

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 LO 138, LLC, SAVE OUR VILLAGE
5 and EVERGREEN NEIGHBORHOOD ASSOCIATION,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF LAKE OSWEGO,
11 *Respondent,*

12
13 and

14
15 EVERGREEN GROUP, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2014-092

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Lake Oswego.

24
25 Gregory S. Hathaway, Portland, filed a joint petition for review and
26 argued on behalf of petitioners LO 138, LLC and Save Our Village. With him
27 on the brief was Hathaway Koback Connors LLP.

28
29 Daniel Kearns, Portland, filed a joint petition for review and argued on
30 behalf of petitioner Evergreen Neighborhood Association.

31
32 Evan P. Boone, Assistant City Attorney, Lake Oswego, filed a response
33 brief and argued on behalf of respondent. With him on the brief was David D.
34 Powell, City Attorney.

35
36 Christe C. White, Portland, filed a response brief and argued on behalf of
37 intervenor-respondent. With her on the brief were Steven P. Hultberg and
38 Radler White Parks & Alexander LLP.

1 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board
2 Member, participated in the decision.

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4 AFFIRMED

04/15/2015

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

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NATURE OF THE DECISION

Petitioners appeal a city council decision that approves intervenor-respondent's (intervenor's) application for a development review permit for a mixed use development on a block in downtown Lake Oswego.

FACTS

Blocks 136, 137 and 138 are located in the city's Downtown Redevelopment Design District (DRDD).¹ Block 137, the subject of this appeal, is zoned East End General Commercial (EC).² A figure from the DRDD, which shows a portion of the DRDD, is included on the following page to show the relationship of the three blocks and their location in the City of Lake Oswego.

State Street (Highway 43) is a north/south arterial that connects Lake Oswego with the cities of Portland to the north and West Linn to the south. A Avenue is an east/west arterial that travels west from Highway 43 through the heart of the Lake Oswego business district. First Street, which separates Blocks 138 and 137, and Second Street, which separates Blocks 137 and 136 are local/residential streets, as is Evergreen Road, which adjoins the south side of Blocks 136 and 137.

¹ The Lake Oswego Community Development Code, which is codified at Chapter 50 of the Lake Oswego Municipal Code, has eleven overlay and design districts. Lake Oswego Municipal Code (LOC) 50.03.001 through .011. The DRDD is codified at LOC 50.03.004.

² The city has a large number of base zones, and the EC zone is one of them.

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3 Block 138 is owned by petitioner LO 138, LLC and is currently
 4 developed with Lake View Village, a commercial, retail and office complex
 5 with six buildings totaling approximately 91,000 square feet. Block 136, to the
 6 west of Block 137, is developed with nine buildings, seven are residential and
 7 two are commercial/office buildings. None of the buildings on Block 138 and
 8 136 are taller than three stories.

9 The redevelopment of Block 137, which the challenged decision
 10 approves, would include three buildings: buildings A, B and C. Those
 11 buildings are to include four stories, and will be up to 60 feet tall. Parking will
 12 be provided underground with parking entrances on First Street and Second

1 Street. The development will include “201 residential units, six live/work units
2 and 36,500 square feet of commercial use * * *.” Record 23. The 36,500
3 square feet of commercial uses will be located on the ground floor.

4 The DRDD and EC zone both allow buildings that are four stories tall
5 and a maximum building height of 60 feet. LOC 50.05.004(5)(d); LOC Table
6 50.04.001-18. The approved residential, retail and office uses are all permitted
7 outright in the EC zone, although ground floor residential development is not
8 allowed on most of Block 137. LOC 50.03.002(3); LOC 50.03.003(1)(d)(ii).
9 The challenged decision approved an exception, which is similar to the more
10 traditional zoning variance, to allow live/work units on the portion of Block
11 137 where they otherwise would not be allowed under LOC
12 50.03.003(1)(d)(ii).

13 In their first assignment of error, petitioners contend the city council
14 erroneously interpreted the LOC in approving a redevelopment that is out of
15 scale with petitioner LO 138, LLC’s development on Block 138 to the east and
16 the existing development on Block 136 to the west. In their second assignment
17 of error, petitioners argue the city council erred in approving buildings that are
18 four stories tall. In their third assignment of error, petitioners challenge the
19 exception to allow live/work units and a gym and library in the part of Block
20 137 where ground floor residential development is prohibited. And finally, in
21 their fourth assignment of error, petitioners contend the additional vehicular
22 trips that will be generated by the approved development will exceed city
23 standards.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. LUBA’s Standard of Review**

3 The Lake Oswego Community Development Code, of which the DRDD
4 is a part, is a land use regulation. All parties recognize that the city council’s
5 interpretations of its land use regulations and comprehensive plan are subject to
6 the deferential standard of review set out in ORS 197.829(1), as explicated in
7 *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).³ As we explain
8 in more detail below, one of the objectives of the DRDD is to create a “village
9 character” within the DRDD. The DRDD includes a definition of “village
10 character.” LOC 50.05.004(4). Petitioners’ contend that the LOC 50.05.004(4)
11 definition of “village character,” and in particular the part of that definition that
12 calls for “a community of small-scale structures,” requires that the city council
13 ensure that the development proposed for Block 137 is not out of scale with the

³ 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;
- “(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.”

