

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

3
4 BEND/SISTERS GARDEN RV RESORT LLC,
5 CELIA HUNG, RICHARD ESTERMAN,
6 and CENTRAL OREGON SHOWS,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF SISTERS,
12 *Respondent.*

13
14 LUBA No. 2014-086

15
16 FINAL OPINION
17 AND ORDER

18
19 Appeal from City of Sisters.

20
21 Wendie L. Kellington, Lake Oswego, filed the petition for review and
22 argued on behalf of petitioners. With her on the brief was Kellington Law
23 Group, PC.

24
25 Steven D. Bryant, Redmond, filed the response brief and argued on
26 behalf of respondent. With him on the brief was Bryant Emerson, LLP.

27
28 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN Board
29 Member, participated in the decision.

30
31 REMANDED 10/02/2015

32
33 You are entitled to judicial review of this Order. Judicial review is
34 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision that approves their application for a temporary use permit, but with conditions that petitioners oppose.

REPLY BRIEF

Petitioners move for permission to file a reply brief. The motion is granted.

FACTS

Petitioners sought the disputed temporary use permit (TUP) in order to lease spaces that would allow multiple outdoor vendors to sell items on a two-acre property located in the City of Sisters. The vendors would occupy a total of 91 portable pop up tents, each 10 feet by 10 feet. A larger stage tent with seating in front would occupy the middle of the site. The vendors would sell arts and crafts, food and drinks, and a variety of retail items. With few exceptions, the vendor tents would only be used for three days at a time, during summer months.

The city’s land use regulations are codified in the Sisters Development Code (SDC). The SDC authorizes “Temporary Uses,” and the decision on appeal approved petitioners’ request for a TUP, with conditions. A different codification, the Sisters Municipal Code (SMC), includes a variety of city ordinances. SMC Title 5 governs “Business Licenses and Regulations.” Although petitioners challenge the city’s interpretation and application of a

1 time limit imposed by the SDC on TUPs, the majority of the parties’ dispute in
2 this appeal concerns the relationship between TUPs authorized by the SDC and
3 Transient Merchant Licenses (TMLs), which are issued under SMC Title 5.

4 **FIRST ASSIGNMENT OF ERROR**

5 **A. The City Council’s Interpretation and LUBA’s Standard of**
6 **Review**

7 The issue presented in the first assignment of error is one of
8 interpretation of the SDC.¹ Because the city council is the governing body, the
9 city council’s interpretation of its land use regulations is subject to deferential
10 review under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247,
11 260-61, 243 P3d 776 (2010).² As relevant here, that interpretation must be
12 upheld unless it “[i]s inconsistent with the express language” of the SDC.

¹ The below is an aid to keep up with the acronyms we use in this opinion.
SDC = Sisters Development Code.
SMC = Sisters Municipal Code
TML = Transient Merchant License
TUP = Temporary Use Permit

² ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

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

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

1 SDC Chapter 2.15 sets out “Special Provisions” governing a variety of
2 different uses. SDC 2.15.1900 governs temporary uses. SDC 2.15.1900(C)(2)
3 sets out time limits for TUPs:

4 **“Time Limits.** Unless otherwise noted, the temporary use shall
5 cease and any approved structure removed upon expiration of the
6 temporary use permit, unless renewed by the Community
7 Development Director or his/her designee. *In no case shall a*
8 *temporary use permit be issued for a period exceeding 180 days in*
9 *any 365 day period.”* (Emphasis added.)

10 Petitioners’ interpretive challenge under the first assignment of error
11 concerns the final sentence of SDC 2.15.1900(C)(2). Petitioners took the
12 position before the city that the 180-day time limit does not begin until the TUP
13 is first used and the 180-days need not be measured in consecutive days.
14 Supplemental Record 44.³ In response to questions from the city council, the
15 city attorney ultimately advised the city council that SDC 2.15.1900(C)(2)

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

“(d) Is contrary to a state statute, land use goal or rule that the
comprehensive plan provision or land use regulation
implements.”

³ If we understand petitioners’ position correctly, that would allow
petitioner to operate for multiple days, separated by days of inactivity, so long
as the total number of days of operation within a 365-day span did not exceed
180 days. For example, under petitioners’ understanding of SDC
2.15.1900(C)(2), the operation authorized by the TUP could operate up to 60
separate periods of three days each.

1 requires that the 180-day period must commence on the date the TUP is issued
2 and must run for 180 consecutive days. Supplemental Record 857.

3 In its findings the city council set out the text of SDC 2.15.1900(C)(2)
4 and then found:

5 “The time-frame requested is from July 1, 2014 to December 27,
6 2014, a total of 180 days. A condition shall be added that allows
7 the applicant up to 180 days within a 365 day period to use the
8 property in this manner[.]” Record 36.

9 Although the above finding is a bit ambiguous, petitioners contend it can be
10 read to be consistent with their interpretation of the SDC 2.15.1900(C)(2) 180-
11 day time limit. We agree. But we do not agree with petitioners’ suggestion that
12 the finding is not consistent with the city councils’ ultimate, albeit implicit,
13 interpretation. The general condition of approval number 1 that the city council
14 included in its September 11, 2014 decision appears to have adopted the city
15 attorney’s interpretation of the SDC 2.15.1900(C)(2) 180-day time limit. That
16 condition is set out below:

17 “**Validity Duration.** This Decision authorizes a Temporary Use
18 Permit for the Bend/Sisters Garden RV Resort Company. This
19 permit is valid beginning September 13, 2014 and terminates on
20 March 11, 2015, 5:00 p.m.” Record 48.

