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

ANDREW KIPP,
Petitioner,

vs.

CITY OF ASTORIA,
Respondent,

and

ROBERT MAGIE and CYNTHIA MAGIE,
Intervenors-Respondents.

LUBA No. 2024-012

FINAL OPINION
AND ORDER

Appeal from City of Astoria.

Daniel Kearns filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Reeve Kearns, PC.

No appearance by City of Astoria.

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

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

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

REMANDED 12/11/2024

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

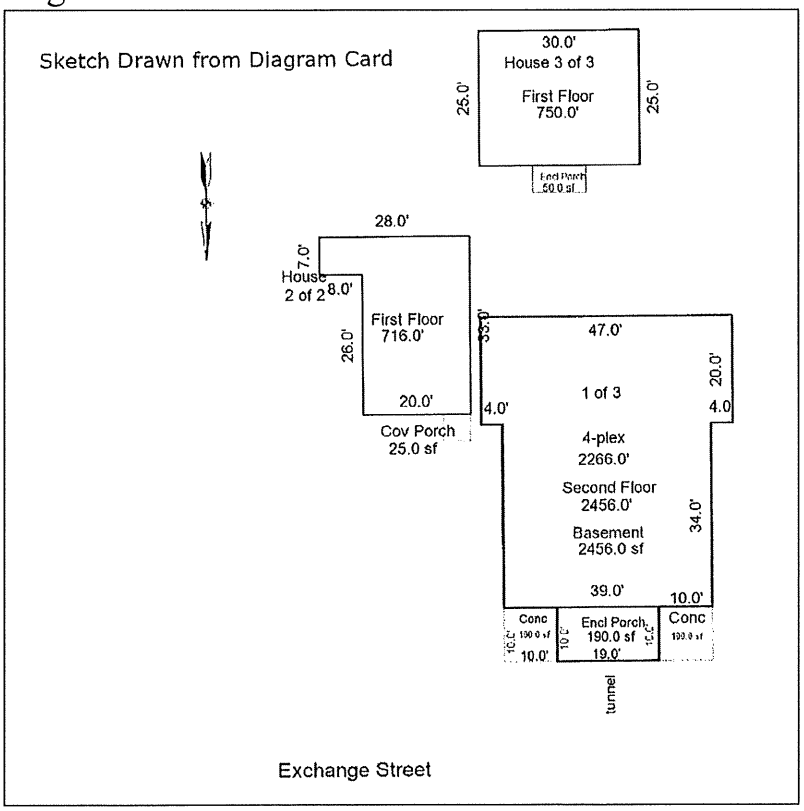
Opinion by Rudd.

NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision verifying use of an apartment building as a nonconforming short-term rental (STR).

BACKGROUND

The subject property is zoned General Commercial (C-3) and located on Exchange Street. It is developed with a fourplex apartment building (the fourplex) and two cottages built in 1920, 1930, and 1955, and depicted on the diagram below.



Record L-267.[1]

[1] All record citations are to the supplemental record.

Intervenors purchased the subject property in 2015. At that time, the fourplex units were all leased to long-term renters. Effective January 1, 2019, the city council amended the Astoria Development Code (ADC) to provide that allowed uses in the C-3 zone include:

> "Motel, hotel, bed and breakfast, inn, home stay lodging (which satisfies requirements in City Code Sections 8.750 to 8.800), and associated uses *except as follows*:
>
> "1. *Structures or portions of structures occupied as a residential dwelling unit after January 1, 2019 and/or originally constructed as a residential dwelling unit may not be used as a motel or hotel, except as noted in Section 2.390.J.2.*
>
> "2. Structures or portions of structures originally constructed as a motel or hotel of greater than three units may be utilized as a motel and/or hotel regardless of current use as residential units." ADC 2.390(J) (emphasis added).[2]

We refer to transient lodging as STR in this decision.

Intervenors "first advertised the four [fourplex] units for STR use on Airbnb after January 1, 2019 * * *." Intervenors-Respondents' Brief 13. Petitioner identified the first date of STR rental use for each of the fourplex units as reported on April 28, 2022 by intervenors' property management company as:

> "1555 Exchange Street . . . December 1, 2021
>
> "1557 Exchange Street . . . April 17, 2022
>
> "1559 Exchange Street . . . long-term tenant holding-over prevented access

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[2] Astoria City Code (ACC) 8.750-8.800 governs Home Stay Lodging Licenses.

"1561 Exchange Street . . . March 15, 2022." Record L-409.

"[U]p until the time when the four units were advertised for STR use, [i]ntervenors continued the long-standing practice of renting to tenants for one-year or six-month terms * * *." Intervenors-Respondents' Brief 13.On October 28, 2021, a long-term tenant of one of the fourplex units completed a web-based, city planning department complaint form stating, in part:

> "Complaint Information:
>
> "Street/Site Address of Complaint: 1559 Exchange S[treet]
>
> "Complaint or explanation of issues: My landlords are breaching my lease agreement and also operating non city compliant air BNBs on the same property." Record L-922.

The city responded to the complaint by initiating an enforcement action. Extensive discussions between city staff and intervenors as well as decisions from city planning staff related to STR activity on the subject property followed. On January 26, 2022, the city issued an enforcement order concluding that the two cottages could continue STR use as nonconforming uses, but that none of the four fourplex units could lawfully be used for STR use. Record L-884.[3]

Intervenors submitted an application for verification of a nonconforming use for a six-unit STR use of the subject property. Record L-833. On June 26, 2023, the city planning department issued a notice of decision approving all six

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[3] Intervenors appealed that enforcement order in *Magie v. City of Astoria*, LUBA No 2022-015, which ultimately was voluntarily dismissed.

units (two cottages and four fourplex units) as nonconforming transient lodging uses. Record L-812. On July 10, 2023, petitioner appealed the staff approval, challenging the decision only as to the four fourplex units. Record L-799. On November 2, 2023, the hearings officer held a public hearing on the appeal. At the conclusion of the public hearing, the hearings officer left the record open until November 9, 2023, for all testimony, and until November 16, 2023 for rebuttal evidence. Intervenors' final written argument was due November 29, 2023.

On December 11, 2023, the hearings officer issued their decision "to allow a transient lodging facility" in the fourplex. Record L-46. Petitioner appealed the hearings officer's decision to the city council. On February 20, 2024,

> "[a]fter considering the record and arguments of the parties, a motion to grant the appeal and overturn the decision of the hearings officer was made and seconded. The resulting council vote showed two councilors in favor and two councilors opposed to the motion. No further motion was made and a tie vote was declared.
>
> "The appellant bore the burden of proof on the appeal pursuant to ADC 9.040.E.5 and a majority vote required to overturn the hearings officer's decision. As a result[,] the appeal is denied and the Public Hearings Officer's decision, Findings of Fact and conclusions of law * * * [were] upheld." Record L-2.

The city council decision was signed on February 26, 2024, and mailed February 27, 2024. This appeal followed.

FIRST ASSIGNMENT OF ERROR AND PORTION OF THIRD ASSIGNMENT OF ERROR

The addresses assigned to the fourplex are 1555, 1557, 1559, and 1561 Exchange Street. Intervenors' counsel submitted written testimony identifying intervenors' actions occurring before and after January 1, 2019, which intervenors argued established their ongoing effort to utilize the fourplex units as STRs. The hearings officer "adopted [intervenors'] attorney letter and [found] that there were no gaps for over 12 months where the STR use was not pursued." Record L-80. By adopting intervenors' attorney's letter, the hearings officer found that intervenors undertook the following activities before January 1, 2019:

> "Summer 2016 – Remove carpet and linoleum and refinish floor in unit 1557;
>
> "January through Oct[ober] 2017 – Create off-street parking area;
>
> "* * * * *
>
> "Fall 2018 – Refinish flooring, kitchen reconfiguration, bathroom renovation, replastering and plumbing for unit 1559;
>
> "Fall 2018 – Strip and finish sleeping porch and landing."[4] Record L-507.

Petitioner does not dispute that these activities occurred.

The hearings officer found that petitioner's

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[4] The findings also identify activity between June 2018 and June 2019 as "Stabilize foundation, replace siding and restoring windows." Record L-507.

> "legal argument is that the City's use of the definition of 'use, start of' was in error. [Petitioner] argue[s] that the City was limited solely to the [nonconforming use] provision in determining when 'it first occurred.' ADC Section 1.400. [Petitioner] argue[s] that the [nonconforming use] can only be allowed when the actual use of the 4 plex as STR started before the effective date of the ordinance. [Petitioner] argue[s] that here the STR use started after the effective date of the STR ordinance." Record L-80.