1 existing development on Blocks 136 and 138. In petitioners’ view, the four-
2 story buildings proposed for Block 137 are out of scale with the development
3 on Blocks 136 and 138. For that reason, petitioners argue the city council
4 should have denied the application, as did the city’s Development Review
5 Commission.⁴ Petitioners argue the city council’s interpretation that the
6 definition of “village character” does not require a direct comparison of the
7 scale of development approved for Block 137 with the scale of development
8 existing on Blocks 136 and 138 is inconsistent with the text of LOC
9 50.05.004(4), other text in LOC 50.05.004, and text in planning documents that
10 LOC 50.05.004 was adopted to implement.

11 In *Siporen*, the Supreme Court set out and agreed with the Court of
12 Appeals’ description of how to analyze whether a local governing body’s
13 interpretation is inconsistent with the text of a land use regulation under ORS
14 197.829(1):

15 “[T]he Court of Appeals attempted to translate the statutory
16 standard at ORS 197.829(1)(a) into terms that would be useful in
17 reviewing the city’s decision. The court began by observing that,
18 under its own decision in *Foland v. Jackson County*, 215 Or App
19 157, 168 P3d 1238 (2007), the determination whether a local
20 government’s interpretation of its own ordinance was
21 ‘inconsistent’ with the express wording of the ordinance for
22 purposes of ORS 197.829(1)(a) depends on

23 “‘whether the interpretation is *plausible*, given the
24 interpretive principles that ordinarily apply to the
25 construction of ordinances under the rules of *PGE* [*v.*
26 *Bureau of Labor and Industries*, 317 Or 606, 859 P2d
27 1143 (1993)].’

⁴ The challenged city council decision resulted when intervenor appealed the Development Review Commission’s decision.

1 “*Siporen*, 231 Or App at 598, 220 P3d 427 (quoting *Foland*, 215
2 Or App at 164, 168 P3d 1238) (emphasis added). The court then
3 explained that that meant that LUBA’s task, and its own, in
4 reviewing LUBA’s order,

5 “‘is not to determine whether the city’s interpretation
6 of the code was ‘correct’ in some absolute sense of
7 choosing among various plausible interpretations,
8 but, instead, merely whether that interpretation
9 satisfied *PGE*’s first level threshold of plausibility. If
10 it does, then, under ORS 197.829(1)(a), LUBA
11 should have, and we must, sustain that interpretation,
12 even if another interpretation might be ‘better’ or
13 more sensible or persuasive.’

14 “*Siporen*, 231 Or App at 598–99, 220 P3d 427. * * *” *Siporen*,
15 349 Or at 255.

16 With that understanding of how we are to review the city council’s
17 interpretations of the Community Development Code and related city land use
18 regulations and plans, we turn to the relevant DRDD text and petitioners’
19 arguments based on that text.

20 **B. The DRDD and Petitioners’ Argument**

21 The DRDD begins with “Purpose,” “Applicability,” and “Relationship to
22 Other Development Standards” sections. LOC 50.05.004(1) through (3).⁵
23 LOC 50.05.004(4) is entitled “Definition of Village Character,” and the text of

⁵ The “Purpose” section at LOC 50.05.004(1) provides:

“The purpose of this section, the Downtown Redevelopment District Design Standard, is to guide the redevelopment of downtown Lake Oswego in a manner that creates a feeling of vitality and sense of place in order to attract private investment and redevelopment of the area and create a community center that reflects and enhances the character of the City of Lake Oswego.”

1 that section is set out in the margin.⁶ Petitioners’ first assignment of error
2 relies principally on the “community of small-scale structures” language in the
3 “village character” definition. Citing text in city planning documents that
4 petitioners believe the “Definition of Village Character” was adopted to
5 implement, petitioners argue “the term scale is a relative term that requires *full*
6 consideration of the size of proposed structures (width, height and length) in
7 comparison with the size of surrounding structures to determine whether the
8 proposed buildings are ‘small scale structures’.” Joint Petition for Review 31
9 (emphasis in original).⁷

⁶ LOC 50.05.004(4) provides:

“As used in this section, ‘*village character*’ means a community of *small-scale structures* that appears and operates like a traditional small town. A village is typically composed of an assembly of smaller mixed use structures often centered on a square or other public space or gathering area, such as a body of water, a transportation route or a landmark building. Adherence to village character is not intended to require an historical reproduction of a turn of the century small town, but rather to encourage the development of a sophisticated small city that is pedestrian friendly, creates a sense of community and attracts people to the downtown in the same manner and using similar design concepts as historic small towns and neighborhood centers.” (Emphasis added.)

⁷ In addition to citing language in the “Purpose” section of the DRDD, *see n* 5, petitioners cite the following language from the Lake Oswego Urban Design Plan:

“2.14. Building Form as City Builder

“Issue: * * * The scale, articulation of the building mass and the relationship of the building to the street and to other

1 **C. The City’s Interpretation**

2 Although the Development Review Commission agreed with petitioners’
3 interpretation of the “Definition of Village Character,” the city council flatly
4 rejected petitioners’ interpretation and rejected petitioners’ contention that the
5 definition applies directly as a mandatory standard in this case. The city’s
6 interpretive reasoning is set out in part below:

7 “Based on [the] Code Structure, the Council finds that the
8 definition of village character in Subsection 4 of LOC 50.05.004 is
9 not an approval standard. It is instead a general and aspirational
10 purpose statement for the balance of the more specific Downtown
11 Redevelopment Design District (DRDD) provisions. The general
12 and aspirational purpose statement in the definition of village

buildings are critical elements that determine what a building will contribute to the overall urban ambience.

