretionary permit applications. The intent of the statute is to [ensure] that these standards be the sole basis for determining whether a discretionary permit application is approved." 57 Or App 798, 801, 646 P2d 662 (1982).

Petitioner argues that the decision violates the codification requirement because the 1991 city code did not limit the nature of a commercial retail use based on specific products and services and the 1991 approval did not limit the use to electronics-related retail stores.

The city responds, and we agree, that the city applied the city code provisions regarding nonconforming uses and, under those provisions, considered all the evidence regarding the use that existed in 2019, when the use became nonconforming. We agree that the city did not impose any specific requirements on petitioner's application that are not codified. The city's consideration of and reliance on the evidence of the use in 2019 in order to identify the nature and extent of the protected nonconforming use does not violate the codification requirement.

The second assignment of error is denied.

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[2] ORS 227.173(1) applies to permits. The city concedes that ORS 227.173(1) applies here. Respondent's Brief 43. Accordingly, we assume for purposes of this decision that ORS 227.173(1) applies.

The city's decision is affirmed.