ADC 1.400 defines "nonconforming use" as "a use that legally conformed with applicable Development Code regulations *when it first occurred* but, due to amendments to those regulations, no longer complies with regulations which apply to it." (Emphasis added.) When applying the definition of "nonconforming use" to the facts of this case, the hearings officer focused on the code definitions of "use" and "use, start of." ADC 1.400 defines "use" as "[t]he purpose for which land or a structure is designed, arranged, or intended, or for which it is occupied or maintained." ADC 1.400 defines "use, start of" as:

> "Use shall be considered as begun when the applicant has physically moved into the site or is in the process of physically moving into the site in preparation of beginning occupation and/or operation. Actual operation and/or business open to the public *need not occur* to consider a use as begun." (Emphasis added.)

The hearings officer concluded:

> "The ADC 3.180 employs the term 'use' to define [nonconforming use]. In that definition it states, 'when it first occurred.' The 'it' referred to in this definition means 'when [the use] first occurred.' As such, it is reasonable for interpreting the meaning of 'use' to look at both the definition of 'use' and for the definition of 'use, start of.' The terms 'start of' and 'first occurred' are synonymous. In interpreting the code, we look to the plain meaning of the words and how they are used in context of the law. *State v. Gaines*, 346 Or 160,

206 P2d 1042 (2009).

> "It was proper for the city to use these definitions to determine that the start of use occurred when [intervenors] started working on their STR before the code was changed. [Intervenors] did not have to rent STRs before the code was changed." Record L-80.

Petitioner contends that the hearings officer misconstrued the meaning of "nonconforming use." Petitioner's first assignment of error is that the hearings officer misconstrued the city's nonconforming use regulations when they relied on a definition that is contrary to the relevant text and context. As a result of that misconstruction, petitioner argues that the hearings officer adopted inadequate findings unsupported by substantial evidence in concluding that the fourplex STR use is a protected nonconforming use. Intervenors respond that the hearings officer's interpretation is correct.

A. First Subassignment

Petitioner's first subassignment of error is that the hearings officer misconstrued "nonconforming use" by relying on the code definition of "use, start of."

1. Standard of Review

ORS 197.835(9)(a)(D) provides that LUBA shall reverse or remand a land use decision if it determines the local government improperly construed the applicable law. As petitioner correctly states, we do not afford deference to the hearings officer's interpretation of local code; we determine whether it is correct.

Petition for Review 10. Intervenors agree that "[i]nterpretations by a hearings officer [are] not entitled to any deference," but then incorrectly assert:

> "Under ORS 197.835(9)(a)(D), LUBA will affirm a hearings officer, even if it is debatable if the hearings officer's interpretation is more consistent with the text of [the code] than [opponents] interpretation' or 'at least as supportable as [opponents'] contrary view.' *Waverly* [*Landing Condo. Owners' Assoc. v. City of Portland*], 61 Or LUBA [448], (slip op at 7) [(2010)]." Intervenors-Respondents' Brief 11.

We explained in *Waverly*:

> "The city at several points in its brief argues that LUBA must review the hearings officer's interpretation under the more deferential standard of review set out in ORS 197.829(1), as explicated by the Court of Appeals in *Siporen v. City of Medford*, 231 Or App 585, 599, 220 P3d 427 (2009), *rev allowed*, 348 Or 13 (2010); *Western Land & Cattle v. Umatilla County*, 230 Or App 202, 214 P3d 68 (2009) and *Foland v. Jackson County*, 215 Or App 157, 164, 168 P3d 1238, *rev den*, 343 Ore 690, 174 P3d 1016 (2007). Under ORS 197.829(1)(a), which requires that LUBA reverse or remand if an interpretation is 'inconsistent with' the comprehensive plan or land use regulation language, we must affirm the city's decision unless we conclude that interpretation is not 'plausible,' given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). *Western Land & Cattle*, 230 Or App at 209.
>
> "The more deferential standard of review set out at ORS 197.829(1) applies to interpretations by local government governing bodies. The deferential standard of review set out at ORS 197.829(1) does not apply to interpretations by other local decision makers, such as hearings officers. *Rochlin v. City of Portland*, 155 Or App 490, 492 n 1, 964 P2d 1081 (1998). Therefore our review of the hearings officer's interpretation in this case is governed by ORS 197.835(9)(a)(D), which requires that LUBA determine whether the

hearings officer '[i]mproperly construed the applicable law.'" 61 Or LUBA at 453-54 (footnotes omitted).

In reviewing the hearings officer's interpretation of the local code, we review the decision for legal correctness with no deference to the hearings officer's interpretation.

2. Construction of "Nonconforming Use"

Our goal is to discern the local governing body's intent considering the text, context, and any relevant legislative history. *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).

a. Text

Again, ADC 1.400 defines "nonconforming use" as "[*a*] *use that legally conformed* with applicable Development Code regulations *when it first occurred* but, due to amendments to those regulations, no longer complies with regulations which apply to it." (Emphases added.) In seeking verification of their STR activity as a nonconforming use, intervenors argued, and the hearings officer agreed, that the use "first occurred" prior to that use becoming illegal under the code. Thus, the operative term is "occurred." "Occur" and "occurred" are not defined in the ADC and are not terms of art as far as we are aware. Accordingly, we look to the plain meaning of those terms. "Occurred" is an intransitive verb that means to "happen" and to "exist." *Webster's Third New Int'l Dictionary* 1561 (unabridged ed 2002). "Occurred" also means "to come to mind." *Id.* The first dictionary definition of "occurred" is consistent with petitioner's argument

that a nonconforming use has not "first occurred" until it actually exists. Here, that means that the STRs were not uses until the fourplex units were used for that purpose. The second dictionary definition of "occurred" is arguably consistent with the hearings officer's reasoning, that a nonconforming use "first occurred" when it first came into the intervenors' minds to use the apartment building rooms as STRs.[5] We will assume that the plain meaning leaves the term ambiguous.

That ambiguity is resolved by the express purpose statement of the nonconforming use regulations.

> "Within the zones established under this Code, there [are] *existing lots, structures and uses of land and structures* which were lawful before this Code was passed or amended, but which no longer conform to the provisions of this Code. It is the intent of this Section to establish requirements that govern the future use of such nonconformities." ADC 3.160(A) (emphasis added).

"Exist" means "to have actual or real being." *Webster's Third New Int'l Dictionary* 796 (unabridged ed 2002). The express intent of nonconforming use provisions is to allow and regulate "*existing*" uses of land and structures. Thus, a nonconforming use has not "first occurred" until it exists. The hearings officer's interpretation of "first occurred" is inconsistent with the text and purpose of ADC 1.400 and ADC 3.160.

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[5] This second definition of "occurred" may require that we insert the bolded language into the definition of nonconforming use, in violation of ORS 174.010: "a use that legally conformed with applicable Development Code regulations when it first occurred ***to the applicant*** but, due to amendments to those regulations, no longer complies with regulations which apply to it."

b. Context

Petitioner argues, and we agree, that the hearings officer erred in relying on the ADC definition of "use, start of" as context for interpreting the meaning of "nonconforming use." The hearings officer concluded that the phrase "first occurred" in the ADC 1.400 definition of nonconforming use is synonymous with the ADC defined "use, start of" and that the STRs did not need to exist on January 1, 2019 because the last line of the definition of "use, start of" provides that "actual operation and/or business open to the public need not occur to consider a use as begun." ADC 1.400. That interpretation is inconsistent with the code text. "Use, start of" and "first occurred" are not synonymous. "Use, start of" expressly provides that the use "need not occur." Differently, a nonconforming use is expressly defined by "when it first occurred." We agree with petitioner that the hearings officer misconstrued "nonconforming use" when they relied on "use, start of" to interpret the term.

The first subassignment of error is sustained.

B. Second, Third, Fourth and Fifth Subassignments of First Assignment of Error and Portion of Third Assignment of Error

ADC 1.400 includes the definition:

> "**Use, Cease of:** Use shall be considered as ceased when the site and/or building is no longer used or available for occupancy by the specific use. A building or site vacant while being continuously marketed, repaired, or otherwise similarly unavailable for use is not considered to be a cessation of use. *A building or site that is occupied by a different use shall be considered as a cessation of the former use.*" (Emphasis added.)