“Principle: * * * New buildings should be compatible with and contribute to the character of the districts.” Lake Oswego Urban Design Plan 11.

Petitioners also cite the following language from the East End Redevelopment Plan:

“The parcel between A Avenue and Evergreen, and 1st and 2nd Streets (Block 137), should be redeveloped to enhance the ‘compact shopping district’ extending one block in all directions from the intersection of 1st Street and A Avenue. The preferred project shall be mixed-use with retail fronting on 1st Street. Along with the retail frontage on 1st Street the site could be developed with a public library overlooking Millennium Plaza Park, a 30 to 70-unit hotel or housing. The mix of uses will need to provide sufficient on-site parking to satisfy the demand for all proposed uses. New or remodeled structures shall be designed to complement structures located on Block 138, Millennium Plaza Park (south) and the townhouses on Block 136 (west).” East End Redevelopment Plan 26.

1 character is implemented through the specific approval criteria of
2 Subsections 5, 6, 9 and 12 of Section 50.05.004. The text and the
3 context of the Code are clear on this point. Subsection 4
4 establishes the general purpose for the whole of the Downtown
5 Redevelopment Design District (DRDD) planning area and
6 Subsections 5, 6, 9 and 12 contain the particular provisions for
7 implementing the vision through specific approval criteria that
8 apply to each individual development proposal.

9 “Specifically, Subsection 5 reads: ‘Building siting and massing
10 shall create a village character *by compliance with* the following
11 requirements.’ Subsection 6 states: ‘Building elements shall be
12 designed to create a village character *through compliance with* the
13 following requirements.’ Subsection 9 states: ‘Parking shall be
14 designed to provide adequate, but not excessive, space while
15 preserving and enhancing the village character of Lake Oswego
16 *through compliance with* the following criteria.’ Subsection 12
17 states: ‘Street, sidewalk and alley design shall safely and
18 efficiently provide for vehicular and pedestrian travel while
19 enhancing village character *through compliance with* the
20 following design standards.’ [Emphases are the city council’s.]

21 “Each of these referenced standards contains a comprehensive list
22 of approval standards that reflect the general definition and are
23 read together, not in conflict with, the definition of village
24 character. As an example, Subsection 5, Building Siting and
25 Massing, ensures that complex massing, Lake Oswego Style
26 design, roof forms, pedestrian amenities, height, stories, entrances
27 and street corners create village character. Subsection 6, Building
28 Design, ensures again that the Lake Oswego Style is adhered to,
29 that projects meet the village character standards for storefront
30 appearance, and that the materials, ground floor and mixed use
31 design also meet those village characteristics. Subsections 9 and
32 12 follow this same pattern. These are the same elements that are
33 more generally described in the definition section but that are
34 actually implemented through the applicable standards in
35 Subsections 5, 6, 9 and 12.

1 “This interpretation gives meaning to the definition as a general
2 purpose statement and meaning to the balance of the DRDD as
3 implementing standards for that purpose. * * *

4 “* * * The City Council * * * does not accept the argument that
5 ‘small-scale’ in the definition means something different than the
6 specific scale criteria found in Subsections 5, 6, 9 and 12 of LOC
7 50.05.004. Even if we found that the term ‘small-scale’ could be
8 defined with a different meaning than the specific approval
9 standards of Subsections 5, 6, 9 and 12, which we do not here,
10 then we find that such a conflict is resolved by having the specific
11 terms found in Subsections 5, 6, 9 and 12 supersede or control
12 over the general, unspecific terms in the village character
13 definition.

14 “The Council finds that there is no conflict between the definition
15 of S[ubs]ection 4 and the approval standards of S[ubs]ections 5, 6,
16 9 and 12 and that ‘small-scale’ in the definition has the same
17 meaning as the scale components specifically regulated under
18 Subsections 5, 6, 9 and 12. The Council also finds that the term
19 ‘small-scale structure’ is ambiguous and general on its own. This
20 is particularly true when the entire phrase from the Subsection 4
21 definition is included, which is a ‘community of small-scale
22 structures.’ One development does not result in the construction
23 of an entire community or the construction of a traditional small
24 town. These are broad, aspirational, purpose-like statements that
25 are only achieved through multiple projects over time. To achieve
26 that result, the City has a Code that contains particular regulations
27 that further define and narrow how each individual project builds
28 that village character, that small scale, and that traditional small
29 town over time. These criteria describe and implement what the
30 City means by the general term ‘village character.’ The Code
31 appropriately qualifies and limits the general definition with the
32 specific requirements of Subsections 5, 6, 9 and 12.” Record 26-
33 28 (emphases in original).

34 Intervenor-respondent argues “[t]he Council’s logical interpretation
35 based on * * * the express language, context and logical order of the code is
36 certainly plausible, if not objectively correct.” Intervenor-Respondent’s Brief

1 19. We agree that the city council’s interpretation easily qualifies as a
2 plausible interpretation of the Community Development Code and that
3 petitioners’ proffered interpretation to the contrary is inconsistent with the
4 Community Development Code text.

