

NATURE OF THE DECISION

Petitioners appeal a city decision that grants community service use and design review approval for an existing drug treatment clinic.

MOTION TO INTERVENE

Allied Health Services East (Allied), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

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

WAIVER

Intervenor argues that petitioners waived the issues raised in their second assignment of error by failing to raise them before the close of the final evidentiary hearing and by failing to adequately identify the issue in their local appeal of the hearings officer's decision in this matter. ORS 197.763(1); 197.835(3); *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). For the reasons set out in petitioners' reply brief, we reject intervenor's waiver arguments.

FACTS

The subject property is a 26,350 square foot site. A building was constructed on the site in 1968, when the site was located in unincorporated Multnomah County. The city found that the 1968 development on the site complied with county land use laws that applied at the time the site was developed. Record 351.

The City of Gresham annexed the property in 1989. Until 2000, the building on the site was occupied by a branch office of the United States Social Security Administration. It is not disputed that when the site was annexed in 1989 the development did not comply with a number of Gresham Community Development Code (GCDC) requirements. In this appeal

1 petitioners focus on GCDC landscape and buffer requirements, and it is undisputed that the
2 development on the site does not comply with the GCDC landscape and buffer requirements.

3 The subject property is zoned Station Center (SC), a zone that permits “Offices,” like
4 the Social Security Administration office. GCDC Table 4.0420(A). The SC zone also
5 allows Community Services Uses, and Allied’s clinic qualifies as a Type III Community
6 Service Use. GCDC Table 4.0420(X); GCDC 8.0112(O). In 2000, Allied began operating a
7 drug treatment clinic on the site, without seeking any land use approval from the city. While
8 that change in use was a change from one permitted use to another permitted use, the city
9 takes the position that Allied should have requested and received Community Service Use
10 and design review approval from the city before Allied’s clinic replaced the Social Security
11 Administration as the occupant of the building on the site. The challenged decision grants
12 the Community Service Use and design review approval that Allied should have sought and
13 received in 2000.

14 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

15 In their first assignment of error, petitioners argue the challenged decision does not
16 establish that Allied’s clinic complies with the landscape and buffer requirements set out at
17 GCDC 7.0202(A)(1) and 9.0111. Petitioners’ first assignment of error establishes a point that
18 no one disputes—that the parking lot that has been developed on the site does not comply
19 with the landscape requirement at 7.0202(A)(1) and the buffer requirement set out in the
20 Buffer Matrix that appears at GCDC 9.0111. Petitioners’ arguments focus on the buffer and
21 to simplify we limit our discussion to the buffer requirement.

22 The city’s Buffer requirements appear in GCDC 9.0101, 9.0110 and 9.0111. If the
23 site was being developed for the first time today with a commercial use, such as the Social
24 Security Administration office, a 15 or 20 foot Type C buffer would be required along the

1 rear of the site that abuts residential development. GCDC Table 9.0111(A).¹ If the site was
2 being developed today for Allied’s drug treatment clinic, a 10-foot Type A buffer would be
3 required along the rear of the site. However, as we have already noted, the site is not being
4 developed for the first time. The site is already developed with a nonconforming building
5 and parking lot on the site, which does not provide the required 10-foot buffer.

6 As we explain below, the city’s legal theory is that because Allied is only changing
7 the *use* of the property from one permitted *use* to another permitted *use*, Allied is not
8 required to bring its nonconforming *development* into compliance with the GCDC buffer
9 requirement.

10 **A. The City’s Findings**

11 Before we turn to petitioners’ challenges to the city’s nonconforming use findings, we
12 briefly discuss city’s design review findings, because the GCDC design review and
13 nonconforming use regulations include an important cross-reference.

14 The city found that Allied’s change in use to the drug treatment clinic was exempt
15 from design review under GCDC 7.003(C)(1).² Under GCDC 7.0003(C)(1) a “change to the
16 primary use” would normally require design review, but not in the particular circumstance
17 presented in this appeal.

¹ The required width of the buffer varies depending on how many trees are planted in the buffer.