Petitioner's fifth subassignment of error is that *if* the hearings officer's consideration of "use, start of" was appropriate in interpreting the term "nonconforming use," then the hearings officer was also required to consider "use, cessation of."

ADC 3.180 provides, in part:

> "B. Change of Nonconforming Use. A nonconforming use may be changed to a conforming use. However, after a nonconforming use is changed to a conforming use, it shall thereafter not be changed to a use that does not conform to the use zone in which it is located.
>
> "C. Discontinuance of Nonconforming Use.
>
> "1. If a nonconforming use involving a structure is discontinued for a period of one (1) year, further use of the property shall conform to this Code except as follows:
>
> "a. When a residential structure has been used in the past for more units than allowed, the use may continue, even if ceased for one year, with the following conditions:
>
> "(1) Structure was not converted back to the lesser number of units (i.e. removal of kitchen, etc.); and
>
> "(2) Units were legal non-conforming units and not converted without necessary permits; and
>
> "(3) The number of units are allowed outright or conditionally in the zone (i.e., duplex or multi-family dwelling in R-2, etc.); and
>
> "(4) The number of units does not exceed the density for the zone (i.e., the lot square footage divided by 43,560 square feet (acre) x maximum density

of zone = number of units allowed by density); and

"(5) Provide required off-street parking spaces per unit, or obtain a variance; and

"(6) If the structure is destroyed per Section 3.190.D, the new use shall comply with the zone requirements and/or Section 3.190.E."

Petitioner's third subassignment of error is:

"The hearings officer misinterpreted ADC 3.180(C) when he concluded that the absence of any STR use in the four-plex for nearly three years after January 1, 2019 was not fatal to this nonconforming use claim. Under ADC 3.180(C), a 12-month discontinuance terminates any nonconforming use right that may have existed." Petition for Review 22.

Petitioner's fourth subassignment of error is:

"The hearings officer misinterpreted ADC 3.180(B) when he concluded that exclusive and consistent use of the four-plex as a conforming use (long-term multi-family dwelling) for three years after January 1, 2019 was not fatal to this nonconforming use claim. Under ADC 3.180(B), conversion to a conforming use destroys any nonconforming use right that may have existed." Petition for Review 26-27.

Petitioner's second subassignment of error is:

"The hearings officer improperly concluded that the lack of any transient lodging use on the date the restrictive zoning was imposed (Jan 1, 2019) and for three years thereafter was not fatal to a determination that the nature and extent of the use had not diminished over time." Petition for Review 19-20.

Petitioner's third assignment of error is, in part, that the hearings officer adopted inadequate findings, not supported by substantial evidence, that

intervenors have a nonconforming use right to operate the fourplex as an STR. Petition for Review 35. Petitioner argues that the hearings officer concluded that intervenors had a valid nonconforming use under ADC 3.180 and that the hearings officer's determination improperly relied on "evidence of work intervenors supposedly did to rehabilitate the building and apartment units in preparation for using them as STRS (Rec 93, 124-25), which the hearings officer concluded was sufficient and credible (Rec 80-81.)"[6] Petition for Review 36.

We remand for the hearings officer to apply the correct interpretation of the nonconforming use code to the evidence and argument before the hearings officer. It is highly likely that the hearings officer will adopt a new decision and new findings on remand regarding the asserted nonconforming use. Because we sustain the first subassignment of error and the hearings officer will have to apply the correct construction of nonconforming use to the evidence, we do not reach the second, third, or fourth subassignments of error of the first assignment of error or the nonconforming use portion of the third assignment of error. We do not reach the fifth subassignment of error because it is contingent on our denying the first subassignment of error, which we sustained.

The first assignment of error is sustained.

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[6] Intervenors agree that the first fourplex unit was made available for STR rental after January 1, 2019.

PORTION OF THIRD ASSIGNMENT OF ERROR

A. Introduction

The hearings officer found, in addition and in the alternative to a nonconforming use, intervenors had established a vested right to continue to develop their STR use of the fourplex.

Vested rights to complete a development may arise before a nonconforming use right is established. *See Fountain Village Development Co. v. Multnomah County*, 176 Or App 213, 221, 31 P3d 458 (2001), *rev den*, 334 Or 411 (2002) (describing vested rights to develop as "inchoate nonconforming uses"). Establishing a vested right does not require demonstration of an existing use at the time restrictive regulations are applied and, instead, depends upon the extent of development in preparation for an intended future use. *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973). A common-law vested right to develop is an equitable claim to an inchoate nonconforming use that requires showing a current vested right to develop at the time that the claim is made. *Oregon Shores v. Board of County Commissioners*, 297 Or App 269, 276, 279, 441 P3d 647 (2019). "[O]ne may secure a right to construct a nonconforming use, but there is no reason to afford that right different or greater protections than the ultimate use itself." *Fountain Village*, 176 Or App at 223. Because a vested right is an inchoate nonconforming use, it may be discontinued or abandoned in the same manner that a nonconforming use is discontinued or abandoned under the

city code. Discontinuance here is governed by ADC 3.180, quoted above, and explained further below as relevant to the vested right determination.

Petitioner's third assignment of error is, in part, that the hearings officer's decision that intervenors have a vested right to maintain and operate the fourplex as an STR is unsupported by adequate findings or substantial evidence. Petition for Review 35. For the reasons explained below, we agree.

B. Standard of Review

ORS 197.835(9)(a)(C) provides that we will reverse or remand a local government decision that is not supported by substantial evidence in the whole record. Substantial evidence is evidence in the whole record that a reasonable person would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Adequate findings identify the relevant approval criterion, the evidence relied upon, and explain how the evidence leads to the conclusion that the criterion is or is not met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).

C. Preservation of Error

ORS 197.835(3) requires that issues before LUBA on review "shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable." ORS 197.797(1), in turn, requires that:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government.

> Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

The "raise it or waive it" principle does not limit the parties on appeal to the exact same arguments made below, but it does require that the issue be raised below with sufficient specificity to prevent "unfair surprise" on appeal. *Boldt v. Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074 (Apr 8, 2022) (slip op at 5-6), *aff'd*, 321 Or App 505 (2022) (nonprecedential memorandum opinion), *rev den*, 370 Or 740 (2023). A particular issue must be identified in a manner detailed enough to give the local government and the parties fair notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When attempting to differentiate between "issues" and "arguments," there is no "easy or universally applicable formula." *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001).

OAR 661-010-0030(4)(d) provides that the petition for review must demonstrate for each assignment of error that the issue was raised below or that preservation is not required. We have held that establishing preservation is petitioner's burden and that petitioners must demonstrate that an issue is preserved with sufficiently specific reference to the record such that respondents, intervenors, and LUBA are not required to comb the record to determine whether an issue was raised below. *Rosewood Neighborhood Association v. City of Lake Oswego*, LUBA No 2023-035 (Nov 1, 2023) (slip op at 6) (holding that a

petitioner bears the burden of establishing error in the land use decision on review as required by ORS 197.835(3) and OAR 661-010-0030(4)(d)).

Petitioner asserts that they "raised objections as to the relevance, credibility and probative value of the evidence offered in support of staff's decision (Rec 647-651, 747-750, 778-780)[.]" Petition for Review 35. Intervenors argue that petitioner does not demonstrate where the third assignment of error is preserved and that requiring intervenors to review the 15 pages cited prejudices their ability to provide a complete response. We agree with intervenors that petitioner has not identified where these issues were raised with particularity in the preservation section of their petition. We do not agree with intervenors that they have been prejudiced by the form of the preservation statement in the petition for review.

OAR 661-010-0005 provides, in part, that "[t]echnical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision." Within the body of the third assignment of error, petitioner cites the hearings officer's decision at Record L-81-84. Petition for Review 36. The hearings officer's decision includes the following:

> "[Petitioner] then describe[s] the legal maxim of vested rights as to [nonconforming uses]. * * * [Petitioner] argue[s] that all the work done on the 4-plex was to make the units habitable generally for [long-term rental], and no steps were taken to put them to STR use. [Petitioner] describe[s] the vested rights factors as described in *Holmes v. Clackamas County*, 265 Or 193, 508 P2d 190 (1973).

> [Petitioner's] post hearing arguments elaborate on why [intervenors] failed to meet these factors." Record L-81.