5 Petitioners take the city to task for sometimes referring to the “Definition
6 of Village Character” as a general “purpose” statement, pointing out correctly
7 that the “Purpose” of the DRDD is set out at LOC 50.05.004(1). *See* n 5. But
8 that imprecision in language is not a basis for remand. The city council simply
9 refused to interpret the generally worded definition of “village character” as a
10 mandatory standard that required the city to compare the proposed
11 development with the development on adjoining lots to determine if the
12 proposed development qualifies in some abstract and comparative sense as
13 “small-scale.” The city’s refusal to do so is entirely consistent with the text of
14 the Community Development Code. The first words of the “Definition of
15 Village Character” are “*As used in this section ‘village character’ means * * *.*”
16 (Emphasis added.) The “section” the definition is referring to is section LOC
17 50.05.004, which sets out the DRDD. The term “village character” is used in
18 section LOC 50.05.004, exactly six times—twice in the subsection LOC
19 50.05.004(4) definition itself, and once in four different subsections that
20 follow, subsections 5, 6, 9 and 12 of section LOC 50.05.004. And each of the
21 four times the term “village character” is used in subsections 5, 6, 9 and 12,
22 those subsections say “village character” will be created or enhanced “by” or
23 “through” “compliance with the following” “requirements” “criteria” or
24 “design standards.” The city council’s interpretation that “village character” is
25 to be achieved by complying with the standards in subsections 5, 6, 9 and 12,

1 and not by direct application of the LOC 50.05.004(4) definition itself, is
2 consistent with the text and structure of LOC 50.05.004.

3 Petitioners concede that LOC 50.05.004(5), “Building Siting and
4 Massing,” limits building height, but petitioners contend “width” and “length”
5 must also be considered directly to ensure that the scale of the proposed
6 buildings is consistent with the smaller scale of the development on adjoining
7 Blocks 136 and 138. There are several problems with that argument. First,
8 petitioners cite no language in the LOC 50.05.004(4) definition that requires a
9 direct comparison of the proposed development on Block 137 with the existing
10 development on Blocks 136 and 138 or establishes the development on those
11 blocks as the standard for achieving a “community of small scale structures.”
12 Second, petitioners cite nothing that supports their contention that “small-
13 scale” invariably or necessarily requires direct consideration of “width” and
14 “length” in addition to “height.” The Community Development Code does not
15 define “scale” or “small-scale.” *Webster’s Third New Int’l Dictionary 2023*
16 (unabridged ed 2002) sets out eleven definitions for the word “scale,” and none
17 of them support the proposition that direct consideration of width and depth is
18 an essential prerequisite in achieving “a community of small-scale structures.”
19 Finally, the city perhaps could have adopted a “maintain small-scale” standard
20 that applies directly or a standard that requires that the scale of proposed
21 development be comparable with the scale of existing development on
22 adjoining blocks, but it did not do so. Instead, it adopted a generally worded
23 definition that says “‘village character’ means a community of small-scale
24 structures” and then immediately after that “definition” set out four sections
25 that in turn set out standards for achieving that “village character.” If, as
26 petitioner argues, the standards set out in sections 5, 6, 9 and 12 are not

1 sufficient to achieve a “community of small-scale structures,” the time to raise
2 that argument was when sections 5, 6, 9, and 12 were adopted and
3 acknowledged as adequate to achieve the “village character” they were
4 expressly adopted to achieve. The city council’s interpretation of the
5 “Definition of Village Character” not to impose a directly applicable mandatory
6 approval criterion easily meets the *Siporen* plausibility standard.⁸

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 As already noted, the buildings approved for Block 137 will be four
10 stories tall. LOC 50.05.004(5)(d) sets out the circumstances in which a fourth
11 story may be allowed.⁹ Most of petitioners’ arguments under this assignment

⁸ The city council also found that petitioners’ suggested interpretation would violate the ORS 227.173(1) requirement that decisions on permits be governed by “standards and criteria.” We need not and do not reach that question.

⁹ LOC 50.05.004(5) provides, in part:

“d. Number of Stories

“New buildings shall be at least two stories tall, and new and remodeled building shall be no greater than three stories tall, except:

“i. Fourth Story

“A fourth story may be permitted subject [to] the following:

“(1) The fourth story is residential and is contained within a gabled or hipped roof;

1 of error are directed at the city council’s conclusion that although LOC
2 50.05.004(5)(d)(i) provides that “[a] fourth story may be permitted subject [to]”
3 the four criteria, the word “may” in LOC 50.05.004(5)(d)(i) should instead be
4 the word “shall,” because the word “may” was the result of a scrivener’s error
5 in a nonsubstantive recodification of LOC 50.05.004(5)(d)(i).

6 We need not resolve the “shall” versus “may” issue because the city
7 council also adopted alternative reasoning for approving the three four-story
8 buildings. The city council concluded even if the word “may” is correctly
9 included in LOC 50.05.004(5)(d)(i), so that approval of a fourth story is
10 permissive rather than mandatory if one or more of the four criteria is met, the
11 city council found that three of those four criteria are met by the proposal so
12 that the four stories “are appropriate in this case.” Record 35.

13 Petitioners’ only challenge to the city council’s alternative finding
14 concerning LOC 50.05.004(5)(d)(i) is that it does not take into consideration
15 whether the four stories are consistent with the LOC 50.05.004(4) “Definition
16 of Village Character,” which petitioners believe requires “small-scale

“(2) The site is sloping and the structure has three or fewer stories on the uphill side;

“(3) The fourth story is significantly stepped back from the building plane created by the lower stories; or

“(4) Fourth story design elements are used to break up the mass of a building, create visual interest and variety, hide mechanical equipment, define an entry or define a particular building’s function. Examples of such design elements include dormers, towers, turrets, clerestories, and similar features.”