² The text of GCDC 7.0003(C)(1) is set out below:

Design Review C. * * *. Design Review C may apply when there is: no increase in residential density that requires an increase in building area; no new buildings; or the development proposal is not in a Design District unless otherwise specified below. The Design Review may include one of the following:

- “1. A change to the primary use. A change in use from an allowed commercial to a Type II or higher Community Service Use, and the change back to an allowed commercial use, shall not be considered a change to the primary use for purposes of this section[.]”

1 “The hearings officer finds that the change in use is exempt from Design
2 Review. GCDC 7.[0]003.C(1) provides ‘A change in use from an allowed
3 commercial to a Type II or higher Community Service use ...shall not be
4 considered a change to the primary use for purposes of this section.’ The
5 applicant is proposing a change in use from an office building, an allowed
6 commercial use, to a drug treatment facility, a Type III Community Service
7 Use. Therefore the proposed change in use from an office building to a drug
8 treatment clinic is exempt from Design Review.” Record 350.

9 Petitioners do not assign error to the above finding that the change in primary use to a drug
10 treatment facility is exempt from design review.³ Petitioners explicitly state “[o]f note,
11 petitioners are not arguing before LUBA that the decision violates design review standards of
12 Chapter 7.” Petition for Review 13 (underscoring in original).

13 Turning to the city’s findings addressing the GCDC nonconforming use standards, the
14 GCDC distinguishes between nonconforming *uses* and nonconforming *development and*
15 *structures*, which are collectively referred to as nonconforming *situations*:

16 “Nonconforming situations are created when prior uses, development and
17 structures were developed in compliance with specific land use districts, but
18 are no longer in conformance due to changes to the land use district or
19 changes to the regulations of the Code. Nonconforming situations can be
20 made up of either a nonconforming use or a nonconforming development,
21 which are defined in **Section 3.0010, Definitions**” GCDC 8.0210.⁴

³ The city did find that Allied’s addition of fencing and gating to the parking lot was subject to design review, but the city made it clear that the change in primary use to a drug treatment clinic was not subject to design review. Record 350-51.

⁴ GCDC 3.0010 includes the following definitions:

“Nonconforming Development. An element associated with a use of land which may have been permitted in the district in which it is located, but which does not conform to current applicable development standards and requirements of Community Development Code. For this purpose, the term ‘development’ includes all improvements on a site, including, but not limited to, buildings, other structures, parking and loading areas, landscaping, paved or graveled areas, and areas devoted to exterior display, storage, or activities. Development also includes improved open areas such as plazas and walkways, but does not include natural geologic forms or unimproved land.”

“Nonconforming Use. A use of land lawfully existing at the time the Community Development Code was enacted, but which is not listed as a permitted land use in the current land use district for the site in question.”

1 The city found that because Allied was proposing no change to the nonconforming
2 development on the site, under GCDC 8.0211(A) Allied is not required to comply with the
3 GCDC landscaping and buffer requirements.⁵ The city explained:

4 “a. GCDC 8.0211.A provides, ‘any situation lawfully existing prior to the
5 implementation of this development code on August 27, 1992 or
6 subsequent amendments to the development code shall be defined as a
7 legal nonconforming situation and may be continued so long as it
8 remains otherwise lawful.

9 “b. The existing building on this site, including the building, parking lot
10 and landscaping etc., was legally established when the site was
11 originally developed. The site was located in unincorporated
12 Multnomah County and subject to County regulations. Therefore the
13 existing development on this site qualifies as nonconforming
14 development that may be continued. No changes are proposed to the
15 existing development, with the exception of the access changes
16 discussed above [see n 3]. Therefore the applicant is not required to
17 modify the existing development to bring it into compliance with
18 current regulations, including the landscape requirements of GCDC
19 7.0202.A(1) and the buffer requirements of GCDC 9.0100.” Record
20 351.

21 The city then recognized that petitioners took the position that notwithstanding the
22 protection extended to nonconforming situations under GCDC 8.0211(A), Allied should be
23 required to comply with the GCDC landscape and buffer requirements because it is changing
24 the use of the property. The city rejected the argument:

⁵ GCDC 8.0211(A) provides:

“Except as otherwise provided in this section, any situation lawfully existing prior to the implementation of this development code on August 27, 1992 or subsequent amendments to the development code shall be defined as a legal nonconforming situation and may be continued so long as it remains otherwise lawful.”