We agree with intervenors that petitioner's preservation statement in the petition for review fails to adequately specify where the issue was raised during the local proceeding. However, in the petition for review, petitioner points to specific findings in the challenged decision that address the same issue that petitioner raises on appeal. That is sufficient to demonstrate that the issue was in fact raised and addressed during the local proceedings. Where a petitioner points to specific findings in the challenged decision in the petition for review, no party can claim unfair surprise or a prejudicial need to comb the record to determine whether an issue was raised below. In these circumstances, we conclude that petitioner's inadequate preservation statement is a technical violation of our rules that does not violate intervenors' substantial rights. *1000 Friends of Oregon v. Linn County*, LUBA Nos 2022-003/004 (Sept 26, 2022) (slip op at 9). Our interpretation and application of OAR 661-010-0030(4)(d) in *Rosewood* does not provide an absolute technical pleading shield against issues that are demonstrably preserved by reference in the petition for review to specific findings in the challenged decision.

This assignment of error is preserved.

D. Discussion

The vested rights question, that is, whether intervenors have a right to maintain and operate the fourplex STR, is necessarily taken in two parts. The first question is whether there are adequate findings supported by substantial evidence

to conclude that intervenors had a vested right to establish the fourplex STR use on January 1, 2019, when that use became nonconforming. If there was a vested right on January 1, 2019, then the second question arises, that is, whether there are adequate findings supported by substantial evidence that any vested right intervenors held on January 1, 2019, was not subsequently abandoned. These elements are intermixed in the hearings officer's findings.

The court explained in *Holmes:*

> "*The test of whether a landowner has developed his land* to the extent that he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors to be considered. Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects." 265 Or at 192-93.

The facts considered in determining whether there are vested rights to develop the land are described in *Polk County v. Martin*, commonly referred to as the *Holmes* factors, and are set out below:

> "(1) The good faith of the property owner in making expenditures to lawfully develop [their] property in a given manner;
>
> "(2) The amount of notice of any proposed re-zoning;

> "(3) The amount of reliance on the prior zoning classification in purchasing the property and making expenditures to develop the property;
>
> "(4) The extent to which the expenditures relate more to the nonconforming use than to the conforming uses;
>
> "(5) The extent of the nonconformity of the proposed use as compared to the uses allowed in the subsequent zoning ordinances;
>
> "(6) Whether the expenditures made prior to the subsequent zoning regulation show that the property owner has gone beyond mere contemplated use and has committed the property to an actual use which would in fact have been made but for the passage of the new zoning regulation;
>
> "(7) The ratio of the prior expenditures to the total cost of the proposed use;
>
> "If the evidence relevant to these factors establishes a 'vested right,' the property owner may complete [their] improvements and thereafter use [their] property in a manner which is a nonconforming use, subject to the restrictions on nonconforming uses * * *." 292 Or 69, 81 n 7, 636 P2d 952 (1981).

As explained above, the hearings officer adopted as findings a letter from intervenors' attorney identifying the activities that intervenors asserted established their vested right to continue development of the STR use. Petitioner argues that intervenors undertook those activities in order to (1) establish a conforming long-term residential use of the fourplex, or (2) establish STR use of the two cottages on the subject property. Petitioner argues that intervenors' investments were not directed toward developing STR use of the fourplex and contends:

> "The evidence, in fact, shows only an intent to make the four-plex units habitable as a dwelling, and shows that intervenors actually used the four-plex for many years after January 1, 2019 as a conforming multi-family apartment for long-term residents. None of intervenors' evidence is specifically tailored to use of the four-plex as an STR as opposed to a conforming multi-family dwelling for long-term tenancy."[7] Petition for Review 35.

1. Parking Lot

The hearings officer found "that there were good faith expenditures directed at STR and not solely for [long-term rentals]" and that intervenors "spent funds for parking before the effective date of the ordinance that was used to provide parking for the STRs at issue here." Record L-82. The hearings officer also found "that the expenditure[s] made, including for parking, committed the property to the STR use." Record L-84. Petitioner argues that the hearings officer's decision that there is a vested right to utilize the four units in the fourplex as STRs improperly relied in part on intervenors' construction of a parking lot.

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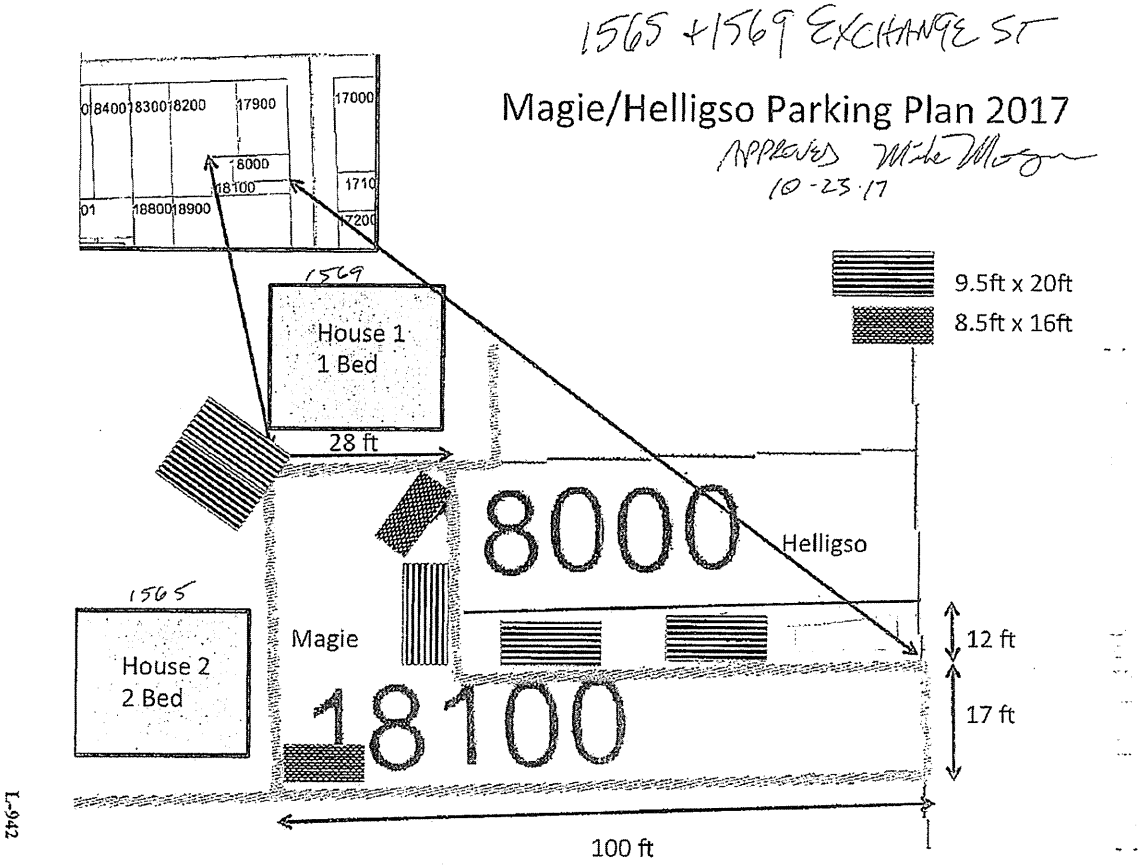
[7] Petitioner also argues that intervenors obtained an occupational tax license for the two cottages in 2017 and registered the fourplex for the City's Transient Room Tax on December 15, 2020. We agree with petitioner that intervenors applying for an Occupational Tax Application Approval for the cottages is not substantial evidence of the planned use of the fourplex. There is no reference to the fourplex on the 2017 tax application approval. Intervenors agree that the tax license is irrelevant. Intervenors-Respondents' Brief 34.

The parties agree that, in 2017, the city's code required that one parking space be provided per guest bedroom of transient lodging.[8] ADC 7.100 (2017). Intervenors placed the following 2017 approved parking plan in the record:



Record L-942.

The fourplex and cottages are located on tax lot 18200, shown above. The 2017 parking plan shows a total of seven off-street parking spaces – tax lot 18200

[8] Record L-78 contains a table stating that, prior to 2019, the minimum parking for transient lodging was one space per guest room and that the minimum parking for transient lodging on November 7, 2022 remains one space per guest room.

