



---

**TO:** Planning Department

**FROM:** Scot Siegel, Planning and Building Services Director

**SUBJECT:** Interpretation: Decks and the 700 sq. ft. exception per LOC 50.05.010.2.c.iii

**DATE:** October 2, 2018

---

**Authority for Interpretation:** This Director's Interpretation is issued pursuant to LOC 50.01.003.2.a.i.

**Affected Code Provisions:** LOC 50.05.010.2.c.iii:

iii. Alteration, expansion, or replacement of an existing primary dwelling unit where the cumulative total increase in footprint of intrusion since August 21, 1997, is not more than 700 sq. ft.

**Questions Presented and Answers:**

*Does the 700 sq ft. exception apply to decks? Yes*

*If so, does each portion of the deck have to be over 30 inches in height per the definition of footprint to qualify for the exception? The exception applies only to decks over 30 inches in height attached to existing primary residential structures. Where the deck is a contiguous part of the footprint of the dwelling, e.g., contiguous to the dwelling unit and 30" above grade, the exception applies.*

If a deck is less than 30 inches in height above grade at any point, the exception does not apply to those sections and to any decking further away from the dwelling at that point.

**Discussion:**

**Background:** The need for an interpretation arises from a stream restoration/violation (LU 18-0047) that includes an attached deck that is partially over 30 inches in height.

**Method of Code Interpretation:**

Under ORS 197.829(1), Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) and Church v. Grant County, 187 Or App 518, 69 P3d 759 (2003), a city's interpretation of its code, and LUBA's review of that interpretation, are guided by the principles articulated in PGE v. Bureau of Labor and Industries, 317 Or

606, 610-12, 859 P2d 1143 (1993): text, context, legislative history, statutory construction principles.  
Siporen v. City of Medford, 349 Or. 247 (2010)

a. Text:

This prong of the method of code interpretation looks to the strict text of the section and to the defined terms. The text of LOC 50.05.010.2.c contains the following:

**c. Exceptions – Specific**

The provisions of this section, except for the construction standards in subsection 4.d of this section, shall not apply to:

\*\*\*

iii. Alteration, expansion, or replacement of an existing primary **dwelling unit** where the cumulative total increase in **footprint** of intrusion since August 21, 1997, is not more than 700 sq. ft.

\*\*\*

An expansion of a dwelling unit is exempted from the Sensitive Lands development requirements if the expansion of the dwelling unit increases the “footprint” of the dwelling unit by less than 700 sq. ft.

“The following terms shall mean: ...

“**Footprint:** “The polygon formed by (a) the surrounding exterior walls of a building or portion thereof, and (b) any **structure which is over 30 in.** in height with or **without exterior walls**, but exclusive of vent shafts and courtyards.” LOC 50.10.003.2 Definitions.

As applied to decks, this means that an expansion of a dwelling unit footprint may occur provided it is not over 700 sq. ft.

Can a portion of a structure (that is an alteration of a dwelling unit) without exterior walls, e.g. decks, that is under 30” in height occur at all? Is a deck that is under 30” in height exempted regardless of this square footage? Looking at the text of this section, is an exemption subject to the applicability provision of LOC 50.05.010.2? An exemption to a general applicability provision is limited to its specific terms; it does not also imply exemptions for that which it does not address. By its text, this exemption is only applicable to increases in footprints of dwelling units, which means it only exempts portions of dwelling units that are over 30” above grade.

b. Context:

This prong of the code interpretation method looks to the way in which the terms are used in related provisions of the code.

LOC 50.05.010.2.a.i exempts “replacement or vertical expansion” of an existing structure “within the footprint” of that structure. This subsection i allows replacement and vertical expansion – but no expansion of the “footprint” of the structure. It is the companion to subsection iii in question: it allows the owner to replace or go up within the footprint, but does not also allow expansion of the footprint. It is as limited in the applicability of the exemption to the “footprint” of a structure as the subsection in question.

The other exemptions do not provide any assistance in interpreting the terms of the subsection in question.

c. Legislative History

This prong of the code interpretation method looks to the record of the proceedings that were before the legislative body, in an effort to discern what the legislative body thought they meant when enacting the code provision in question.