GCDC 8.0220(A) similarly provides:

“In order to avoid undue hardship, nothing in this section shall require any change in the location, plans, construction, size, or designated use of any building, structure, or part thereof, for which a valid development permit has been granted prior to the enactment of the Community Development Plan.”

1 “i. [Petitioners are] correct that [Allied] is proposing a new use in the
2 nonconforming building on the site. However, as discussed above, a
3 change in use from a commercial use to a Type III Community Service
4 Use ‘[s]hall not be considered a change to the primary use for purposes
5 of this section.’ GCDC 7.[0]003.C(1).” Record 351.

6 Petitioners assert three challenges to the city’s reliance on GCDC 8.0211(A) and
7 7.0003(C)(1) to conclude that Allied need not comply with the GCDC buffer requirement.
8 We address those three challenges separately below.

9 **B. A Change of Use is Development**

10 Petitioners first argue the change in use to a drug treatment clinic constitutes new
11 development that must comply with all GCDC standards including the buffer requirement:

12 “[N]on-conforming use standards do not exempt a new use from having to
13 comply with current standards. [G]CDC 8.0220.J states that ‘New
14 development ... on a nonconforming development site [is] subject to all
15 current standards.’ The hearings officer found that ‘applicant is proposing to
16 change the use of the site.’ What applicant proposes—a drug and alcohol
17 treatment facility—is a new use on the site. It is a use that is categorically
18 distinct and different from the use previously approved on the site. As such,
19 the proposed use—which is new development—is subject to all current
20 standards.” Petition for Review 10.

21 The city found that although the applicant is seeking approval for a change of *use* (from one
22 permitted use to another permitted use), the applicant is not seeking approval for any change
23 in the nonconforming *development*. The city reasoned that because no change was proposed
24 in the nonconforming *development*, under GCDC 8.0211 Allied could not be required to
25 make its nonconforming development consistent with the GCDC buffer requirements.

26 In the above challenge, petitioner merely expresses disagreement with the distinction
27 the city draws between nonconforming uses and nonconforming development. The city’s
28 distinction between uses and development is fully consistent with the most relevant text of
29 the GCDC. *See* n 4 and related text. For the first time at oral argument, petitioners cited the
30 GCDC 3.0010 definition of “development,” which they suggest establishes that a change of

1 use constitutes development.⁶ Petitioners attempt to rely on the GCDC 3.0010 definition of
2 development was not included in the petition for review and comes too late. Even if
3 petitioners had cited and relied on the GCDC 3.0010 definition of “development” in their
4 petition for review, petitioner makes no attempt to confront the clear distinction that the
5 GCDC makes between “nonconforming development” and “nonconforming use.” It is quite
6 clear from the GCDC 3.0010 definitions that, at least in the context of nonconforming
7 situations, there is a difference between uses and development. We agree with the city’s
8 conclusion that a change in use (without any change in development or structures) is not new
9 development, within the meaning of GCDC 8.0220(J).

10 Petitioner also takes the city to task for finding that because the applicant’s change of
11 use to a drug treatment clinic is exempt from design review under GCDC 7.0003(C)(1) that it
12 necessarily follows that the change of use is exempt from the GCDC buffer requirements. If
13 GCDC 7.0003(C)(1) is read in isolation we agree with petitioners. *See* n 2. Read in isolation
14 GCDC 7.0003(C)(1) only exempts Allied from design review; it says nothing about buffer
15 requirements. But if the city’s finding is read in conjunction with GCDC 8.0220(J), which
16 the city does not cite but petitioners do cite in their petition for review, albeit selectively, it is
17 clear that the city is correct that Allied’s change of use is exempt from GCDC buffer
18 requirements.