(two spaces), tax lot 8000 (two spaces) and tax lot 18100 (three spaces).[9] The hearings officer found that intervenors purchased lot 18100 in March 2015 and accepted intervenors' statement that, in 2017, they spent approximately $19,479 for the "Driveway - creation of off-street parking to accommodate 11 bedrooms for short term rental use." Record L-497 (intervenors' table of expenses); Record L-237 (written testimony stating that intervenors purchased a vacant lot in May 2015 "to create off street parking for our tenants/guests"); Record L-83 (finding "that the expenditures for parking was for the non-conforming use"). Intervenors explained that two of the spaces on the above plan were to serve the Helligso property (marked "8000" on the above drawing), leaving five spaces for intervenors' utilization for the fourplex and the two cottages.[10] Record L-842.

The cottages, approved as a nonconforming STR use, have a total of three bedrooms and therefore require three parking spaces. The fourplex has a total of eight bedrooms and therefore requires eight parking spaces. Intervenors argued that they were told by the planning director "during a subsequent site inspection" that the apartments and cottages were credited with 1.5 on-street parking spaces

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[9] The drawing provided above is reproduced from the record and shows the Helligso property as tax lot 8000. Given the tax lot numbers surrounding the property, we suspect that the correct tax lot number may in fact be 18000.

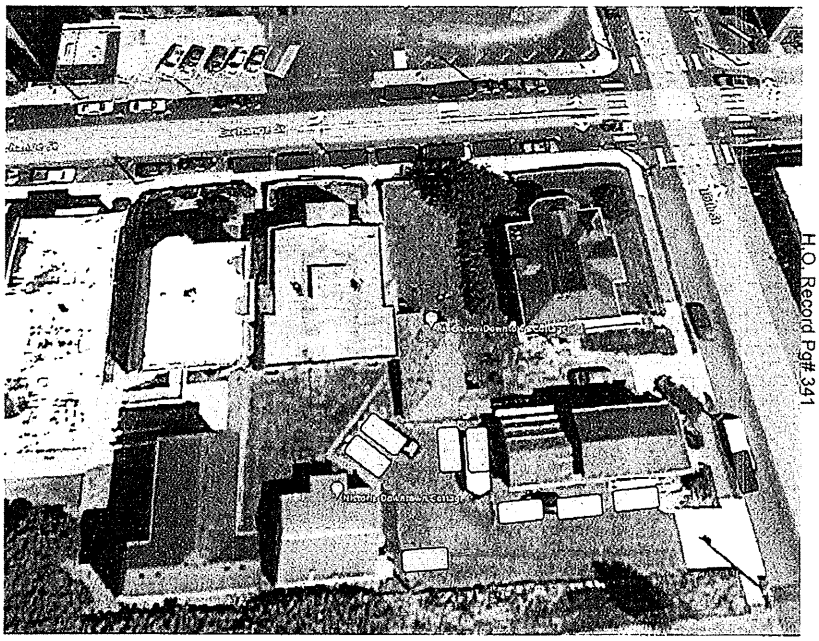
[10] The parties do not indicate whether there is another 2017 parking plan with the address for the Helligso property handwritten on it, but the title of the 2017 plan is "Magie/Helligso Parking Plan 2017."

per bedroom because of the buildings' long existence.[11] *Id.* As part of their nonconforming use verification application, intervenors submitted the following figure depicting and describing on-street and off-street parking as allocated to their STR use for the cottages and the fourplex.

June 2017

STR parking requires 1 space/bdr (2017 ADC Article 7 table 7.100). 11 spaces required and 14 provided for guest convenience and overflow parking of our 6 STR units

Magie on-street
Magie STR off-street
Helligso STR off-street



H.O. Record Pg# 341

L-466

Record L-466. Intervenors argue that, based on a credit of nine on-street parking spaces, the five parking off-street spaces in the parking lot provide more than the required 11 parking spaces for STR use of the eight bedrooms within the

[11] Eight bedrooms multiplied by 1.5 on street parking spaces per bedroom equates to twelve on-street parking spaces.

fourplex, as well as the three bedrooms in the cottages.[12] Intervenors assert that the nine on-street parking spaces were adequate to accommodate long-term rental use and that the five off-street parking spaces provided two more spaces than needed to serve the cottage STRs. Intervenors argue that the hearings officer correctly relied on the additional off-street parking investment and development as supporting their vested right to an STR use of the fourplex units. Intervenors-Respondents' Brief 4.

As further support, intervenors submitted testimony from a neighbor (Helligso), the manager of the intervenors' STRs since some time in 2021. Helligso's November 3, 2023 letter explains that they were also interested in developing STRs on their property and describes their work with intervenors to develop off-street parking to serve both their properties. Record L-730. Additional testimony dated April 28, 2022 was submitted from a broker with Pacific Capital Management stating that the company managed the fourplex between May 2018 and November 2021 and described their discussions with intervenors during this period concerning upgrading the fourplex units for STR use. Record L-837. Lastly, intervenors submitted testimony dated April 26, 2022 from the current mayor, who acted as an advisor to the intervenors beginning in 2015, discussing intervenors' long-term goals for the fourplex, investments

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[12] Six on-street spaces are shown on one side of Exchange Street and two on-street spaces are shown on the other side of Exchange Street. Another on-street space is depicted on 16th Street.

therein, and the decision to create parking for STR activity. Record L-836. The hearings officer concluded that intervenors "spent funds for parking before the effective date of the ordinance that was used to provide parking for *the STRs at issue here*." Record L-82 (emphasis added).

Intervenors argue that petitioner does not discuss this third-party testimony and that the third-party testimony supports the hearings officer's conclusion that that intervenors had a long-term goal to rehabilitate and use the fourplex as STR on January 1, 2019. We agree with intervenors that the third-party statements support the hearings officer's conclusion that the off-street parking lot was developed to serve STR activity on intervenors' property. The documents from the third parties do not, however, support the hearings officer's conclusion that *the number* of parking spaces required under the ADC to serve 11 STR bedrooms (cottage and fourplex bedrooms) were secured prior to January 1, 2019.

In the context of their nonconforming use analysis, the hearings officer found:

> "The use of the STR is set by the four walls of the 4-plex and the number of bedrooms used. The City also has business regulations for STRs. I find this is adequate to determine the nature and extent of the [nonconforming use]. I also find that [intervenors] *established the nature and extent* of the [nonconforming use] by providing evidence of parking for *all* the units." Record L-80 (emphases added).

Not only do we find a lack of substantial evidence supporting the hearings officer's conclusion that all the necessary parking required was in existence on

January 1, 2019, we do not see substantial evidence in the record that all the required parking could be provided on site.

First, and most importantly, we agree with petitioner that there is not substantial evidence that intervenors' pre-2019 parking development and investment supported development of the STR use of the fourplex. There is no reference to the fourplex on the 2017 parking plan. The 2017 parking plan shows only the cottages in outline and only includes the handwritten physical addresses for the cottages, 1565 and 1569 Exchange Street.[13] The fourplex is not depicted.

The third-party testimony is not substantial evidence to support the conclusion that sufficient off-street parking was developed for lawful STR use of eight bedrooms in the fourplex. For example, Sean Fitzpatrick, the current mayor, stated as General Manager, Wecoma Partners, that:

> "My notes reflect that we were discussing your project as early as June of 2015. You were purchasing or had recently purchased the lot on 16th to provide the parking required for short term rentals. The lot in itself was too small to build on, so it had no value to the owner/seller. The highest and best use was for parking for your units.
>
> "* * * * *
>
> "The main building and the two smaller buildings needed considerable work. * * *

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[13] Although no Helligso structure is shown, the 2017 plan is titled "Magie/Helligso parking plan" and intervenors stated that two of the parking spaces depicted were to serve Helligso.

"* * * * *

"The only way that you could repair and restore the buildings was to use them as Short Term Rentals, as market rents could not cover the cost to operate - mortgage, property taxes, insurance, utilities, maintenance, repairs, etc." Record L-836.[14]

The Fitzpatrick letter does not discuss the number of parking spaces required by the ADC for STR use of the fourplex. The letter from Shannon Fitzpatrick, Principal Broker, Pacific Capital Management, does not discuss STR parking at all. Record L-837. Helligso's letter asserts:

"In March of 2015, after [intervenors] purchased the empty lot next to mine, we started discussing plans to create a shared driveway to increase access to his properties and create off street parking for both of us. After going through the process of planning and getting our lot legally changed to accommodate the plan, the construction of the driveway was completed in Early 2017.