1 structures.” However, we rejected petitioners’ first assignment of error
2 challenging the city council’s interpretation that the “Definition of Village
3 Character” does not impose a directly applicable mandatory approval standard.

4 Petitioners’ second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 The mixed use proposal that is at issue in this appeal includes several
7 live/work units that will include both a commercial or office component on the
8 ground floor, and a residential component on an upper floor. LOC
9 50.10.003(2).¹⁰ In addition, the proposal includes a gym and a library that will
10 be available for use by the residents of the dwelling units on Block 137, but
11 will not be available for use by the public. Apparently, because the commercial
12 or office component of the live/work units is viewed as an accessory to
13 residential use, as are the gym and library, they are considered residential uses
14 under the LOC.

15 Ground floor residential uses are permitted in a 65-foot by 280-foot part
16 of Block 137 along Second Street, but under LOC 50.03.003(1)(d)(ii) and LOC
17 Figure 50.03.003-A ground floor residential is prohibited on most of Block
18 137. A color diagram that appears at Record 229 and appears again with
19 explanation on page 32 of intervenor-respondent’s brief shows the area for

¹⁰ LOC 50.10.003(2) sets out Community Development Code definitions and defines “Live/Work Building” as follows:

“A building that contains one or more commercial or office spaces on the first floor connected to residential units above or behind the commercial or office space, and the ownership of the building is not divided between the residential and commercial portions of the building.”

1 which an exception was approved. The perimeter of Block 137 is to be
2 developed entirely for retail, commercial or office use, except for the 65-foot
3 by 280-foot part of Block 137 along Second Street where residential use is not
4 prohibited. However, the approved gym, library and portions of several
5 live/work units will be located on an interior portion of Block 137, where LOC
6 50.03.003(1)(d)(ii) prohibits ground floor residential use. To approve that
7 aspect of the proposal, the city granted an exception to the LOC
8 50.03.003(1)(d)(ii) ground floor residential use prohibition, under LOC
9 50.08.005(1)(iii), which permits the city to grant exceptions to the DRDD and
10 other Community Development Code standards.¹¹

11 LOC 50.08.005(1)(iii) permits the city to approve an exception to
12 standards like the LOC 50.03.003(1)(d)(ii) ground floor residential use
13 prohibition if “[t]he applicant demonstrates that the alternative design
14 accomplishes the purpose of the Urban Design Plan in a manner that is equal or
15 superior to a project designed pursuant to this standard.” The LOC

¹¹ LOC 50.08.005(1) provides, in part:

“The reviewing authority may allow exceptions to LOC 50.05.004, Downtown Redevelopment Design District, and to other Lake Oswego Community Development Code provisions that are applicable to the downtown redevelopment design district without the need to obtain a formal variance in one or more of the following circumstances:

“* * * * *

“iii. The applicant demonstrates that the alternative design accomplishes the purpose of the Urban Design Plan in a manner that is equal or superior to a project designed pursuant to this standard.”

1 50.08.005(1)(iii) reference to “this standard” is a reference to the standard that
2 is the subject of the exception (here the LOC 50.03.003(1)(d)(ii) ground floor
3 residential use prohibition).

4 The Lake Oswego Urban Design Plan for the East End Redevelopment
5 Area was adopted by the Lake Oswego Redevelopment Agency in 1988. With
6 one possible exception that we address below, the parties appear to agree that
7 “the purpose of the Urban Design Plan,” for purposes of applying LOC
8 50.08.005(1)(iii) in this case is threefold.¹² That threefold purpose is to create:
9 (1) “a high-density compact shopping district,” (2) “a pedestrian network,” and
10 (3) “high density housing to provide greater intensity of use in the retail
11 core.”¹³

12 **A. The City Council’s Findings**

13 The city council’s findings in support of the exception are set out in part
14 below:

¹² Record 31; Joint Petition for Review 50; Intervenor-Respondent’s Brief 33.

¹³ This threefold Urban Design Plan purpose is set out in the following Urban Design Plan Objectives:

“Objective 1.3 Create a high-density, compact shopping district to serve as the retail core of the East End Redevelopment Area.”

“Objective 1.6 Create a pedestrian network that links surrounding neighborhoods to the retail core, civic spaces and facilities.”

“Objective 1.9 Create development areas for high-density housing to provide greater intensity of use of the retail core, cultural and recreational facilities.”

1 “The Council does not accept the argument that suggests the UDP
2 [Urban Design Plan] allows only commercial uses on this site or
3 requires more commercial and less residential use. The EC zone
4 and DRDD standards control the uses permitted on the site. Those
5 regulations allow residential uses on the site as well as commercial
6 uses and do not prescribe the proportion or percentage of those
7 uses. The only exception to this is the area on the ground floor
8 where the EC zone provides that residential uses are not allowed.
9 * * * The applicant has requested an exception to the residential
10 use prohibition in that area to permit the gym and library
11 (accessory uses to the residential use) and a portion of the backs of
12 the residential units that are actually permitted along Second
13 Street.

14 “* * * *

15 “The majority of the exception area will be in gym or library use
16 or in a live/work configuration, with ‘work’ (commercial use) on
17 the ground floor and residential on the upper floors. Even if the
18 use of a live/work unit is viewed as a single type of use,
19 nevertheless the Council finds that the commercial portion of the
20 live/work will be occurring on the ground floor and thus would
21 meet the purposes of the UDP at least equally to a project that
22 meets the standard. Regardless of whether these live/work units
23 qualify as residential or commercial uses, they meet the exception
24 standard.