19 GCDC 8.0220 sets out circumstances where changes to nonconforming uses *are*
20 required to comply with current GCDC standards and circumstances where changes to

⁶ GCDC 3.0010 defines “development” as follows:

“**Development.** Any man-made change to improved or unimproved real estate, including but not limited to construction, installation or alteration of buildings or other structures; condominium conversion; land division; establishment or termination of a right of access; storage on real property; tree removal; drilling; and site alteration such as that due to land surface mining, dredging, grading, paving, excavation, or clearing.”

1 nonconforming uses *are not* required to comply with current GCDC standards. The complete
2 text of GCDC 8.0220(J) is set out below:

3 *“An alteration to a nonconforming development that requires a design review*
4 *as per Section 7.0000 shall be subject to all current standards with the*
5 *exception that existing nonconforming structures are allowed to remain in a*
6 *nonconforming condition. Enlargement of a nonconforming structure is*
7 *subject to this section and Section 8.0221, and to applicable design review*
8 *standards. New development and structures on a nonconforming development*
9 *site are subject to all current standards.” (Italics and underlining added.)*

10 In petitioners’ argument quoted above, they set out only the last sentence of GCDC
11 8.0220(J). As we have already explained, the applicant does not propose to enlarge the
12 building on the property and proposes no new development, so the last two sentences of
13 GCDC 8.0220(J) do not apply here. Under the very broad GCDC 3.0010 definition of the
14 word “alteration,” Allied’s proposal to change the primary use of the site could be viewed as
15 an “alteration to a nonconforming development.”⁷ But even if that change in use does
16 constitute an “alteration to nonconforming development,” it would not require that Allied
17 now make its nonconforming development comply with the GCDC buffer standards, for two
18 reasons. First, as we have already explained, that change of use is exempt from design
19 review under GCDC Section 7.0000(A). Based on the italicized text in the first sentence of
20 GCDC 8.0220(J), that change would not be subject to current standards. Second, even if that
21 was not the case, and the change in use did require design review, in that circumstance
22 “existing nonconforming structures” are allowed to remain as they are under the underlined

⁷ GCDC 3.0010 defines “alteration” as follows:

“Alteration. An ‘alteration’ may be a change in construction or a change of occupancy. Where the term ‘alteration’ is applied to a change of construction, it is intended to apply to any change, addition, or modification in construction. When the term is used in connection with a change of occupancy, it is intended to apply to changes of occupancy from one trade or use to another or from one division of trade or use to another.”

1 language of the first sentence of GCDC 8.0220(J).⁸ Under GCDC 8.0220(J), only the
2 alteration itself is subject current standards.

3 **C. The City Erred in Relying on the GCDC Nonconforming Use Standards**
4 **When There Was no Application for a Nonconforming Use Application**

5 Petitioners argue it was error for the city to rely on the GCDC nonconforming use
6 standards for three reasons. First, Allied did not submit an application specifically requesting
7 a nonconforming use determination. Second, there are two nonconforming use standards that
8 petitioners contend Allied does not satisfy. And third, planning staff expressed skepticism
9 that the applicant’s proposal could be approved as a nonconforming use.

10 Petitioners’ arguments here suffer from their continued failure to distinguish between
11 nonconforming uses and nonconforming development. With regard to petitioners’ first
12 argument—that an application specifically requesting a nonconforming use determination is
13 an absolute prerequisite for a finding that the existing development qualifies as
14 nonconforming development—petitioner cites no authority for that contention. Moreover,
15 when there was no dispute that the *development* on the site (as opposed to the drug treatment
16 clinic *use*) predated application of the GCDC and complied with county land use laws that
17 applied at the time of development, we see no reason why the city could not assume that
18 development qualifies as “nonconforming development,” within the meaning of the GCDC.
19 *See* n 4. There is certainly substantial evidence in the record to support a conclusion that the
20 site was legally developed under Multnomah County land use laws when the property was
21 within Multnomah County’s jurisdiction and that the existing building has been continuously
22 occupied since construction, most recently by the Social Security Administration and Allied.