"During our conversation around parking in 2016 we discussed the plan to move his properties into Short Term Rentals. I was in the process of renovating my own home and was excited by this idea as I had been considering doing a similar thing in my home. After looking at the city codes we mapped out potential parking spaces for both properties with the express intent to meet the city's parking requirements for Short Term Rentals.

"* * * * *

"At no point during our often more than once a week conversation over 7+ years did this plan change from the original plan to have all of the units be STRs. Then the new regulations that were voted into place in summer of 2019 with 'retroactive' status, potentially

[14] We note that three of the five off-street parking spaces appear allocated to the cottages approved as non-conforming uses.

> jeopardizing months of work and money, which by itself seems extremely suspect considering the immense time lapse.* * *" Record L-730-31.

Although Helligso states generally that the "parking area" "goes above city standards for all six units," like the other letters, Helligso's letter does not discuss the amount of parking required under the ADC for use of eight fourplex bedrooms as STR.

Second, even if the record supported a conclusion that intervenors' pre-2019 parking development related, in part, to the STR use of the fourplex, that evidence that the hearings officer relied upon is insufficient to establish a vested right to develop all four fourplex units for STR use. To vest a right to develop all four fourplex units for STR use, the parking development effort must be aimed to satisfy the parking requirements *for all four units*. Vested rights are significant, yet *incomplete* development efforts. However, the fact that the number of parking spaces developed on January 1, 2019 did not satisfy the parking requirements for STR use of the fourplex means that the partially developed parking is not evidence supporting a vested right to continue to develop all four of the fourplex units for STR use. Analogously, if a party had commenced developing a 1,500 square foot structure by clearing a pad and laying a foundation prior to restrictive zoning, that development effort would not establish a vested right to develop a 2,000 square foot structure. *Crone v. Clackamas County,* 21 Or LUBA 102 (1991) (discussed below.) The parking lot created by intervenors had two extra parking spaces available for the fourplex use if three were dedicated to the

cottages. Two parking spaces is the amount of parking required for STR use of *one* of the two-bedroom fourplex units.

Crone concerned a petitioner's claim of a vested right to further divide property. In 1971, the petitioner purchased the parent parcel and placed two homes on it. In 1973, they divided the parent parcel into two parcels. In 1974, the county adopted a subdivision ordinance. In 1975, petitioner sold an acre of the one of the two parcels along with one of the homes. The county determined that the petitioner did not have a vested right to complete the 1975 division. We explained:

> "Petitioner cites evidence that in 1971 she placed two homes on the parent parcel, however at best, this evidence establishes that petitioner contemplated creating two parcels from the parent parcel. * * *. We do not believe that these expenditures are 'substantially and directly' related to further dividing the parent parcel into tax lots 400 and 200.
>
> "Petitioner also cites evidence that she obtained two septic, two plumbing and two well drilling permits for the parent parcel. However, this evidence suffers from the same defects as the evidence regarding the 1971 placement of two houses on the parent parcel * * *." 21 Or LUBA 102, 105-06 (1991).

Similarly, the expenditures to develop the 2017 parking plan, at best, are "substantially and directly related" to providing sufficient parking for STR use of two of the eight bedrooms in the fourplex.

> "Under *Holmes* and the appellate court cases that have followed and elaborated on *Holmes,* where a property owner *commences development of his or her property* at a time when there are no land use laws or at a time *when the development is permitted under*

> *existing land use laws, that property owner can achieve a right to continue and compete that development*, notwithstanding that land use laws that would preclude that development are enacted during the development process and before development is complete." *DLCD v. Clatsop County*, 58 Or LUBA 714, 734 (emphases added).

Here, there is no substantial evidence that use of all four fourplex units for transient lodging was permitted under the ADC on December 31, 2018, given the amount of off-street parking shown to be available.

The parties agree that *prior to* the code change effective January 1, 2019, transient use of the entire fourplex required provision of one parking space per bedroom. Neither intervenors or the hearings officer identify a 2017 ADC provision allowing a credit against required off-site parking such that relying on intervenors' recollection that a planning director indicated during a site inspection that on-street parking could be counted to meet the code, was evidence a reasonable person would rely upon in evaluating the parking in 2023 or 2024.[15]

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[15] In footnote 6 of their brief, intervenors state: "Although the authority for Mr. Cronin's statement that the Intervenors were allotted 1.5 spaces on Exchange Street is not known, ADC 7.030 (2017) allows for the accommodation of off-street parking using nearby on-street areas. [Record] L-986." Intervenors-Respondents' Brief 33. ADC 7.030 (2017) provided in part:

> "A. Off-street parking and loading areas required by this ordinance *shall be provided on the same lot with the use except that*:
>
> "* * *

In finding that the property owner made good faith "expenditures to *lawfully* develop [intervenors'] property," the hearings officer found that intervenors "spent funds for parking before the effective date of the ordinance that was used to provide parking *for the STRs at issue here*." Record L-82 (emphases added). Although intervenors submitted a plan with their 2023 nonconforming use application showing where nearby on-street parking is physically available, there is not substantial evidence in the record that eight *ADC compliant, that is, off-street,* parking spaces existed (or could be developed) for the fourplex on January 1, 2019, where none of the contemporaneous evidence supports that conclusion.

We agree with petitioner that the hearings officer's finding that there is a vested right to utilize the four units in the fourplex as STRs improperly relied in

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> "2. In non-residential zones, up to 50% of the required parking area may be located off the site of the primary use or structure provided it is within 300 feet of such site.
>
> "B. *Off-street parking is incidental to the use which it serves. As such, it shall be located in a zone appropriate to that use, or where a public parking area is a specific permitted use.*" Record L-986 (emphases added.)

Intervenors do not explain how this provision allows meeting parking obligations using "on street areas" as they assert. Intervenors-Respondents' Brief 33. Given that the code section applies to "off-street parking and loading" it appears to us that this section may provide that the "off-street parking" obligation may be met off-street on lots within the same zone as the primary use or lots in a zone allowing public parking, within 300 feet of the primary use property.

part on intervenors' construction of a parking lot inadequately sized to serve the fourplex as an STR.

2. High End Furnishings and Finishes

Petitioner argues that the hearings officer improperly relied on intervenors' representation that they sourced higher end materials for the fourplex and upgraded the building to a higher level than they would have for long-term tenants.

In response to the *Holmes* factor "the good faith of the property owner in making expenditures to lawfully develop his property in a given manner," the hearings officer found, in part:

> "I asked about this at the hearing and I find convincing [intervenors'] argument that finishes and furnishing are significantly different and more costly for a STR. It is a matter of common sense and my own experience (especially when my wife is booking the accommodations) that when people are spending significant amounts of money for housing on vacation, they want a nice place. The photos attached to these letters show nice accommodations. Certainly, there could be lesser standards and cheaper STRs. Here, the money was spent to make these higher end STR rentals. If that money had not been spent, it would have been a closer decision." Record L-82-83.

The finish and decor findings adopted by the hearings officer include:

> "Summer 2016 – Remove carpet and linoleum and refinish floor in *unit 1557.*
>
> "* * * * *
>
> "Fall 2018 – Refinish flooring, kitchen reconfiguration, bathroom renovation, replastering and plumbing for *unit 1559*;

> "Fall 2018 – Strip and finish sleeping porch and landing." Record L-507 (emphases added.)
>
> "Spring 2020 – Renovating unit interiors including renovating kitchens, floors, plumbing repairs not to make the units habitable but rather to make them function at the level attractive to short term renters. Installed retaining wall and parking improvements.
>
> "Bi-weekly throughout 2020 – Sourced period appropriate and maritime related furniture and décor." Record L-508 (emphases added.)

Intervenors argue:

> "At the hearing, [intervenors] explained:
>
> > "'It is important to understand that when we purchased the property in 2015 from the Lower Columbia Preservation Society, all but one of the units were rented [correction, all units were occupied at purchase but one tenant defaulted on rent and left within the first month]. Although the old carpet or painted floors, acoustic ceiling tiles with upstairs units having rough cut cedar paneling on the walls and ceilings would have made it impossible to market to tourists, we could have continued to long-term rent the [fourplex] in the state that it was in. Therefore, the structural improvements were not critical to making the building habitable, as some claimed at the hearing, but rather were necessary to market for short term rentals.' [Record] L-459." Intervenors-Respondents' Brief 36 (first brackets in original; second and third brackets added).