25 “The commercial-like uses of the live/work units, the gym, and the
26 library are the type of uses that would be permitted in a retail area.
27 The only distinction here is that they are operating as accessory to
28 a residential use and therefore are considered residential use. In
29 form they are active uses and are therefore appropriate on the site
30 in this location. The gym and library areas are active gathering
31 areas, are similar in use to a commercial or public use and are
32 offset by the area committed to commercial that is permitted to be
33 residential along Second Street and the east-west corridor.
34 Specifically, a surface parking lot for commercial uses would be
35 permitted on the site where the gym, library, plaza and back doors
36 of the residential units are located as well as the live-work units.

1 The Council finds that the proposed uses are at least equal to a
2 parking lot in serving the purpose of the UDP.

3 “Substantial evidence was submitted into the record demonstrating
4 that the amount of commercial use compared to residential use on
5 the ground floor is consistent with the available transportation
6 facilities and that adding even more retail or office would create
7 excessive traffic trips that would negatively impact the system.
8 Recognizing that there are two more blocks intended for this
9 compact shopping district that have not been redeveloped, the
10 balance of the residential and commercial ground floor uses on the
11 Wizer block preserves remaining capacity for these other blocks to
12 accommodate a share of the retail and office demand.

13 “Thus, in this proposed development, the multiple purposes of the
14 UDP are better served than a project designed to the standard. The
15 proposed exception: (a) provides an appropriate balance of retail,
16 office and housing on the ground floor in a mixed use form as
17 directly encouraged by the UDP; and (2) at the same time
18 preserves the City’s ability to develop all four blocks of the
19 compact shopping district as anticipated by the UDP by preserving
20 capacity in the transportation system to serve the remaining two
21 blocks of the four-block district.” Record 31-32.

22 **B. Petitioners’ Argument**

23 Petitioners first argue:

24 “As a starting point, there are two fundamental UDP purposes at
25 issue: (1) the prohibition in LOC 50.03.003.1[d].ii against ground
26 floor residential on almost all of Block 137 and (2) the UDP
27 Objectives and policies favoring the creation of a high-density,
28 compact shopping district to serve as the retail core of the East
29 End Redevelopment Area. * * *” Joint Petition for Review 50
30 (petitioners’ underscoring).

31 After quoting the same three policies we quoted earlier, *see* n 13, petitioners
32 then set out additional language from the Urban Design Plan that emphasize a

1 desire for high density commercial activity and include references to
2 developing housing on upper floors over commercial and office uses.¹⁴

3 The LOC 50.03.003(1)(d)(ii) prohibition against ground floor residential
4 on a part of Block 137 is not a fundamental purpose of the Urban Design Plan;
5 it is a Community Development Code regulation. The three objectives that the
6 city council and all parties set out in their briefs set out the Urban Design Plan
7 purpose, and as we have already explained that purpose is threefold. While a
8 compact retail core is one of the Urban Design Plan purposes, so are pedestrian
9 network links and high density housing.

10 Petitioners are correct that the additional Urban Design Plan language
11 they cite on page 51 of the joint petition for review further emphasizes the
12 desire for a compact commercial core and include language encouraging
13 residential development on upper floors. *See* n 14. But the mixed use
14 development at issue in this appeal includes commercial development on most
15 of the ground floor and has residential development on upper floors. As the
16 city council noted in its findings, while the Urban Design Plan undeniably calls
17 for a compact commercial core, it does not mandate that all properties in that
18 commercial core must be developed commercially or that residential use not be
19 allowed on ground floors. Again, the prohibition against ground floor
20 residential use on a part of Block 137 is in the Community Development Code,
21 which expressly allows exceptions to that prohibition. That prohibition is not

¹⁴ Objective 3.3.1 states in part “[e]xplore placing high-density multifamily housing and commercial office space on upper floors of shopping district buildings to add activity to the core area.” The Urban Design Plan includes a District Development Guideline with the following language: “[w]here available, second, third, and fourth levels are a combination of commercial office space and housing.”

1 stated in, and is not a purpose of, the Urban Design Plan. The Urban Design
2 Plan also calls for high density residential development, in addition to compact
3 commercial development, and while it calls for that development on upper
4 floors, nowhere does the Urban Design Plan express a purpose or policy to
5 prohibit ground floor residential development. And in fact there are a number
6 of areas within the Urban Design Plan area where ground floor residential is
7 allowed.

8 Petitioners criticize the city council’s findings regarding the nature of the
9 work portion of the live/work units and regarding the nature of the private gym
10 and library. Petitioners first contend that work portion of the live/work units
11 likely will amount to little more than “someone working at home on a
12 computer” which petitioners contend is more similar to a residential use than a
13 commercial or office use. Joint Petition for Review 54. Petitioners also argue
14 that while a 24-Hour Fitness gym or public library might further the compact
15 retail core purpose of the Urban Design Plan, a private library and gym will not
16 do so.

17 Petitioners must do more than speculate that the work portion of the
18 live/work units will not be put to a real office or commercial use. The county’s
19 findings that those parts of the exception area are office or commercial in fact if
20 not in name are a plausible explanation for why the exception for the areas to
21 be developed with live/work units will equally meet the purposes of the Urban
22 Design Plan by supporting the high density residential component and
23 providing a commercial/office component.