⁸ The CDC 3.0010 definition of “structure” is broad enough to include both the nonconforming building and the nonconforming parking lot:

“Structure. Anything which is constructed, erected or built and located on or under the ground, or attached to something fixed to the ground. * * *”

1 Record 132-35, 325-27, 505, 634-35. Petitioner offers no reason to believe the city
2 erroneously assumed the existing development on the site qualifies as nonconforming
3 development in approving the limited design review and Community Service Use application
4 that was before it.

5 Petitioners' next argue that the drug treatment clinic does not satisfy GCDC 8.0220
6 (H) and (I), which govern changes to nonconforming uses.⁹ Because GCDC 8.0220 (H) and
7 (I) govern nonconforming *uses* rather than nonconforming *development* and the applicant
8 sought approval of the drug treatment clinic as a permitted Community Service Use, not as a
9 change in nonconforming use, GCDC 8.0220 (H) and (I) simply do not apply.

10 Finally, petitioners point out that planning staff expressed skepticism that the
11 applicant's proposed drug treatment clinic could be approved as a nonconforming use.
12 Record 511-12. Although Allied reserved its right to argue in the future that the drug
13 treatment clinic should be viewed as a nonconforming use, it proceeded to seek limited
14 design review approval and Community Service Use approval for the change in use to a drug
15 treatment clinic. As far as we can tell neither planning staff nor anyone else ever expressed
16 any doubt that the *development* on the site qualified as nonconforming development.
17 Petitioner also argues the planning staff's "doubts are also consistent with [GCDC] 8.0231.F
18 that states nonconforming uses are discontinued when a valid City business license is not

⁹ GCDC 8.0220(H) and (I) provide as follows:

“**H.** A legally established nonconforming use may be replaced by another nonconforming use that is deemed to be essentially identical to the legally established nonconforming use under the Type I procedure. An example would be the replacement of a nonconforming hair salon by a barber shop. Any such replacement is subject to compliance with **Sections 8.0220** and **8.0231**.”

“**I.** A legally established nonconforming use shall only be replaced by another such use that is deemed substantially similar to the legally established use after review under the Type II procedure. An example would be the replacement of an automotive tire and brake repair facility by an automotive muffler shop. Any such replacement is subject to compliance with **Sections 8.0220** and **8.0231**.”

1 maintained, a concern expressed by the Planning Commission.” Petition for Review 12.
2 GCDC 8.0231(F) actually provides that a nonconforming “use shall be considered
3 discontinued or vacated upon * * * [t]he expiration date of a valid City business license that
4 was not renewed.” Once again, petitioners attempt to rely on a limitation that applies to
5 nonconforming *uses*. Allied’s drug treatment clinic, like the Social Security Administration
6 that preceded it, is a permitted use. And while it is true that Allied mistakenly sought and
7 was issued business licenses from the City of Portland rather than the City of Gresham
8 following annexation, petitioners neither allege nor cite any evidence that would suggest that
9 Allied allowed its “City business licenses” to *expire* without renewal.

10 **CONCLUSION**

11 The GCDC like many land use regulations is complicated. While we have attempted
12 to simplify our discussion of the GCDC by limiting that discussion to those sections that are
13 particularly relevant, the design review and nonconforming use provisions in the GCDC are
14 not easy reading. It is particularly noteworthy that GCDC 8.0220(J), which makes it clear
15 that in the circumstances presented in this case Allied is not required to bring its
16 nonconforming development on the site into compliance with the GCDC buffer
17 requirements, is not cited in the city’s decision. And petitioners cite and rely on only the
18 inapplicable last sentence of GCDC 8.0220(J), but omit any discussion of the controlling first
19 sentence of GCDC 8.0220.J. However, remand to the city to address GCDC 8.0220(J) would
20 serve no purpose, since the record and GCDC 8.0220(J) clearly support the city’s decision in
21 this matter, even though the city’s reasoning is faulty in part because it relied on GCDC
22 7.0003(C)(1) to reach its conclusion that Allied does not have to comply with the current
23 buffer requirements, rather than GCDC 8.0220(J). ORS 197.835(11)(b).¹⁰

¹⁰ ORS 197.835(11)(b) provides:

- 1 The first and second assignments of error are denied.
- 2 The city's decision is affirmed.

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”