Intervenors do not explain how the listed items (carpet, floor, ceiling tiles) are "structural," but a reasonable person could conclude that investments in improving the finishes in units 1557 and 1559 and the entry and occurring before January 1, 2019 were in pursuit of developing a STR use.

The hearings officer found that "expenditures made before the zone change show that [intervenors] went well beyond mere thinking about STR use." Record L-84. The hearings officer also found, however, "from my own experience, [long-term rentals] that are furnished are generally not furnished with expensive furnishings as [intervenors have] done here." Record L-83. We agree with petitioner that the hearings officer improperly relied on furnishing that was purchased and placed after January 1, 2019 in concluding that intervenors had established a vested right to develop the STR use of the fourplex. In determining whether a vested right exists, the city must consider "[w]hether *expenditures made prior to the subsequent zoning regulations* show that the property owner has gone beyond mere contemplated use and *has committed the property to an actual use* which would in fact have been made but for the passage of the new zoning regulation." *Polk County*, 292 Or at 81 n 7. The investments after January 1, 2019 may be considered in the context of whether an established vested right was subsequently abandoned, not whether the vesting right was initially established.

3. City Staff Emails

Petitioner also cites different city staff emails referenced by the hearings officer and regarding the city staff's evaluation of the use in 2020, concluding that the use was allowed and noting that the city subsequently issued notices of zoning violation for the fourplex STR use. Petition for Review 39. Intervenors argue that

> "staff took this issue up again in 2020, considered the non-conforming use issues and concluded that STR within the fourplex was started before 2019 and may continue. This determination led to the City issuing a transient license for all '11 bedrooms' on the property. [Record] L-927. The Hearings Officer agreed that this determination gave Intervenors further reinforcement that they were allowed to continue with their STR efforts. [Record] L-81-82." Intervenors-Respondents' Brief 34 (footnote omitted).

The hearings officer found that the 2020 email supported the conclusion that intervenors acted in good faith in continuing to invest in STR development after December 15, 2020, which relates to the first *Holmes* factor.[16] Record L-82. A reasonable person could conclude that investing during a period when the city did not identify a code violation was not unreasonable. This evidence does not relate, however, to whether intervenors had established a vested right on January 1, 2019. Accordingly, we agree with petitioner that the hearings officer improperly relied on that evidence to find a vested right.

4. Conclusion

Intervenors summarize the issue as follows:

> "[T]he only question for LUBA is whether a reasonable person looking at all of these facts, including the expenditures for high-end furniture necessary to furnish STR units, and conclude that all of these actions were not in furtherance of a short-term use. A reasonable person could make the same conclusion." Intervenors-Respondents' Brief 37.

[16] Activity after January 1, 2019 is not relevant to whether intervenors had a vested right on January 1, 2019.

We do not agree with intervenors that this is in fact the only question. The hearings officer's evaluation of the *Holmes* factors mixes actions before and after January 1, 2019. For example, we understand the high-end furniture was acquired during 2020 and does not relate to the threshold question of whether there was a vested right on January 1, 2019.[17] The hearings officer erred in relying on expenditures and actions after January 1, 2019 to conclude that intervenors had established a vested right. Because a vested right is the right to *complete* a nonconforming use, the fourplex STR was required to have the capacity to provide or to develop eight off-street parking spaces on January 1, 2019. The hearings officer therefore also erred in relying on on-street parking to meet the ADC requirement for sufficient off-street parking spaces to serve the eight fourplex bedrooms. As an inchoate nonconforming use, the basis for a vested right must demonstrate an ability to be consistent with the code applicable before the change in the law. Thus, we agree with petitioner that the hearings officer's vested rights determination is unsupported by adequate findings and substantial evidence. On remand, the hearings officer should adopt findings addressing whether intervenors had a vested right to establish the STR use of all four units in the fourplex on January 1, 2019, when that use became nonconforming, based on efforts and expenditures prior to January 1, 2019. If the hearings officer again

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[17] We understand the high-end furniture was purchased after January 1, 2019, and offered to show continuing efforts to develop the use. We express no opinion on whether furniture may be used to establish a vested right to complete a use.

concludes that intervenors had a vested right on January 1, 2019, then the hearings officer should determine whether any vested right intervenors held on January 1, 2019, was abandoned.

This portion of the third assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

A. Assignment of Error

Petitioner's second assignment of error is that the hearings officer

> "misapplied and misinterpreted the law of vested rights and rendered a decision lacking adequate findings and substantial evidence when it concluded * * * that intervenors had earned a greater right under a vested rights theory than they would be entitled to as a nonconforming use under ADC 3.180." Petition for Review 29.

B. Preservation

Petitioner's preservation statement asserts: "Petitioner argued that intervenors did not have a valid vested right to operate the four-plex as an STR (Rec 753-758, 667-669, 53-67)." Petition for Review 29. Intervenors argue that petitioner has not met their burden to demonstrate in the petition for review that the issue was preserved, in violation of OAR 661-010-0030(4)(d) as construed in *Rosewood*.

We agree with intervenors that petitioner does not identify with particularity where this issue was preserved in the preservation section of the assignment of error. In the body of the second assignment of error, however,

petitioner cites the hearings officer's decision at Record L-82-84.[18] Petition for Review 32. At Record L-82, the hearings officer states in his findings that he will address the *Holmes* "factors as quoted from [petitioner's] attorney's letter. [Record L-409-10.]" Record L-82. Above the list of factors at Record L-409 is petitioner's statement:

> "Any nonconforming use or *vested right [intervenors] may have had was lost through lapses in use that exceed 12 months and when they put the 4-plex to a conforming use.*
>
> "ADC §3.180(C) provides that any nonconforming use that lapses for a period exceeding 12 months is lost. *In this case ADC §3.180(C) means that if [intervenors] did not put the 4-plex to actual STR use within 12 months of January 1, 2019, i.e., by January 1, 2020, any nonconforming right was lost.*" Record L-409 (Emphases added).

We conclude that petitioner's failure to identify with particularity in their preservation statement where the second assignment of error is preserved does not prejudice intervenors' substantial rights where the petitioner cites a page of the hearings officer decision on which petitioner raised the issue of the relationship of vested rights and nonconforming use law.

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[18] As we discussed in our resolution of the prior assignment of error, the hearings officer stated in their decision that petitioner described "the legal maxim of vested rights as to [nonconforming uses]" and that they agreed with petitioner's "description of the law." Record L-81.

C. Discussion

1. Misconstruction of Law

Petitioner argues that the hearings officer misconstrued the law by not applying ADC 3.180 to their vested rights evaluation. ADC 3.180(C) provides, subject to conditions not relevant here, that if a nonconforming use is discontinued for a period of one-year, further use of the property must conform to the code.[19] ADC 3.180(B) provides that "after a nonconforming use is changed to a conforming use, it shall thereafter not be changed to a use that does not conform to the use zone in which it is located."

We explained in Hood River Citizens for a Local Economy v. City of Hood River,

> "discontinuance is potentially an issue under any application of the *Holmes* common law vested rights doctrine, even if no other legislation applies. As a refinement of that doctrine, *Fountain Village* and *Crosley* [*v. Columbia County*, 65 Or LUBA 164, *aff'd*, 251 Or App 653, 286 P3d 911 (2012)] indicate that if the local government has adopted legislation governing discontinuance of a nonconforming use, that legislation will also apply to discontinuance of a vested right." 65 Or LUBA 392, 414-15 (2012).

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[19] ADC 3.180(C)(1):

> "If a nonconforming use involving a structure is discontinued for a period of one (1) year, further use of the property shall conform to this Code except [where the nonconforming use does not involve a structure or, subject to criteria, a residential structure used for more units than allowed.]"

For the reasons set out in *Hood River*, we agree with petitioner that a vested right is lost if development of the vested rights use is discontinued for a year or development of the vested right is otherwise forfeited under the ADC. We agree with petitioner that the hearings officer misconstrued the law in failing to apply ADC 3.180(B) and (C) to intervenors' use of the fourplex after January 1, 2019. Vested rights are based in common law and subject to the city's nonconforming use limitations.

The misconstruction of law subassignment of error is sustained.

2. Adequacy of Findings and Substantial Evidence

Petitioner argues that the decision lacks adequate findings and substantial evidence that any vested right held by intervenors complies with ADC 3.180.