21 We conclude that, in adopting general condition of approval number 1, the city
22 council implicitly interpreted the SDC 2.15.1900(C)(2) 180-day time limit to
23 require that a TUP be limited to a single 180-day period, which must begin on

1 the day the TUP is approved.⁴ That implicit interpretation is adequate for
2 review, and is entitled to deferential review under ORS 197.829(1) and
3 *Siporen. Alliance for Responsible Land Use v. Deschutes County*, 149 Or App
4 259, 266, 942 P2d 836 (1997).

5 **B. Petitioners’ Challenge to the City Council’s Interpretation**

6 Petitioners argue the above condition renders the TUP for their proposed
7 outdoor sales “virtually useless,” because it begins and terminates outside the
8 period of the year with reliably good weather. Petition for Review 10.

9 “[T]he text of 2.15.1900(C)(2) is straightforward. The code states:
10 ‘In no case shall a temporary use permit be issued for a period
11 exceeding 180-days in any 365 day period.’ SDC 2.15.1900(C)(2).
12 This means exactly what it says. The applicant has a right under a
13 TUP to conduct a temporary use for 180 days in *any* 365-day
14 period. The 180 days is just that, 180 days. The reference to ‘days’
15 means one counts days, not months. It does not say 180
16 ‘consecutive’ days or ‘6 months.’ No language in the provision
17 limits how an applicant uses the 180 days other than the days must
18 be used within a 365-day period. The 180 days may be used
19 consecutively or singularly or some combination of those.
20 However, the number of days the permit is used cannot exceed
21 180 days.

22 “The reference to ‘any 365 day period’ refers to the ultimate
23 timeframe during which the applicant may use his or her 180
24 ‘days.’ Nothing in the language of the code says that the TUP time
25 period necessarily runs from the final city approval for a period of
26 six consecutive months, as the city condition requires. * * *”
27 Petition for Review 15-16.

⁴ The TUP was approved on September 11, 2014, under the condition the 180-day time limit commenced on September 13, 2014. The reason for the two-day difference is not clear from the record.

1 Petitioners contend the city council’s interpretation violates ORS
2 174.010 by inserting language into SDC 2.15.1900(C)(2) that is not there and
3 by failing to give effect to, and thereby omitting, words that are included in
4 SDC 2.15.1900(C)(2).⁵ Petitioners argue the city councils’ interpretation is also
5 inconsistent with relevant contextual requirements in the SDC, which explicitly
6 require that certain other time periods be measured in “consecutive days,”
7 when that is the city’s intent.⁶

⁵ ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted, or to omit what has been inserted*; and where there are several provisions or particulars such construction is, if possible, to be adopted as *will give effect to all*.” (Emphasis added.)

We understand petitioners to contend that requiring the 180 day period to commence on the date the permit is issued and requiring that the 180 days be continuous require inserting text into SDC 2.15.1900(C)(2). We also understand petitioners to contend that requiring the 180 day period to begin on the date the permit is issued makes the words “in any 365 day period” meaningless, thereby failing to give those words effect and omitting them from SDC 2.15.1900(C)(2).

⁶ For example under SDC 2.15.1900(E)(5) “Temporary non-profit seasonal sales * * * up to 30 consecutive days per calendar year” are exempt from land use review. And under SDC 2.15.2400(E)(7) temporary exemptions from the city’s dark sky standard may be granted for “up to five consecutive days per calendar year.”

1 **C. The City’s Two-Part Interpretation**

2 **1. A TUP is Limited to a Single Period of no More Than**
3 **180 days**

4 We restate the key sentence of SDC 2.15.1900(C)(2):

5 “In no case shall a temporary use permit be issued for a period
6 exceeding 180 days in any 365 day period. (Underlining and
7 italics added.)

8 While it is possible to characterize the city council’s condition as
9 imposing a 180 *consecutive* day limit, it is also possible to characterize the
10 condition as limiting the TUP to a single *period* of 180 days that begins on
11 “September 13, 2014 and terminates on March 11, 2015, 5:00 p.m.” Limiting
12 the TUP to a single period of 180 days is entirely consistent with prohibition in
13 SDC 2.15.1900(C)(2), that “[i]n no case shall a temporary use permit be issued
14 for a *period* exceeding 180 days * * *.” A possible negative implication from
15 that language is that in all cases a temporary use permit shall be issued for a
16 period of 180 days or less. On the other hand, petitioners’ interpretation that
17 SDC 2.15.1900(C)(2) allows TUP holders as many separate periods of
18 operation as they wish, so long as those separate periods of use do not extend
19 beyond a total of 180 days in any 365-day period, has no textual support in
20 SDC 2.15.1900(C)(2). As the city points out, petitioners’ interpretation is also
21 inconsistent with the SDC definition of TUP. Under SDC 1.3.300, by
22 definition, a temporary use is one that is for a “fixed period of time,” which

1 expires at the end of that period time.⁷ We reject petitioners’ argument that
2 under SDC 2.15.1900(C)(2) a temporary use permit may not be limited to a
3 single period of time that may not exceed 180 days. The city councils’ implicit
4 interpretation is consistent with the text of SDC 2.15.1900(C)(2) and therefore
5 is not reversible under ORS 197.829(1) and *Siporen*.