24 We tend to agree with petitioners that the private library and private gym
25 will not accomplish “the purpose of the Urban Design Plan in a manner that is
26 equal or superior to” a 24-Hour Fitness or other commercial gym that is open to

1 the public or a public library, particularly if the focus of the inquiry is limited
2 to the Urban Design Plan purpose of creating a high density retail core. But
3 that is not the test under LOC 50.08.005(1)(iii). The test under LOC
4 50.08.005(1)(iii) is whether the “alternative design accomplishes the purpose of
5 the Urban Design Plan in a manner that is equal or superior to a project
6 designed pursuant to this standard.” As the city council points out in its
7 findings, the standard at issue here does not mandate commercial development;
8 it simply prohibits ground floor residential. As the city council found, it would
9 be entirely consistent with that standard to develop surface parking, as
10 currently exists on Block 137 today, on the areas the city approved for
11 live/work units and the library and gym. The city council found the proposed
12 live/work units and library and gym would be at least as supportive of the
13 Urban Design Plan purpose of creating a high density retail core as a surface
14 parking lot and would be more supportive of the Urban Design Plan purpose of
15 developing high density residential in East End Redevelopment Area. The
16 city’s interpretation could be criticized as one that creates and then knocks
17 down a straw man. But petitioners do not really attack that reasoning, and we
18 cannot say that reasoning exceeds the city council’s interpretive discretion
19 under *Siporen*. The exact parameters of the *Siporen* plausibility standard are
20 not clear to us, but the city’s interpretation seems to be well within the required
21 level of deference and is not inconsistent with the text of LOC
22 50.08.005(1)(iii).

23 The third assignment of error is denied.

24 **FOURTH ASSIGNMENT OF ERROR**

25 Petitioners’ 59-page joint petition for review concludes with a fourth
26 assignment of error that is two pages long. Petitioners’ first contend the city

1 council decision does not itself “directly address trip generation, traffic
2 volumes, and the capacity of the affected streets or their ability to handle safely
3 the traffic volumes this project is estimated to generate.” Joint Petition for
4 Review 56. The city council relied on a July 11, 2014 staff report that states, in
5 part:

6 “● All immediate intersections will operate at level of service
7 C or better in the 2016 future condition, and the State Street
8 intersections will have a volume-to-capacity of ratio of less
9 than 1.1.

10 “* * * * *

11 “● Increases to existing roadway volumes are acceptable for
12 the current functional classifications. Second Street will see
13 the greatest increase since all those trips are new, residential
14 trips, but staff does not recommend re-classifying the
15 roadway because functional classifications depend on
16 several factors, volume being just one. Access points are
17 being reduced and the speed remains unchanged.

18 “● Evergreen Road may experience an increase in traffic
19 volumes; however it will continue to operate within the
20 expected volumes for a local street classification. The
21 majority of traffic will continue to use the arterial and
22 collector system much the same as today. No new
23 transportation improvements are necessary as a result of
24 increased traffic impacts from this development.” Record
25 1362-63.

26 The above findings recognize that First and Second Streets and
27 Evergreen Road, all local/residential streets, will be affected by the proposed
28 development. But the findings also state, and petitioners do not dispute, that all
29 immediate intersections will continue to operate at acceptable levels of service

1 (LOS).¹⁵ The findings conclude that the adjoining collector and arterial street
2 system will absorb the majority of the traffic. The findings concede that
3 Second Street will see increased daily traffic, but explain that Evergreen will
4 continue to experience the level of traffic normally expected for local streets.
5 Finally, the findings conclude that reclassification of the local/residential
6 streets to a higher level is not warranted, because such reclassifications are
7 governed by a number of factors, and traffic volume is only one of them.

8 In challenging the above findings, petitioners appear to rely on three
9 documents. First, petitioners rely on the applicant’s traffic report, which
10 concludes 2,580 new daily trips can be expected to be generated by the mixed
11 residential and commercial development approved for Block 137, or 2,110 new
12 daily trips if pass-by trips are not counted. Petitioners contend that number of
13 new trips is inconsistent with the Lake Oswego Comprehensive Plan, citing
14 “Section 12, Transportation, Sec. b which requires the City to ‘ensure that
15 traffic generated by new land uses does not exceed the design capacity of the
16 street system, or adversely affect adjoining neighborhoods.’”¹⁶ Joint Petition
17 for Review 57, n 14. Petitioners also cite “Section 12, Transportation Fig 16,
18 p. 12-13 [sic should be p. 12-23], depicting the Functional Classification

¹⁵ The 1994 Lake Oswego Comprehensive Plan establishes LOS E as the required LOS. Lake Oswego Comprehensive Plan 12-2; Intervenor-Respondent’s Brief Appendix 13.

¹⁶ As respondent points out, there is no “Sec. b” in Plan Goal 12, but Goal 12, Subgoal 1, Policy 4(b) includes the language that petitioners attribute to “Sec b.” Respondent’s Brief 14. As we explain later in this opinion, the city takes the position that Goal 12, Subgoal 1, Policy 4(b) does not apply here.

1 System and specif[ying] a target maximum volume of 1,200 ADT [average
2 daily traffic or trips] for local streets.” *Id.*

3 Petitioners contend the 2,110 or 2,580 new daily trips the approved
4 mixed use development is expected to generate will exceed the 1,200 ADT
5 target maximum for local streets. Petitioners contend they raised this
6 comprehensive plan issue below, and that the city’s findings are inadequate to
7 respond to this issue. The city and intervenor respond to the fourth assignment
8 of error in three ways. We address each of those responses separately below.