Petitioner maintains:

> "Like Wal-Mart's failure to act upon its claimed vested right to expand for 30 years, intervenors in this case failed to actually operate the four-plex units as STRs for 3 years after January 1, 2019, and they stopped all construction and renovation progress once they put the four-plex to long-term multi-family use, which happened before January 1, 2019. This failure to act upon their claimed vested right for more 12 than months terminated any vested right they may have had to 'complete' the STR four-plex under ADC 3.180(B) & (C)." Petition for Review 34.

Petitioner also argues that this case involves facts and claims similar to those in *Crosley*, where there were significant gaps in progress developing the nonconforming use. Petition for Review 33. The hearings officer did not make findings as to whether vested rights were lost due to noncompliance with ADC

3.180(B) and (C). Intervenors argue that this is harmless error because of the hearings officer's nonconforming use findings.

Addressing the nonconforming use application, the hearings officer adopted intervenors' "attorney letter and [found] that there were no gaps for over 12 months where the STR use was not pursued." Record L-80. We explained in *Crosley*:

> "The right that the holder of a vested right has is the right to continue 'construction' of a proposed use until construction of that proposed use is complete and the vested right is converted to a nonconforming use, or, put another way, the nonconforming use is fully established. Since the use that a vested right protects is an inchoate nonconforming use, *i.e.* a use that does not yet exist, there is no nonconforming use to 'maintain.' It is the continued 'construction' of an inchoate nonconforming use that must not be abandoned, discontinued or interrupted for more than one year in Columbia County under CCZO 1506.4 to avoid losing a vested right to continue construction of that vested right. If petitioner discontinued or interrupted construction of the dwelling for more than one year after the construction of the foundation was completed in 1979, the fact that petitioner may have engaged in some activities that can be characterized as maintaining the foundation or maintaining or enhancing the vegetation on the property does not alter the fact that construction was discontinued or interrupted. Where construction of a residence has been discontinued or interrupted, actions to maintain the partially constructed residence are not sufficient to continue 'construction' of the residence." 65 Or LUBA 164, 174 (2012).

In a footnote we added:

> "As an example, it seems highly unlikely that a maintenance action to fix a broken window in a large nonconforming industrial building would be sufficient to constitute a continuation of that nonconforming industrial use if that building was vacant and unused

for industrial use during the year the window was replaced." *Id.* at 174 n 6.

In this case, in their analysis of *the nonconforming use*, the hearings officer found:

> "[Petitioner] argue[s] that there were gaps in the use that exceeded 12 months and the units all had long term rental agreements which nullified the [nonconforming use] for STR. I adopt [intervenors'] attorney letter and find that there were no gaps for over 12 months where the STR use was not pursued." Record L-80.

Intervenors' attorney letter that the hearings officer adopted as findings identifies both dates before and after January 1, 2019 and describes some exterior activity as occurring between June 2018 and June 2019. The adopted findings identify the following activities as occurring solely after January 1, 2019:

> "January 2019 – Reinforcing the foundation including parking construction vehicles and materials, including a porta-potty in the parking lot.
>
> "Winter 2019 – Finishing the basement including short-term rental supply storage and furniture staging areas.
>
> "Spring 2020 – Renovating unit interiors including renovating kitchens, floors, plumbing repairs not to make the units habitable but rather to make them function at the level attractive to short term renters. Installed retaining wall and parking improvements.
>
> "Bi-weekly throughout 2020 – Sourced period appropriate and maritime related furniture and décor
>
> "Winter 2020 – Obtaining occupancy tax licensing for all [fourplex and cottage units]
>
> "Winter 2020 through April 2021 – Learned of water intrusion through the windows on the east and south wall required scaffold

and tarp the south wall and installation of custom metal window sills.

"March 2021 through May 2021 – constructed a fence to prevent short term renters from accessing the property through the neighbor's driveway

"January 2022 – Installed electronic locks

"Spring 2022 – Installed security cameras

"August 2022 – Installed decibel meters to monitor sound, temperature and humidity levels.

"*There was never any 12-month period where [intervenors] discontinued their efforts to prepare the units for the short term market.*

"*Regarding changing the use, [intervenors] never changed the use to accommodate long term rentals. Rather, they rented units as they had always been allowed to do until their units were ready for short term marketing on Airbnb.* A reasonable person would not continue to buy furniture, utensils, dishes and towels in order to engage in the long-term rental of units if they believed the regulations would prohibit short term use. They would not painstakingly restore straight-grain fir floors to accommodate long-term renters, knowing that such use could require allowing service animals that would destroy those same floors. They would not install locked storage areas for paper products, soaps, and cleaning supplies necessary for weekly cleaning of units that would be accommodated by long-term renters. All of these actions taken before and after the code changed indicate that they always intended and were working towards short term rentals." Record L-507-08 (emphases added).

The findings that there is a vested right to use the fourplex as an STR are inadequate because they do not explain whether the hearings officer relied on activities after January 1, 2019, to find that intervenors established vested rights,

or whether those activities demonstrate that a vested right was not abandoned. Furthermore, findings that simply state a use was not interrupted are impermissibly conclusory. *Suydam v. Deschutes County* 29 Or LUBA 273 (1995). The above findings do not address all the items and periods of time set out in the chronology. They therefore do not explain why the evidence shows that development of the STR use was never discontinued for a period of twelve consecutive months and that the listed action items were tailored to a fourplex STR as opposed to long-term rental use.

The hearings officer also found that renting the units to long-term tenants was a rational course of action while work was done to establish the STR use and, thus, consistent with a nonconforming use. ADC 3.180(B) provides "after a nonconforming use is changed to a conforming use, it shall thereafter not be changed to a use that does not conform to the use zone in which it is located." The findings explain the economic rationale for long-term rentals but do not address the code or explain why the code allows ongoing long-term rentals in the C-3 zone without an abandonment of any vested right to STR use. The hearings officer's findings on nonconforming uses may not substitute for vested rights findings.

Accordingly, the failure to adopt findings that a vested right to use the fourplex as an STR was not lost due to discontinuance or operation of a conforming use is not harmless.

The second assignment of error is sustained.

DISPOSITION

In our resolution of the first assignment of error, we agree with petitioner that the hearings officer misconstrued the city's definition of "nonconforming use" and the purpose of the city's nonconforming use regulations. Intervenors concede that the fourplex units were not used as STRs prior to or on January 1, 2019, the date that the use became nonconforming. That could lead to a conclusion that a nonconforming use determination is prohibited as a matter of law. However, as explained above, the hearings officer found in addition and in the alternative, that if intervenors had not established a nonconforming use, then intervenors had established a vested right to continue to develop the STR use.

The question then becomes whether the correct disposition is remand or reversal. As we explained in *Richmond Neighbors v. City of Portland*:

> "OAR 661-010-0071 provides that LUBA shall reverse a decision when '[t]he decision violates a provision of applicable law and is prohibited as a matter of law,' while LUBA shall remand a decision when '[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law.' * * * [W]hether reversal or remand is appropriate depends on whether it is the decision or the proposed development that must be corrected. If the identified errors can be corrected by adopting new findings or accepting new evidence, * * * then remand is appropriate. If the identified errors require a new or amended development application, then reversal is appropriate." 67 Or LUBA 115, 129 (2013) (citing *Angius v. Washington County*, 35 Or LUBA 462, 465-66 (1999); *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992)).

LUBA's decision to reverse or remand is not limited to the disposition requested by the parties, but is based on "what the nature of the assigned and

established error demands." *McKay Creek Valley Assn. v. Washington County*, 114 Or App 95, 99, 834 P2d 482, *adh'd to as modified on recons*, 116 Or App 299, 841 P2d 651 (1992), *rev den*, 317 Or 396, 857 P2d 851 (1993).

We review a non-legislative decision as a whole and must reverse, remand, or affirm the decision.[20] ORS 197.835(1) (LUBA "shall review the land use decision * * * and prepare a final order affirming, reversing or remanding the land use decision * * *."); *Dreyer v. City of Eugene*, 78 Or LUBA 391, 398 (2018), *aff'd* 296 Or App 490, 437 P3d 1236 (2019) ("LUBA may resolve the merits of an appeal only by affirming, reversing, or remanding the decision on review."). Petitioner has not established that the hearings officer's vested rights decision "violates a provision of applicable law and is prohibited as a matter of law." For reasons explained above, we remand the vested rights determination. Accordingly, we remand the entire decision.

The decision is remanded.

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[20] See ORS 197.835(6) and (7) and OAR 661-010-0071(3) for review of decisions adopting a change to an acknowledged comprehensive plan or land use regulation.