6 2. **The 365 Day Period**

7 Turning to the city council’s implicit interpretation that SDC
8 2.15.1900(C)(2)’s 180-day period limit must begin on the day the TUP is
9 issued, we conclude that aspect of the city councils’ interpretation is
10 inconsistent with the express “in any 365 day period” language in SDC
11 2.15.1900(C)(2). The city council’s implicit interpretation has the effect of both
12 omitting the bracketed language and inserting the following italicized language
13 in SDC 2.15.1900(C)(2): In no case shall a temporary use permit be issued for
14 a period exceeding 180 days [~~in any 365 day period~~] *beginning on the date the*
15 *TUP is issued.* (Strikethrough and italics added.) The express language of SDC
16 2.15.1900(C)(2) allows the authorized period of up to 180 days to begin and
17 end any time within a 365-day period. The city council’s interpretation ignores

⁷ SDC 1.3.300 sets out the following definition for temporary use:

“**Temporary Use** - A short-term, seasonal, or intermittent use. A temporary use is one established for a fixed period of time with the intent to discontinue such use upon the expiration of such time. Such uses do not involve the construction or alteration of any permanent structure.”

1 that language and requires that the 180-day period be tacked on to the date of
2 the decision. That aspect of the city's councils' interpretation is inconsistent
3 with the express language of SDC 2.15.1900(C)(2).

4 However the city's erroneous understanding that the 180-day period
5 must begin on the date the permit is issued provides no basis for remand in this
6 case. Petitioners requested that the TUP be effective from July 1, 2014 through
7 December 31, 2014. Record 2351. When the local proceeding extended past
8 July 1, 2014 and into September 2014, petitioners never requested that the TUP
9 be effective for a 180-day period in 2015, for example beginning June 1, 2015.
10 Had petitioners made such a request, we believe the city could have granted it.
11 But because petitioners never made such a request, the city cannot be faulted
12 for not giving petitioners something they never asked for.

13 When the proceedings extended until the end of the summer in 2014,
14 petitioners requested that the TUP be effective for multiple periods of days so
15 long as the total number of days in those periods did not exceed 180. Record
16 1003-04; Supp Rec 44. As we have already explained, the city's interpretation
17 of SDC 2.15.1900(C)(2) to require that a TUP must be limited to a single
18 period of time that may not exceed 180 day is not reversible under ORS
19 197.829(1) or *Siporen*. The city council did not err by refusing to approve a
20 TUP for multiple periods of time, when that would be inconsistent with the city
21 council's interpretation that only a single period of no more than 180 days can
22 be approved under SDC 2.15.1900(C)(2).

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioners’ second assignment of error challenges general condition of
4 approval number 6, which is set out below:

5 “6. **Business and Transient Merchant Licenses.** The applicant
6 is required to obtain a City Business License prior to the
7 commencement of the first event on these sites, which
8 Business License shall be renewed every year that events
9 are to be conducted. Further, each vendor is required to get
10 a Transient Merchant license from the City.” Record 48.

11 Petitioners argue the city erred by requiring as a Condition of TUP approval
12 that “each vendor participating in each Temporary Use event obtain a [TML]
13 for each day of participation and pay the \$100 per day TML fee for each day of
14 participation[.]” Petition for Review 21. Petitioners advance seven different
15 legal theories in support of that argument. We group some of those theories
16 together and discuss them below as separate sub-assignments of error, after
17 addressing the city’s jurisdictional challenge to the second assignment of error.

18 At the outset, however, we note that while general condition of approval
19 number 6 does require that individual vendors must obtain a TML, the
20 condition does not require that each such vendor must pay a \$100 fee.
21 Apparently the city has required vendors using petitioners’ property to pay
22 TML fees in the past.⁸ But the city has authority to grant exemptions from the

⁸ At oral argument LUBA was advised that petitioners requested a waiver of transient merchant licensing fees for its vendors in the past, and the city denied

1 TML fee on a case by case basis, and nothing in general condition of approval
2 6 would preclude the city from doing so for petitioners’ vendors if and when
3 transient merchant licenses are sought by those vendors in the future. As
4 explained later in this opinion, the SMC also grants blanket exemptions from
5 the TML fee where a “sponsoring organization” has secured a “special event
6 permit.” *See* n 16. We understand the city to take the position in its brief, that
7 the city council intended to make it clear to petitioners in the decision that is
8 before us in this appeal, that petitioners’ vendors would not qualify for that
9 blanket TML fee exemption.

10 **A. The City’s Jurisdictional Challenge**

11 Although the city concedes that the TUP qualifies as a “land use
12 decision,” as that term is defined by statute, and that LUBA has exclusive
13 jurisdiction to review land use decisions, the city contends that the part of the
14 city’s decision that is challenged under the second assignment of error applies
15 the city’s business license requirements, rather than land use standards, and
16 therefore the second assignment of error is not reviewable by LUBA as a land
17 use decision or a limited land use decision.