The exception was created in 2010 with Ordinance 2567 (LU 10-0043). The exception at that time read:

“Alteration, expansion, or replacement of an existing primary dwelling unit where the footprint of the new intrusion is not more than 700 square feet in the RP or RC district and no closer to a protected water feature than the pre-existing structure.”<sup>1</sup>

Staff could not find any legislative discussion involving decks.

The overall purpose of Ordinance 2567 was to allow *de minimis* development, as evidenced by:

a. Ordinance 2567 Title

“An Ordinance of the Lake Oswego City Council Amending Lake Oswego Code Article 50.16 (Sensitive Lands Overlay Districts) to Clarify Terms and Allow De Minims Development in Resource Overlay Districts, and Adopting Findings (LU 10-0043-1752).”

b. Council Findings

“The City Council concurs with the Planning Commission and finds that:

1. Amending LOC Article 50.16 as proposed, and allowing development with *de minimis* impact to resources, ...”

Ord. 2657, pg. 24, lines 1-3.

---

<sup>1</sup> This exception was later amended with Ordinance 2687 (LU 15-0019).

iii. Alteration, expansion, or replacement of an existing primary dwelling unit where the **cumulative total increase in** footprint of ~~the new~~ intrusion **since August 21, 1997**, is not more than 700 sq. ft. ~~in the RP or RC district and is not closer to a protected water feature than the pre-existing structure.~~

**Comment:** The above edit clarifies that the 700 sq. ft. intrusion is an ultimate limit. LOC 50.05.010.2 Applicability includes RP, RC, and HBA protection areas, though as a practical matter this exemption will only apply in RP and HBA protection areas.

This amendment is not relevant to the question presented.

8           5. Allowing the footprint of an existing dwelling to be increased by up to 700 square feet,  
9 with the limitations described below, will have a *de minimis* impact because:

- 0           a. Additions are allowed only to existing primary residential structures; additions will  
1 not allow new residential uses to be established in the resource area.  
2  
3           b. Additions will not be closer to the resource area than the pre-existing use.  
4  
5           c. The size of additions will be limited by other factors including lot coverage,  
6 architectural and design considerations, the internal configuration of structures,  
7 and setbacks.  
8  
9           d. Following enactment of Titles 3 and 13, Metro concluded that 500 square feet  
0 additions to all types of structures have *de minimis* impacts upon natural  
1 resources.  
2  
3           e. An additional 200-square foot expansion area, although not identical to Metro’s  
4 500-square foot allowed expansion, will similarly have a *de minimis* impact upon  
5 the natural resources, particularly when considering the limitation on the type of  
6 structure (primary residential) and internal configuration limitations, together with  
7 the prohibition against expansion closer to the resource.  
8

Ord. 2657, pg. 25, lines 10-28.

C. Council Report

The council report (October 27, 2010) discusses that additions on existing structures are considered *de minimis* because when an existing home is already located in a resource area, an addition to that building has a relatively small additional impact on the resource.

D. Planning Commission Findings

The Planning Commission Findings states that:

“allowing the footprint of an existing dwelling to be increased by up to 700 square feet with the limitations described below will have a *de minimis* impact because:

- a. Additions are allowed only to existing primary residential structures; additions will not allow new residential uses to be established in the resource area.  
b. Additions will not be closer to the resource area than the pre-existing use.  
c. The size of additions are limited by other factors including lot coverage, architectural/design considerations, and setbacks.  
d. Metro, following enactment of Titles 3 and 13, concluded that 500 square feet additions to structures – all structures – have a *de minimis* impact upon the natural resources of a jurisdiction. See Metro Model Code, quoted in Exhibit E-2. The Commission concurs with Metro’s conclusion.  
e. Additions to existing primary residential structures will be limited when considering that the opportunity to expand will be limited by internal configuration of residences.

- f. The Commission finds that an additional 200 square feet expansion area, although not identical to Metro's 500 square feet *de minimis* expansion, will similarly have a *de minimis* impact upon the natural resources, particularly when considering the limitation on the type of structure (primary residential v. any structure) and internal configuration limitations (adding an additional 200 square feet beyond 500 square feet will present less opportunities for full expansion due to the layout of residence and the prohibition against expanding closer to the resource).

The Commission concludes that the primary residential additions permitted by these changes will have a *de minimis* impact on upland or riparian habitats, and that the proposed amendment complies with the Lake Oswego Comprehensive Plan, Goal 5 policies cited above."

