

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

3
4 GOODPASTURE PARTNERS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF EUGENE,
10 *Respondent,*

11 and

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13
14 WILLAMETTE OAKS LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2014-034

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Eugene.

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24 Michael C. Robinson and Corinne S. Celko, Portland, filed the petition
25 for review and Corinne S. Celko argued on behalf of petitioner. With them on
26 the brief was Perkins Coie LLP.

27
28 No appearance by the city.

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30 James W. Spickerman, Eugene, filed the response brief and argued on
31 behalf of intervenor-respondent. With him on the brief was Gleaves
32 Swearingen LLP.

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34 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board
35 Member, participated in the decision.

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37 AFFIRMED

07/23/2014

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39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a decision by the city approving an extension of the schedule for construction of the final phase of a previously-approved PUD.

MOTION TO INTERVENE

Willamette Oaks, LLC moves to intervene in the appeal. The motion is granted.

FACTS

Willamette Oaks, LLC (Willamette Oaks) operates a retirement center in Eugene. Willamette Oaks originally received approval of its retirement center in 1986 when the city approved a two-phase planned unit development (PUD). In 1986, the applicable version of the city’s code that applied to the PUD application was the 1971 version of the code. Willamette Oaks subsequently requested and received a minor modification to Phase 2 of the PUD that broke Phase 2 into four phases – phases 2, 3, 4 and 5. Phases 2, 3 and 4 received final PUD approval in 1987 and were completed thereafter.

In 1990, Willamette Oaks applied for and received approval of a major modification to Phase 5. The approval required Willamette Oaks to submit an application for final PUD approval for Phase 5 by February, 1995.¹ The city subsequently granted an extension to that deadline to August, 1997, on the

¹ According to the city’s planning department, the 1990 major modification decision included the following:

“Approval is granted for a five-year time frame from completion of the first phase of this development for the beginning of construction of subsequent phases.” Record 261.

1 condition that Willamette Oaks submit an application for final PUD approval
2 for Phase 5 prior to August 8, 1997.

3 Willamette Oaks submitted an application for final PUD approval for
4 Phase 5 on July 29, 1997. In September, 1997, the city approved the final PUD
5 for Phase 5, and imposed PUD Condition 1(d), requiring the city and
6 Willamette Oaks to enter into a performance agreement:

7 “1. Prior to the execution of the final PUD agreement, the
8 applicant shall address the following:

9 “ * * * * *

10 “d. A specific schedule indicating number of phases,
11 construction to be completed during each phase, and
12 time period of each phase, must be submitted by the
13 applicant. Absent an approved schedule as specified,
14 and as per Eugene Code 9.510(4)[1971], the applicant
15 shall be required to obtain all approvals for necessary
16 building permits within one year of the decision date
17 of this final approval of Phase [5] development. The
18 final executed PUD agreement shall further specify
19 the time schedule by which all construction shall be
20 completed.” Rec. 57.

21 In accordance with PUD Condition 1(d), in November, 1997, Willamette Oaks
22 and the city entered into a Performance Agreement that set forth a construction
23 time schedule. Section 1.a of the Performance Agreement provides that
24 construction would commence by April 15, 1999 and be completed by
25 September 17, 2001. As we discuss in more detail below, the Performance
26 Agreement also includes a provision that governs modifications of the
27 agreement. The construction time schedule set out in the Performance
28 Agreement was subsequently extended several times. Record 259.

1 In 2001, the city adopted the code provisions that govern PUD
2 modifications today, replacing the 1971 code. In July, 2013, Willamette Oaks
3 submitted an application to modify the final PUD approval for Phase 5 to
4 extend the time for commencing construction to June 9, 2014 and to complete
5 construction by June 9, 2015.²

6 The planning director approved the PUD modification and imposed a
7 condition that requires Willamette Oaks and the city to execute a conforming
8 amendment to the Performance Agreement specifying the new commencement
9 and completion dates for construction. Petitioner appealed the decision to the
10 hearings officer. The hearings officer approved the modification with the
11 condition requiring an amendment of the Performance Agreement, and this
12 appeal followed.