18 As defined by ORS 197.015(10)(a) a local government decision that
19 applies the statewide planning goals, a comprehensive plan or a land use

that request. Petitioners filed a petition for writ of review challenging that waiver denial in Deschutes County Circuit Court. LUBA was also informed at oral argument that the pending circuit court proceeding has been suspended pending LUBA’s resolution of this appeal.

1 regulation qualifies as a land use decision. There is no dispute that parts of the
2 appealed decision that are not at issue under the second assignment of error
3 apply city land use regulations, and for that reason the appealed decision is a
4 land use decision subject to LUBA review.⁹ The city’s jurisdictional challenge
5 is really a scope of review challenge rather than a jurisdictional challenge.

6 LUBA’s scope of review under ORS 197.835(9) includes authority to
7 determine whether the decision on review “[i]mproperly construed the
8 applicable law[.]” ORS 197.835(9)(a)(D). Where LUBA has jurisdiction to
9 review a land use decision, it also has jurisdiction to review challenges to that
10 decision’s construction of “applicable law,” even if that “applicable law” is not
11 a statewide planning goal, a comprehensive plan provision or a land use
12 regulation. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100, (2000).

13 In *Carlsen*, we left open the possibility that a law might be so unrelated
14 to the land use laws that make a decision qualify as a land use decision under
15 ORS 197.015(10)(a) that such a law might not qualify as “applicable law”
16 within the meaning of ORS 197.835(9)(a)(D). *Id.* at 100. Although the parties
17 do not address that issue, the TML requirements were a significant issue during
18 the proceedings below and that issue is intertwined with the land use issues.¹⁰

⁹ ORS 197.825(1) grants LUBA exclusive jurisdiction to review land use decisions.

¹⁰ The intertwined nature of the land use issues and TML issue is most obvious in our discussion under section C below.

1 We cannot say the TML issue is so unrelated to the land use issues in this case
2 that LUBA should limit its review to the first assignment of error.

3 We reject the city’s jurisdictional challenge.

4 **B. The City Exceeded its Authority in Adopting the Transient**
5 **Merchant License Condition**

6 Petitioners argue the city lacked authority to impose the disputed
7 condition requiring that each of petitioners’ vendors get a TML from the city.
8 Petitioners advance two arguments in support of that position, which we
9 address separately below.

10 **1. SDC 2.15.1900(C)(3)**

11 SDC 2.15.1900(C)(3) authorizes “Additional Conditions” as follow:

12 **“3. Additional Conditions** In issuing a temporary use permit,
13 the Community Development Director or his/her designee
14 may impose reasonable conditions as necessary to preserve
15 the basic purpose and intent of the underlying zoning
16 district. These conditions may include, but are not limited to
17 the following: increased yard dimensions; fencing,
18 screening or landscaping to protect adjacent or nearby
19 property; limiting the number, size, location or lighting of
20 signs; restricting certain activities to specific times of day;
21 refuse containers; and providing sanitary lavatory facilities
22 or have a written agreement for use of lavatory facilities by
23 operators and patrons within 200 feet of the vehicle’s
24 location.”

25 Petitioners contend the disputed TML condition is not “necessary to preserve
26 the basic purpose and intent of the underlying zoning district” and therefore
27 exceeds the conditioning authority granted by SDC 2.15.1900(C)(3).

1 The city does not really respond to the argument, except to contend this
2 issue exceeds LUBA’s scope of review and to offer the following explanation:

3 “* * * It was clear from the outset that that Petitioner * * *
4 misunderstood the Application of the Business License Code and
5 viewed obtaining a Temporary Use Permit as a means of avoiding
6 the City’s Transient Merchant License requirements. The City
7 intended to be transparent with Petitioner * * * regarding the
8 Business License requirements for its proposed use and include
9 those provisions within its Decision so there was no issue that
10 Petitioner * * * understood the Business License requirement. The
11 fact remains that regardless of whether the Business License
12 requirement for the Transient Merchants was included in the
13 Decision document, it would apply to those businesses in the same
14 manner that all other provisions of the SMC apply to Petitioners
15 and to the Transient Merchant. * * *” Respondent’s Brief 6-7.

16 While the disputed condition does not appear to be one that falls within
17 the scope of SDC 2.15.1900(C)(3), at least the city does not argue that it does,
18 the challenged decision is a Type II decision under the SDC. SDC 4.1.400(C) is
19 a more general grant of conditioning authority for Type II decisions.¹¹ If the

¹¹ SDC 4.1.400(C) provides as follows:

“Administrative Decision Requirements. The Community Development Director or designee shall make Type II written decisions addressing all of the relevant approval criteria and standards. Based upon the criteria and standards, and the facts contained within the record, the Community Development Director or designee shall approve, *approve with conditions*, or deny the requested permit or action. The decision may include a requirement for non-remonstration for future road improvements. At the discretion of the Community Development Director or designee, any Type II application may be forwarded to the Planning Commission for decision.” (Emphasis added.)

1 city wants to anticipate and resolve what it perceives to be misunderstandings
2 regarding business licensing requirements in its TUP conditions of approval
3 when adopting Type II decisions, we believe the grant of authority in SDC
4 4.1.400(C) is broad enough to allow such conditions of approval.