Planning Commission Findings, Pg. 4.

It is clear from the legislative history that "allowing the footprint of an existing dwelling to be increased" was to be limited to *de minimis* impact to the resource, and that the opportunity for expansion would be constrained not just by the 700 sq. ft. limitation but also the dwelling's architectural / design considerations and setbacks. The intention to limit the expansion to *de minimis* impacts to the resource cuts against any interpretation of the exemption that would allow decking below 30" above grade to be unlimited throughout the resource. This exemption was to allow a small expansion of the footprint of a dwelling unit, which means that it would only apply to an alteration that expands the footprint of a dwelling by less than 700 sq. ft.

d. Rules of Construction

This prong of code interpretation applies maxims of construction to discern the legislative body's intention.

a. Scheme:

"In applying common-law maxims of statutory construction in an attempt to determine legislative intent, courts show great deference to legislative power. However, because intent is an individual trait, and the legislature is composed of many individuals, determining the collective intent of a diverse body such as the legislature is difficult. As a result, courts will often look to evidence of the purpose of a statute or statutory scheme, or the statute or scheme's underlying policy. Since such purpose or policy would likely be understood and shared by a majority of the members of the enacting legislature, it is therefore a reliable expression of the "intent" of the legislature as a whole."

Interpreting Oregon Law, Step Three Analysis: General Maxims of Statutory Construction, §4.7 (2009 edition)

Looking to the scheme of the exemptions, subsection i exempts the replacement or vertical expansion of "footprints" of structures. This subsection iii exempts the "alteration, expansion, or replacement of an existing dwelling unit" footprint up to 700 sq. ft. The scheme of the exemptions is to allow *de minimis* expansion of the existing dwelling unit close to and a part of the dwelling unit, so the expansion or alteration would not have a far ranging impacts on the resource.

b. Avoid Absurd Results

Courts will assume that the legislature would not have intended that a statute produce absurd results. *State v. Vasquez-Rubio*, 323 Or 275, 282–283, 917 P2d 494 (1996). Defining exactly what constitutes an absurd result is difficult; Oregon courts have yet to craft such a definition. However, one judge suggested that the result of a proposed construction of a statute is absurd when any reasonable person would conclude that the legislature could not possibly have intended the result, even if the text of the statute arguably supports it. See *Young v. State*, 161 Or App 32, 43, 983 P2d 1044 (1999) (Haselton, J., concurring). The broad nature of this approach invites abuse and the majority in *Young* declined to follow Judge Haselton’s view on this point. Oregon courts are reluctant to apply the absurd-results maxim, “because it entails the risk of judicial displacement of legislative policy on the basis of judicial speculation that the legislature could not have meant what it unmistakably said.” *Southwood Homeowners Ass’n v. Philomath*, 106 Or App 21, 24, 806 P2d 162 (1991). However, the maxim has been applied in some cases.”

Interpreting Oregon Law, Step Three Analysis: General Maxims of Statutory Construction, §4.7 (2009 edition)

Where the intention was to allow *de minimis* expansion of a dwelling unit, it would be an absurd result for the exemption to be construed to permit unlimited deck expansion so long as it would be less than 30” above grade. It would also be an absurd result to conclude that only the alteration of a dwelling unit could occur by the expansion of the dwelling unit itself by requiring exterior walls in the enlargement, i.e., it would be absurd to interpret the exemption to not apply to any expansion by the addition of a deck attached to the dwelling unit, but allow expansion of a dwelling unit where the expansion had walls, flooring, and roof.