13 **FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR**

14 As we discuss in more detail in our resolution of the fourth assignment
15 of error, the hearings officer found that Eugene Code (EC) 9.8370 provides the
16 applicable approval criteria for modifying the construction schedule and that

² As we explain in more detail in our resolution of the fourth assignment of error, although the specific construction time schedule originated with the Performance Agreement, the city has processed Willamette Oaks' post-2001 requests to extend the time schedule as applications for city approval to modify the final PUD. Record 259 (planning director decision explaining that “[t]he time schedule for construction of Phase 5 was then subsequently extended by several additional modifications (see MDA 00-6, MDA 00-15, MDA 03-11, and MDA 07-1), *each of which were approved by the city*”) (Emphasis added.) We assume for purposes of this opinion that is because the 2001 amendments to the EC require the modification of the construction schedule to be processed as a PUD modification and a modification of the Performance Agreement, rather than solely as modification of the Performance Agreement.

1 the construction schedule extension satisfies EC 9.8370(1) and (2).³ EC
2 9.8370(1) allows the city to approve a modification of a final PUD approval if
3 “[t]he proposed modification is consistent with the conditions of the original
4 approval.” EC 9.7025(6) provides that approval of a modification to an
5 approved PUD that is subject to the provisions of a performance agreement
6 requires comparable or conforming modifications to the performance
7 agreement.

8 Petitioner’s first three assignments of error really boil down to a single
9 challenge to the hearings officer’s conclusion that the modification is
10 consistent with PUD Condition 1(d). According to petitioner, extending the

³ EC 9.8370 provides:

“Modifications to Approved Planning Unit Development. The applicant for the original PUD may apply for a modification of the final PUD approval following the Type II process. The planning director shall approve the request only if it complies with the following criteria:

“(1) The proposed modification is consistent with the conditions of the original approval.

“(2) The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties.

“If the planning director determines that the proposed modification is not consistent with the above criteria, the proposed modification may not occur unless a new tentative PUD application is submitted based on the Type III procedural requirements. Nothing in this section shall preclude the applicant from initially submitting the requested modification as a new tentative PUD application.”

1 construction time schedule is not consistent with PUD Condition 1(d).
2 According to petitioner, PUD Condition 1(d) itself and the terms of the
3 Performance Agreement, as amended, both preclude extensions of the
4 construction time schedule.

5 We set out PUD Condition 1(d) above and repeat it here:

6 “A specific schedule indicating number of phases, construction to
7 be completed during each phase, and time period of each phase,
8 must be submitted by the applicant. Absent an approved schedule
9 as specified, and as per Eugene Code 9.510(4), the applicant shall
10 be required to obtain all approvals for necessary building permits
11 within one year of the decision date of this final approval of Phase
12 [5] development. The final executed PUD agreement shall further
13 specify the time schedule by which all construction shall be
14 completed.” Record 57.

15 As noted, a construction schedule was subsequently approved as part of the
16 Performance Agreement between the city and Willamette Oaks.

17 The Performance Agreement includes two clauses that are central to
18 petitioner’s challenges to the hearings officer’s decision and we set them out
19 below. First, Section 1.a of the Performance Agreement originally provided:

20 “Time Schedule. Time being of the essence, the construction will
21 commence by April 15, 1999, and total construction, including
22 landscaping, shall be completed on or before September 17, 2001.
23 These dates shall be part of the development schedule within the
24 meaning of Sections 9.510 of the Eugene Code, 1971 (or the
25 corresponding provision of any such future law). Notwithstanding
26 the foregoing development schedule, the time for completion shall
27 be extended by the period of time commencement or completion
28 of construction is delayed on account of any suit, action or other
29 proceeding challenging the granting of project approval or the
30 right project, or on account of any strike, lockout, civil
31 commotion, military activity, sabotage, or inability to obtain
32 materials, labor, or service, natural disaster or casualty, or any
33 other cause reasonably beyond the power of the Developer to

1 control or lessen the effect thereof upon commencement or
2 completion.” Record 107-08 (underlining in original).

3 In 2007, Section 1.a of the Performance Agreement was amended to provide:

4 “Time being of the essence, the commencement of construction for
5 Phase [5] shall occur by August 1, 2010, with the completion of
6 Phase [5] construction by August 1, 2011.” Record 338.

7 Second, Section 2 of the Performance Agreement provides:

8 “ADDITIONS, DELETIONS, OR MODIFICATIONS. Any
9 additions, deletions, or modifications to this Agreement, including
10 the exhibits, are subject to provisions of Section 9.516(9) of the
11 Eugene Code, 1971 (*or the corresponding provision of any such*
12 *future law*).” Record 335-36 (emphasis added.)