5 **2. Under ORS 197.195 Approval or Denial of a Limited**
6 **Land Use Decision Must be Based on Land Use**
7 **Regulations**

8 The challenged decision is a limited land use decision.¹² Under ORS
9 197.195 all comprehensive plan provisions that apply to limited land use
10 decisions must be incorporated into the city’s land use regulations, in this case
11 the SDC. ORS 197.195(3)(c)(C) requires that the city give notice of limited
12 land use decisions that “[I]ist[s], by commonly used citation, the applicable
13 criteria for the decision[.]” Petitioners contend the applicable approval criteria
14 in this case are in the SDC and that the city’s notice makes no mention of the
15 city’s business licenses and regulations at SMC Title 5. Because the city’s
16 TML regulations at SMC Title 5 are not land use regulations, petitioners
17 contend the city’s imposition of general condition of approval number 6 “is
18 prohibited by ORS 197.195.” Petition for Review 23.

¹² ORS 197.015(12) defines the term “[I]imited land use decision” to include certain decisions that pertain to sites “within an urban growth boundary[.]” There is no dispute that the decision before us in this appeal qualifies as a limited land use decision.

1 ORS 197.195(1) prohibits a local government from directly applying
2 comprehensive plan requirements as a basis for its decision on an application
3 for limited land use decision approval, where the comprehensive plan
4 requirements have not been incorporated into the local government’s land use
5 regulations.¹³ That prohibition is simply inapplicable to the city’s business
6 license regulations. Nothing in ORS 197.195 makes any reference to local
7 government licensing and other city non-land use regulations that may apply to
8 activities or uses authorized by limited land use decisions or prohibits a local
9 government from conditioning its approval of a limited land use decision on
10 compliance with other applicable city regulations. Petitioners have not
11 established that the city exceeded its authority in adopting the TML condition.

12 This subassignment of error is denied.

13 **C. The Temporary Use Permit Does Not Qualify As An Exempt**
14 **Special Event Permit.**

15 SMC 5.24 sets out the city’s licensing requirements for transient
16 merchants.¹⁴ SMC 5.24.115(1) requires that all transient merchants must obtain

¹³ ORS 197.195(1) provides, in part:

“* * * If a city or county does not incorporate its comprehensive plan provisions into its land use regulations, the comprehensive plan provisions may not be used as a basis for a [limited land use] decision by the city or county or on appeal from that decision.”

¹⁴ SMC 5.24.110 provides:

1 a “temporary business license,” which the parties refer to as a transient
2 merchant license or TML.¹⁵ SMC 5.24.115(2) directs the city council to set the
3 license fee for a TML and gives the city administrator or city council authority
4 to “waive or reduce the fee for any entity when the City Administrator or City
5 Council finds that the purpose of the activities of the entity will benefit the
6 city.” We will refer to this waiver as the “Benefit the City TML Fee Waiver.”
7 SMC 5.24.115(5) waives the TML fee for “special event[s]” for which a
8 “special event permit” has been secured from the city.¹⁶ We will refer to this
9 waiver as the “Special Event TML Fee Waiver.”

10 Petitioners contend the events that will be held under the TUP are
11 “special events” and that the TUP is a “special event permit,” within the

Definition. Transient merchant is a person who either carries goods, wares or merchandise from area to area (or City to City), selling or offering the same for retail sale; or who offers goods, wares, merchandise or services from a vehicle, trailer or cart, temporary apparatus, temporary location, or door to door without making the business permanent and continuous in the City.”

¹⁵ SMC 5.24.115(1) provides:

“No person or other entity shall engage, conduct or participate in the business of a transient merchant in the City without first obtaining a temporary business license * * *.”

¹⁶ SMC 5.24.115(5) provides:

“Exemption. An exemption shall be granted for the permit fee if the transient merchant activity is held in conjunction with a *special event* for which the sponsoring organization has already secured a *special event permit* from the City.” (Emphases added.)

1 meaning of SMC 5.24.115(5). Petitioners argue “[t]he City made a decision
2 contrary to its regulations when it required each vendor participating in TUP
3 special events ‘to get a [TML]’, but then failed to indicate that the fees for the
4 TMLs will be waived. * * *” Petition for Review 32. In other words,
5 petitioners contend that in imposing general condition 6, which requires that all
6 of petitioners’ vendors obtain TMLs, it was error for the city to fail to specify
7 that those vendors will qualify for a Special Event TML Fee Waiver under
8 SMC 5.24.115(5).¹⁷

9 Planning staff during the proceedings before the planning commission
10 pointed out the term “special event” is not defined anywhere in the SMC, and
11 appeared to take the position that a “special event permit” is the same thing as a
12 “public event permit,” which is issued under a different section of Title 5 that

¹⁷ There is no question that petitioner asserted below that a TUP and the Special Event Permit referenced in SMC 2.24.115(5) are the same thing. But in their appeal of the planning department’s decision concerning the TUP to the planning commission, petitioners argued that SMC 2.24.115(5) exempted their vendors from having to secure a TML at all:

“The Temporary Use Approval is a Special Event Permit authorizing commercial sales – which is a use permitted outright – by different vendors in a single location. The Temporary Use Permit goes through the rigor of a specific land use approval process. The applicant has paid the Temporary Use Fee. Fairly read, per SMC 5.24.115(5) * * *, no Transient Merchant License is required where the Applicant possesses a Temporary Use permit, which is a type of Special Use Permit. Otherwise, there is no point to a Temporary Use Permit.” Record 2191.