9 **A. Limited Land Use Decision/Incorporated Comprehensive Plan**
10 **Standards.**

11 The city and intervenor both contend the challenged decision is a
12 “limited land use decision,” as ORS 197.015(12) defines that term.¹⁷ The
13 challenged decision was treated by the city as a “minor development permit,”
14 which includes statutory limited land use decisions. LOC 50.07.003(14)(a)(i).
15 Comprehensive plan standards may only be applied to limited land use
16 decisions as approval standards if they have been incorporated into the city’s
17 land use regulations. ORS 197.195(1). While some comprehensive plan
18 standards have been incorporated into the Lake Oswego Community
19 Development Code, the city and intervenor contend the comprehensive plan
20 standards identified by petitioners in their fourth assignment of error have not.

¹⁷ As defined by ORS 197.015(12), a limited land use decision includes “a final decision or determination by a local government pertaining to a site within an urban growth boundary that concerns” “[t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.”

1 In their jurisdictional statement, petitioners simply allege that the
2 challenged decision is a “land use decision as defined by ORS
3 197.015(1[0])(a).” Joint Petition for Review 17.¹⁸ Petitioners did not respond
4 at oral argument to intervenor’s and the city’s arguments that the challenged
5 decision is a limited land use decision as ORS 197.015(12) defines that term
6 and their arguments that the cited comprehensive plan standards have not been
7 incorporated into the city’s land use regulations. Neither did petitioner seek
8 permission to file a reply brief to respond to those arguments. Without any
9 response from petitioners to those arguments, their fourth assignment of error,
10 which simply assumes the cited comprehensive plan requirements apply as
11 approval standards, is inadequate to state a basis for reversal or remand.

12 **B. Petitioners Have Not Shown the 2,580 New Trips Will Result**
13 **in a Violation of the 1,200 ADT Standard.**¹⁹

14 Intervenor contends that petitioners also have not demonstrated that the
15 2,580 new trips that the proposal is expected to generate will be distributed
16 onto the three adjoining local/residential streets in a way that will result in
17 more than 1,200 ADT. Intervenor is correct. Petitioners just assume that those
18 trips will result in more than 1,200 ADT on First Street, Second Street and
19 Evergreen Road. It does seem likely that a fair number of those trips will occur
20 at least partially on First Street or Second Street as the driveways that access

¹⁸ LUBA has jurisdiction to review both land use decisions and limited land use decisions.

¹⁹ For ease of reference we refer to the 1,200 ADT standard as a “standard,” recognizing that the city and intervenor take the position that the 1,200 ADT standard is not really a standard and that it does not apply at all to the limited land use decision in this case.

1 the underground parking will be located on those streets. But intervenor is
2 correct that petitioners simply assume the 2,580 new trips will result in a
3 violation of the 1,200 ADT standard on the three adjoining local/residential
4 streets.

5 **C. The Cited Comprehensive Plan Standards are not Applicable**
6 **Mandatory Standards**

7 The 1,200 ADT standard appears in Figure 16 “Functional Classification
8 System” of the Lake Oswego Comprehensive Plan. Intervenor-Respondent’s
9 Brief Appendix 12. Under a column titled “Traffic Volume” for a row in that
10 figure entitled “Local Streets/Residential” there is the following entry: “1,200
11 or less.” The city and intervenor point out that at the bottom of Figure 16
12 appears the following language:

13 “These are general characteristics of each street classification.
14 Actual classification is based on a review of the function and
15 characteristics of all aspects of a roadway.”

16 The city and intervenor contend that even if the 1,200 ADT “standard”
17 had been incorporated into the city’s land use regulations as a standard for
18 limited land use decisions, it is not the hard and fast standard that petitioners
19 suggest it is. Other comprehensive plan language simply states that “[t]raffic
20 volumes less than 1,200 are desirable.” Lake Oswego Comprehensive Plan 12-
21 9; Intervenor-Respondent’s Brief Appendix 20. As we noted earlier, the
22 planning staff findings that the city council adopted explained that traffic
23 volumes are but one of a number of factors that go into determining the
24 appropriate classification for a street. We agree with the city and intervenor.
25 Even if the proposal will result in more than 1,200 ADT on First Street, Second
26 Street or Evergreen Road, petitioners have not established that such levels of
27 traffic necessarily result in an inconsistency with the comprehensive plan.

1 Finally, Goal 12, Subgoal 1, Policy 4(b), which includes the “[e]nsure
2 that traffic generated by the new land uses does not exceed the design capacity
3 of the street system, or adversely affect adjoining neighborhoods” language
4 that petitioners rely on, provides, as relevant:

5 “Where residential neighborhoods are bisected by existing major
6 streets, the impacts of traffic – noise, safety, aesthetics and air
7 quality – shall be minimized by the following actions:

8 “* * * * *

9 “b. Ensure that traffic generated by new land uses does not
10 exceed the design capacity of the street system, or adversely
11 affect adjoining neighborhoods.

12 “* * * * *.”

13 The city contends that this policy applies where “residential neighborhoods are
14 bisected by existing major streets,” which is not the situation here.

15 Again, petitioners did not reply to this response to their fourth
16 assignment of error, either at oral argument or in a reply brief. In the absence
17 of such a reply, we agree with the city that Goal 12, Subgoal 1, Policy 4(b) is
18 inapplicable in the circumstances presented in this appeal.

19 For the reasons discussed above, the fourth assignment of error is denied.

20 The city’s decision is affirmed.