13 The hearings officer found that the June 9, 2014 deadline to commence
14 construction and the June 9, 2015 deadline to complete construction is
15 consistent with PUD Condition 1(d), as required by EC 9.8370(1):

16 “[Petitioner] argues that conditions of the original approval require
17 a specific time schedule for all construction to be completed in a
18 [performance] * * * agreement. According to [petitioner] that
19 [performance] * * * agreement specified a completion date in
20 2001. Under [petitioner’s] reasoning, any change to the 2001
21 completion date is necessarily inconsistent with [PUD Condition]
22 1(d), and therefore the modification does not satisfy EC 9.8370(1).

23 “[Petitioner] misconstrues what is required by [PUD Condition]
24 1(d) * * *. [PUD] Condition 1(d) required that Willamette Oaks
25 execute a [performance] * * * agreement that specified the time
26 schedule for completion of all development. Willamette Oaks did
27 that in the 1997 [Performance] * * * agreement. There is nothing
28 in [PUD] condition 1(d) that requires the time schedule established
29 in the [Performance] * * * agreement to be set in stone or that it
30 could not be modified under the City code. * * *” Record 12.

31 Earlier in the decision, the hearings officer also found:

1 “While the original [Performance] * * * agreement was certainly
2 more comprehensive and specific about the various bases for
3 extending time schedules, the mere fact that the specific language
4 was left out of the later modification does not mean further
5 extensions are categorically prohibited. EC 9.7230(5) specifically
6 allows for modifications to the commencement and expiration
7 period, and I do not see that the change in language between the
8 two [Performance] * * * agreements prohibits further extensions.
9 If the 2007 modification had specifically stated no further
10 extensions shall be permitted then I would likely reach a different
11 conclusion, but absent a specific prohibition against further
12 extensions I agree with the planning director that Willamette Oaks
13 may seek an extension of the time schedules.” Record 10.

14 On appeal to LUBA, petitioner argues that extending the construction
15 schedule does not satisfy EC 9.8370(1), which requires the extension to be
16 consistent with PUD Condition 1(d), because PUD Condition 1(d) required
17 Willamette Oaks and the city to identify a construction time schedule and then
18 complete construction according to the identified schedule. We understand
19 petitioner to argue that the terms of the Performance Agreement that set out a
20 completion date of 2001, and in particular the 2007 modification of Section 1.a
21 to delete the references to circumstances under which Willamette Oaks could
22 obtain an extension, provide context for interpreting PUD Condition 1(d) to
23 require that no extensions of the construction schedule were available after
24 2007.

25 The issue on appeal is whether the hearings official “improperly
26 construed the applicable law.” ORS 197.835(9)(a)(D). We cannot say that the
27 hearings officer misconstrued EC 9.8370(1) in concluding that the construction
28 schedule extension is consistent with PUD Condition 1(d), where nothing in
29 PUD Condition 1(d) or the terms of the Performance Agreement, even as
30 amended, prohibit extensions of the construction schedule. PUD Condition

1 1(d) itself does not specify a construction schedule at all; it calls for the
2 applicant to submit a construction schedule and the city to approve that
3 construction schedule as part of the Performance Agreement. PUD Condition
4 1(d) sets a default one-year deadline for securing all needed building permits
5 in the event Willamette Oaks did not submit a construction schedule and the
6 city does not approve that construction schedule as part of the Performance
7 Agreement. While the inclusion of the default building permit schedule in
8 PUD Condition 1(d) could reasonably be interpreted by the hearings officer to
9 preclude *unlimited* extensions of the construction schedule, and while the city
10 could certainly read PUD Condition 1(d) together with the dates specified in
11 Performance Agreement Sections 1.a and 2 as context for concluding that the
12 city's intent in imposing PUD Condition 1(d) was to prevent unlimited
13 extensions of the construction schedule, nothing in PUD Condition 1(d) or the
14 Performance Agreement requires that the initial agreed-to construction
15 schedule must be the only construction schedule.

16 Finally, petitioner argues that the hearings officer erred in conditioning
17 his approval of the PUD modification on the execution of a conforming
18 amendment to the Performance Agreement by the city and Willamette Oaks
19 setting out the new dates for commencement and completion, as required by
20 EC 9.7025(6). According to petitioner, that condition is prohibited by EC
21 9.8335(1), which prohibits the planning director from modifying a condition of
22 an original PUD approval in approving a PUD modification.