1 governs Public Events. SMC 5.06.¹⁸ Record 2052; Supplemental Record 49.
2 SMC 5.06.020(1) requires public event permits for all public events.¹⁹ By
3 definition, a public event permit authorizes events on public land. We
4 understand the staff position to be that because petitioners' proposed event will
5 take place on private land, it would not qualify for a public event permit, and
6 because a special event permit is another term for a public event permit,
7 petitioners' event therefore would not qualify for the SMC 5.24.115(5) Special
8 Event TML Fee Waiver.

¹⁸ SMC 5.06.010 sets out definitions, including the following:

“‘Large Public Event’ means any organized gathering of 75 persons or more which is held in a City park or on public property to which the general public or private parties are invited.” SMC 5.06.010(3).

“‘Small Public Event’ means any organized gathering of 30 to 74 persons which is held in a City park or on public property to which the general public or private parties are invited.” SMC 5.06.010(9).

¹⁹ 5.06.020(1) provides:

“It shall be unlawful for any person, persons, corporation, or organization to allow, promote, conduct or cause to be advertised, any public event defined in this Ordinance to be conducted in a City park or on public property to which the general public or private parties are invited unless the person, persons, corporation, or organization sponsoring said public event shall first obtain a permit as provided, and shall comply with all regulations provided in this Ordinance.”

1 In its brief, the city responds to petitioners’ arguments that city staff
2 erred by treating the different terms “special event permit” and “public event
3 permit,” as the same thing:

4 “The record is clear that the City has always used Special Event
5 Permit and Public Event Permit interchangeably. However, even if
6 Petitioners are correct that the City cannot use those terms
7 interchangeably, it does not help Petitioners’ argument. The result
8 of such a determination would be that Transient Merchants
9 operating under a Public Event Permit would have to pay the
10 Transient Merchant License Fee. As Petitioners correctly point
11 out, the City has no process for a ‘Special Event Permit,’ which
12 means that no entity could obtain such a permit and take
13 advantage of the Transient Merchant Fee Exemption in SMC
14 5.24.115(5). What the lack of a Special Event Permit process
15 certainly does not mean is that Petitioner * * * is entitled to a fee
16 waiver under [SMC] 5.24.115(5) for obtaining a different type of
17 permit.” Respondent’s Brief 8.

18 In this argument in support of the second assignment of error, petitioners
19 argue it was error for the city to impose a condition of approval requiring that
20 all its vendors individually obtain TMLs, without also specifying that those
21 vendors would be eligible for a fee waiver for those TMLs under SMC
22 5.24.115(5). As we have explained, petitioners’ legal theory in taking this
23 position is that the “special event permit[s]” referenced in SMC 5.24.115(5) are
24 the same thing as or include TUPs, which are authorized by SDC 2.15.1900.

25 As we have explained, planning staff took the position that the “special
26 event permit[s]” referenced in SMC 5.24.115(5) are the same thing as “public
27 event permits,” which are required by SMC 5.06.020(1).

1 In its brief, the city introduces yet another possibility—that the “special
2 event permit[s]” referenced in SMC 5.24.115(5) are neither TUPs nor public
3 event permits, with the result that SMC 5.24.115(5) creates a TML fee
4 exemption for holders of special event permits, a type of permit the city does
5 not issue.

6 Obviously all of these interpretations have weaknesses. Further
7 complicating matters, the city council did not expressly address this issue or
8 adopt any interpretation SMC 5.24.115(5). We accept the city’s concession in
9 its brief that the city wanted to be transparent and ensure that petitioners were
10 not misled about the city’s TML requirements. That desire for transparency
11 presumably extended to the TML fee issue and whether petitioners’ vendors
12 would qualify for the SMC 5.24.115(5) TML Special Event Fee Waiver.
13 General condition of approval number 6 was first adopted by the planning
14 commission. But as we have already noted, that condition takes no position on
15 whether SMC 5.24.115(5)’s Special Event TML Fee Waiver applies. Record
16 1049. Similarly, the city council decision imposes general condition of
17 approval number 6 without taking any position on whether the Special Event
18 TML Fee Waiver applies. Record 48. If the city wishes to take the position that
19 Special Event TML Fee Waiver does not apply to petitioners’ vendors, simply
20 because petitioners have now secured a TUP, it needs to (1) more clearly take
21 that position in its decision, and (2) adopt interpretive findings to explain why

1 the city council believes TUPs do not qualify as “special event permits,” within
2 the meaning of SMC 5.24.115(5).²⁰

3 This subassignment of error is sustained.

4 **D. The City Issued Petitioner a Business License as an Events**
5 **Coordinator, Making Petitioner Exempt From the Transient**
6 **Merchant License Fee**

7 We are not going to try to make sense of all the parties’ arguments under
8 this section or their representations regarding what the record shows
9 concerning past city practice. The evidentiary record is not very clear on a
10 number of key points and the parties in a number of instances seem to be
11 arguing past each other without responding directly to the other party’s
12 arguments.

13 Petitioner Esterman was issued a business license as an “Event
14 Coordinator” on July 1, 2014. Record 417. Petitioners advance a two-part
15 argument for why they believe that business license should allow petitioners to
16 lease spaces to vendors to conduct temporary retail sales on the property
17 without those vendors having to secure TMLs or pay TML fees. First,
18 petitioners contend the record is clear that the city has historically exempted
19 “city business license holders from (1) obtaining individual TMLs for their

²⁰ If we are wrong, and the city does not want to take a position in this decision on whether petitioners’ vendors will qualify for the SMC 5.24.115(5) Special Event TML Fee Waiver, the city council is free to take that position as well.