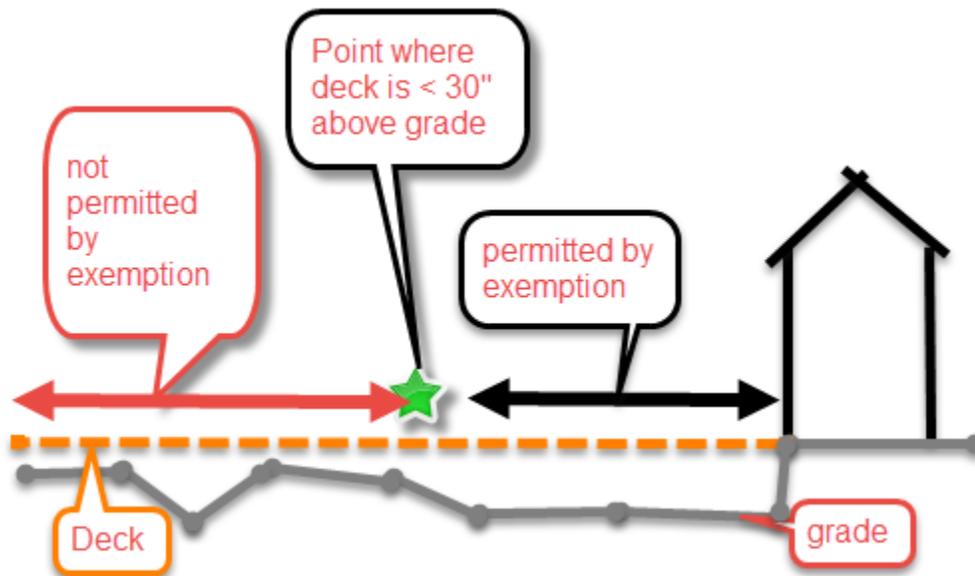
The absurdity of either extreme can be avoided by applying the scheme of allowing expansion of the existing dwelling unit close to and a part of the dwelling unit where it expands the footprint by being 30” or more above grade, and ending the deck expansion where it is no longer is 30” above grade and not allowing “islands of deck” where it would be less than 30” above grade, meaning the deck expansion must be contiguous to the dwelling unit.

Conclusion:

Applying the methodology for interpreting code – text, context, legislative history, and rules of construction – in an effort to ascertain the Council’s intention of exempting up to 700 sq. ft. cumulative of the footprint of a dwelling unit to allow its alteration or replacement, staff interprets subsection iii to exempt up to 700 sq. ft. cumulative of the portions of a deck that is (1) attached to the dwelling unit, (2) 30” or more above grade, and (3) is not separated from the dwelling unit by a portion of decking that is less than 30” above grade.

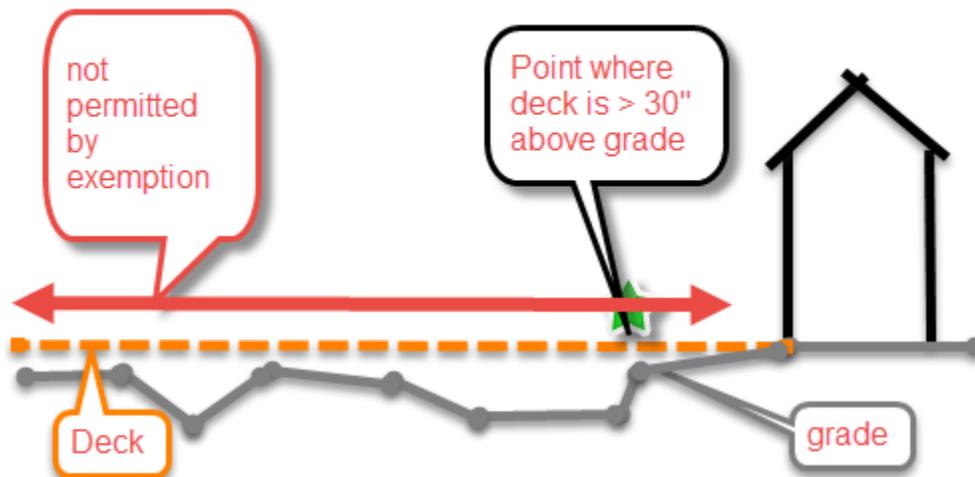
When decking is (1) less than 30” above grade, or (2) even though that portion of the decking is 30” or more above grade but it is on the other side of the portion of the decking that is less than 30” above grade, then the exception is not applicable to those portions of the deck.

Example 1: Grade is MORE than 30" at Dwelling Wall



New deck is permitted from the exterior wall to the point where the grade is less than 30" above grade.

Example 2: Grade is LESS than 30" at Dwelling Wall



New deck is NOT permitted from the exterior wall because the deck does not expand the footprint of the dwelling unit (deck is not more than 30" above grade until some distance from the dwelling).

Note: Where the deck is 30 inches or less from grade, the deck could qualify for the exception in LOC 50.05.010.2.c.iv of up to 200 square feet for all development provided the deck is not located within a wetland or below the top of the bank or stream and does not require a grading permit.