23 The hearings officer found, and we agree, that the planning director did
24 not modify PUD Condition 1(d) in the course of approving a modification of
25 the construction schedule, and that EC 9.8335(1) is not implicated. Record 12.

26 The first, second, and third assignments of error are denied.

1 **FOURTH ASSIGNMENT OF ERROR**

2 In its fourth assignment of error, petitioner maintains that the 1971
3 version of the EC that is specified in Section 2 of the Performance Agreement,
4 specifically EC 9.516(9)(1971), controls extension of the construction time
5 schedule, and that the hearings officer erred in applying EC 9.8370, first
6 adopted in 2001. See n 2. That is so, according to petitioner, because the
7 construction schedule is part of the Performance Agreement and is not part of
8 the PUD approval for Phase 5. Accordingly, petitioner argues, EC 9.8370 is
9 not “the corresponding provision” to EC 9.516(9)(1971) because EC 9.8370
10 applies to modifications of final PUD *approvals*, while 9.516(9)(1971) applied
11 to modifications of PUD *performance agreements*.

12 As we explained above, although the specific construction time schedule
13 originated with the Performance Agreement, the parties to the Performance
14 Agreement - Willamette Oaks and the city - apparently have treated the
15 schedule as incorporated into the approved final PUD, and the city has
16 processed Willamette Oaks’ requests to extend the time schedule as
17 applications to modify the final PUD. Record 259 (planning director decision
18 explaining that “[t]he time schedule for construction of Phase 5 was then
19 subsequently extended by several additional modifications (see MDA 00-6,
20 MDA 00-15, MDA 03-11, and MDA 07-1), each of which were approved by
21 the city.”). The extension requests received planning department file numbers
22 and the requests were “approved” by the city, rather than “agreed to” by both
23 parties to the Performance Agreement, as would be the case if the only action
24 that occurred was an amendment of the Performance Agreement, which is a
25 contract between two parties.

1 The hearings officer concluded that EC 9.8370 is the “corresponding
2 provision” of EC 9.516(9)(1971).⁴ EC 9.516(9)(1971) is identical to EC
3 9.8370 except that EC 9.8370 contains only two criteria, while EC
4 9.516(9)(e)(1)(1971) contained a third criterion, (c), requiring the city to find
5 that the proposed changes to a PUD performance agreement “[r]emain

⁴ The hearings officer found:

“While [petitioner] is correct that [EC] 9.516(9)(1971) applies to the [Performance] Agreement and EC 9.8370 applies to PUD approvals, it does not follow that EC 9.8370 cannot be the ‘corresponding provision of any such future law.’ As the staff report explains, under the current version of the code both modifications to the PUD approval and modifications to any PUD performance agreements are processed under EC 9.8370. That view is consistent with EC 9.7025, which provides:

“Modifications. Approval of a modification to any land use application that is subject to the provisions of a performance agreement shall require comparable modifications to the performance agreement consistent with the provisions of this section.’

“EC 9.7025 does not provide any approval criteria or process for modifying a performance agreement, so it is consistent with the planning director’s view that PUD approvals and PUD performance agreements are modified under the same procedure at EC 9.8370. Furthermore, EC 9.516(9)(1971) is essentially identical to EC 9.8370 except that EC 9.8370 eliminated section (c) from the 1971 code requiring that the changes remain consistent with the applicable permit criteria. As the staff report explains, the requirement in Section 9.516(9)(e)(1)(c)(1971) was specifically removed as part of the 2001 land use code revision. Therefore, I believe it is clear that EC 9.8370 is the ‘corresponding provision of any such future law’ to section 9.516(9) and the planning director did not err in applying the approval criteria of EC 9.8370.” Record 8-9.

1 consistent with applicable permit criteria.” Record 8. Although EC 9.8370
2 and EC 9.516(9)(e)(1)(1971) are not completely identical, the hearings
3 officer’s interpretation of the EC - that the provisions are similar enough to
4 conclude that EC 9.8370 is the “corresponding provision” of EC
5 9.516(9)(e)(1)(1971) - is correct.

6 More importantly, petitioner does not develop any argument that the
7 proposed modification fails to satisfy EC 9.516(9)(e)(1)(c)(1971). Absent any
8 attempt to demonstrate the legal significance of any failure to apply EC
9 9.516(9)(e)(1)(c)(1971), petitioner’s fourth assignment of error provides no
10 basis for reversal or remand of the decision.

11 The fourth assignment of error is denied.

12 The city’s decision is affirmed.