1 individual vendors, and (2) from ever paying the TML fee. The second part of
2 petitioners’ reasoning is set out below:

3 “The city TML fee waivers the city has historically issued because
4 the applicant holds a ‘current business license with the [city]’ can
5 only be explained as a *mandatory* waiver under SMC 2.15.1900(5)
6 [sic should be SMC 5.24.115(5)] and the only basis for the
7 mandatory waiver is a determination that the business licensee has
8 ‘*secured a special event permit from the city*’ within the meaning
9 of SMC 5.25.115(5). * * *” Petition for Review 33 (emphases in
10 original).

11 The first part of petitioners’ argument is not entirely supported by the
12 parts of the record they cited. The record seems to show that at least in some
13 cases, holders of city business licenses who wished to operate a temporary
14 business at a location in the city were required to obtain a TML, but the TML
15 fee was waived because they held a city business licenses.²¹ In one case cited

²¹ That evidence includes the following:

1. Record 1855-63. TML issued to “Slick’s Que Co” for a mobile kitchen selling pulled pork. The TML fee was waived because applicant had current business license.
2. Record 1865. TML issued to “Pieceful Expressions for an unidentified use. The TML fee was waived because applicant had current business license.
3. Record 1867-69. TML issued to “Poppies, LLC” “Catering/Event Planning. The TML fee was waived because applicant had current business license.
4. Record 1875-77. TML issued to Canyon Creek Pottery for an unspecified use. The TML fee was waived because applicant had current business license.

1 by petitioners, the TML fee waiver appears to have been a SMC 5.24.115(2)
2 Benefit the City TML Fee Waiver, rather than a SMC 5.24.115(5) Special
3 Event TML Fee Waiver. Record 1879-81. The record is much less clear on
4 what the city requires where the holder of a city business license is organizing a
5 temporary event where vendors other than the business license holder will be
6 selling to the public. Some of the pages cited by petitioner suggest that in such
7 cases vendors who do not themselves hold city business licenses are required to
8 secure TMLs and pay the TML fee. Record 1871-73.²² However, the transcripts
9 attached to the petition for review include testimony that can be read to say that
10 where holders of city business licenses sponsor events that attract vendors,
11 those vendors are not required to obtain TMLs and pay a fee.

12 To summarize, the record supports petitioners' position that the city
13 requires holders of city business licenses who wish to conduct temporary sales
14 apart from the licensed business location to get a TML, but waives the fee
15 because they hold a city business license. The record is less clear how the city
16 treats holders of city business licenses who wish to sponsor events where
17 vendors other than the holder of the city business license will be making sales.

18 The second part of petitioners' argument is the critical part. Petitioners

²² Record 1871-73 is an E-mail message and a page of hand written notes. The e-mail message lists 22 approved transient vendors approved for a quilt show. The message includes the following handwritten note: "Send letter to Vendors that did not have licenses they must come and pay a license fee." Record 1871.

1 contend that a person or business who has secured a business license as an
2 “Event Coordinator” has also “secured a special event permit from the City,”
3 within the meaning of SMC 5.24.120(5).” *See* n 16. Therefore, petitioners
4 contend, they qualify for the SMC 5.24.120(5) Special Event TML Fee Waiver
5 where “transient merchant activity is held in conjunction with a special
6 event[.]” *Id.* In its brief, the city responds: “The fact that Petitioner Esterman
7 has a City Business License as an Event Coordinator is not relevant. SMC
8 5.24.115(5) refers to the ‘sponsoring organization’ that has ‘secured a Special
9 Event Permit from the City.’ Petitioner Esterman is not a ‘sponsoring
10 organization’ and has not ‘secured a Special Event Permit from the City.’”
11 Respondent’s Brief 8. Simply stated, we understand the city to take the position
12 that petitioner Esterman’s business license as an “Event Coordinator” is not the
13 same thing as a “special event permit,” for a “special event,” within the
14 meaning of SMC 5.24.115(5).

15 As was the case under section C, there is no dispute that petitioners
16 raised the issue that is presented in section D. And as was the case with the
17 issue in section C, the city appears to concede in its brief that the city council
18 wished to make it clear that petitioners’ vendors would be subject to the TML
19 fee, and would not be eligible for the SMC 5.24.115(5) Special Event TML Fee
20 Waiver. But the city council’s decision fails to address petitioners argument
21 that the business license as an “Event Coordinator” qualifies petitioners’
22 vendors for the SMC 5.24.115(5) Special Event TML Fee Waiver. On remand

1 the city council must consider whether petitioner Esterman’s business license
2 as an “Event Coordinator” qualifies as a “special event permit” under SMC
3 5.24.115(5), so that the TML fee waiver provided by SMC 5.24.115(5) applies
4 to petitioners’ vendors, and adopt findings to explain its position on that
5 issue.²³

6 A potential threshold issue that we do not resolve is presented in the
7 city’s brief. In that brief the city takes the position that petitioner Esterman is
8 the holder of the business license as an “Event Coordinator.” The city takes the
9 position that the applicant for the TUP is petitioner Bend/Sisters Garden RV
10 Resort LLC and that Bend/Sisters Garden RV Resort LLC could not take
11 advantage of petitioner Richard Esterman’s business license, even if it does
12 qualify as a special event permit.

13 Citing ORS 197.763(1) and 197.835(3), petitioners contend the city
14 waived this issue by failing to raise it below. ORS 197.763(1) is directed at
15 issues that “may be the basis for an appeal to the Land Use Board of Appeals”
16 and requires that such issues be adequately raised to preserve the issue for
17 appeal to LUBA.²⁴ ORS 197.835(3) limits LUBA review to preserved issues.

²³ Again, this obligation flows from our understanding that the city wished to clear up in this decision all issues raised by petitioners below concerning whether their vendors would be required to obtain TMLs and whether those vendors would qualify for the SMC 5.24.115(5) Special Event TML Fee Waiver.

²⁴ ORS 197.763(1) provides:

1 But those issues are limited to issues that “may be the basis for an appeal to”
2 LUBA. ORS 197.763(1) and 197.835(3) do not apply to limit the defenses a
3 local government may raise in defending its decision at LUBA in responding to
4 preserved issues that are raised by petitioners at LUBA.

5 However, based on the current briefing, we are unable to evaluate the
6 merits of the city’s position that the applicant cannot take advantage of Richard
7 Esterman’s business license. First, the business license was issued to “Richard
8 Esterman Central Oregon Shows.” Record 417. Second, the petitioners in this
9 appeal are “Bend/Sisters Garden RV Resort LLC, Celia Hung, Richard
10 Esterman, individually and dba Central Oregon Shows.” Finally, the legal
11 relationship between the applicant and Richard Esterman is far from clear. The
12 applicant is listed on the TUP application form as “Bend/Sisters Garden RV
13 Resort.” Record 2351. But petitioner Celia Hung signed as the applicant. *Id.*
14 There is a letter in the record that identifies Richard Esterman as the Marketing
15 and Business Manager for Bend/Sisters Garden RV Resort. Record 2358. The
16 identity of the real applicant, and the holder of the business license as an Event

“An issue which may be the basis for an appeal to the Land Use Board of Appeals 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.”

1 Coordinator, is sufficiently murky that we decline to address this issue at this
2 point. If the city wishes to pursue this theory on remand it may more clearly
3 explain why it believes that the applicant in this appeal cannot attempt to take
4 advantage of the business license the city issued to Richard Esterman/Central
5 Oregon Shows.

6 To summarize, unless the city can establish on remand that the applicant
7 for the TUP in this appeal is not entitled to rely on the business license that was
8 issued to Richard Esterman/Central Oregon Shows, the city council must
9 consider whether petitioner Esterman’s business license as an “Event
10 Coordinator” qualifies as a “special event permit” under SMC 5.24.115(5), so
11 that the TML fee exemption provided by SMC 5.24.115(5) applies to the TUP
12 applicant’s vendors, and adopt findings to explain its position on that issue.

13 **E. Petitioner’s Constitutional Arguments**

14 Petitioners argue the city’s decision to charge their vendors a TML
15 license fee is arbitrary and capricious, and therefore violates the due process
16 clause of the Fourteenth Amendment to the United States Constitution. Citing
17 isolated statements that can be read to suggest that the person making the
18 statement believes the city wishes to discourage out of town transient
19 merchants, petitioners contend the city action denying TML fee waivers
20 violates Article 1, Section 20 of the Oregon Constitution, the equal privileges
21 and immunities clause. And finally, petitioners contend discriminatory
22 treatment of out of state vendors regarding the TML license fee constitutes

1 unlawful economic protectionism in violation of the federal commerce clause
2 in Article 1 Section 8 of the U.S. Constitution.

3 Petitioners’ constitutional challenge is doubly premature. First, as we
4 have already explained, the challenged decision does not deny petitioners’
5 vendors TML fee waivers. It simply requires that those vendors secure TMLs
6 without deciding whether those vendors will qualify for fee waivers. Second,
7 we have assumed in this decision, largely based on the arguments presented by
8 the city in its brief, that the city wished to resolve the issue of whether
9 petitioners’ vendors would qualify for waivers. However, the findings the city
10 council adopted to support its decision simply fail to respond to petitioners’
11 arguments below that its vendors qualify for TML fee waivers from the TML
12 licensing fees for the reasons set out in sections C and D of this opinion.

13 Until the city has an opportunity to adopt findings to address those
14 arguments and adopt additional findings to more adequately explain its legal
15 reasoning regarding whether petitioners’ vendors will qualify for TML fee
16 waivers, we are in no position to assume the waivers will be denied or that they
17 will be denied for reasons that are unconstitutional. If on remand, the city
18 adopts a decision that determines that petitioners’ vendors do not qualify for
19 TML fee waivers and petitioners believe the city’s reasoning in denying those
20 waivers and its past practice of granting and denying TML fee waivers
21 demonstrates that the city is engaging in unconstitutional economic
22 protectionism and discrimination against nonresidents, it may appeal that

1 decision and make its arguments to LUBA. Those arguments are premature at
2 this point.

3 This subassignment of error is denied.

4 The second assignment of error is sustained, in part.

5 The city's decision is remanded.