

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 MARK KNAPP and STACEY DEAN,  
5 *Petitioners,*  
6

7 vs.  
8

9 CITY OF CORVALLIS,  
10 *Respondent,*  
11

12 and  
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14 WALNUT PROFESSIONAL, LLC and  
15 WILLAMETTE VALLEY PLANNING,  
16 *Intervenors-Respondents.*  
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18 LUBA No. 2009-008  
19

20 FINAL OPINION  
21 AND ORDER  
22

23 Appeal from City of Corvallis.  
24

25 Mark Knapp and Stacey R. Dean, Corvallis, filed the petition for review on their own  
26 behalf.  
27

28 David E. Coulombe, Corvallis, filed a response brief and James K. Brewer argued on  
29 behalf of respondent. With him on the brief was Fewel & Brewer & Coulombe.  
30

31 Daniel A. Terrell, Eugene, filed a response brief and argued on behalf of intervenors-  
32 respondents. With him on the brief were Bill Kloos and Law Office of Bill Kloos, PC.  
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34 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,  
35 participated in the decision.  
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37 AFFIRMED

07/31/2009  
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39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioners appeal a decision by the city approving a Major Modification of a previously approved Conceptual and Detailed Development Plan, and a Tentative Subdivision Plat.

**FACTS**

In 2003, Walnut Professional, LLC (intervenor) received approval for a Conceptual and Detailed Development Plan (2003 CDP/DDP) for a 6.77-acre property that is bound on the south by Walnut Boulevard and on the north by Century Drive. The 2003 CDP/DDP was approved at a time when the applicable version of the Corvallis Land Development Code was the version enacted in 1993 (1993 LDC). In 2006, the city amended its Land Development Code (LDC).<sup>1</sup> In 2008, intervenor applied for a Major Modification to the CDP/DDP.<sup>2</sup> As part of the Major Modification, intervenor sought a variation to LDC standards related to block perimeters, in order to construct blocks that are bound by walkways without streets and that contain wider pedestrian facilities than allowed under the LDC. The planning commission approved the applications, and petitioners appealed the approval to the city council. The city council approved the applications, and this appeal followed.

**FIRST ASSIGNMENT OF ERROR**

LDC 4.0.60.n.2(a) provides in general that commercial planned developments should be designed with a connecting network of public and private streets, that is, without overly large blocks:

“Commercial developments shall create a series of complete blocks bound by a connecting network of public or private streets with sidewalks. \* \* \*”

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<sup>1</sup> The challenged decision and the parties’ arguments reference both the 1993 LDC and the 2006 LDC. We refer to the 1993 version of the LDC as “1993 LDC” and the 2006 version of the LDC simply as “LDC.”

<sup>2</sup> Intervenor also sought approval of a tentative subdivision plat. Petitioners do not challenge that approval.

1 LDC 4.0.60.n.2(b) provides the maximum block perimeters and maximum block faces. As  
2 part of the major modification application, intervenor sought approval to construct internal  
3 pedestrian pathways that would connect the nine buildings to be built on the property, rather  
4 than a “network of public or private streets with sidewalks” though the development as  
5 required by LDC 4.0.60.n.2(a), and to allow block perimeters and block faces that exceed the  
6 maximum lengths set forth in LDC 4.0.60.n.2(b). LDC 4.0.60.n.2 allows variations to the  
7 general requirement that commercial developments should be designed with a connecting  
8 network of public and private streets, in two circumstances. First, LDC 4.0.60.n.2(a) allows  
9 blocks that are bound by walkways without streets “\* \* \* [w]hen necessary to minimize  
10 impacts to a designated wetland, to slopes greater than 15 percent, to parks dedicated to the  
11 public, and/or to Significant Natural Features, \* \* \*.” In addition, LDC 4.0.60.n.2(c) allows  
12 block perimeter distances and block face distances to be 30% greater than the distances  
13 specified in LDC 4.0.60.n.2(b) under the circumstances specified in that section:

14 “Variations of up to 30 percent to these block distances may be allowed  
15 outright to minimize impacts to a designated wetland, to slopes greater than  
16 15 percent, to parks dedicated to the public, to Significant Natural Features, to  
17 *existing street patterns*, and/or to existing development.” (Emphasis added).

18 The city approved the variation, finding, as relevant, that:

19 “\* \* \* [T]he need for the requested variance is the result of the public street  
20 network approved for the subject site through the [CDP/DDP], which  
21 precludes the extension of a new public street through any portion of the site.  
22 \* \* \* The Council notes that the applicant is not obligated to modify the  
23 approved Conceptual Development Plan through the subject proposal in order  
24 to achieve consistency with the referenced criterion.” Record 75.

25 In so finding, we understand the city to have determined that the variation was necessary “to  
26 minimize impacts \* \* \* to existing street patterns” under LDC 4.0.60.n.2(c).

27 In the first assignment of error, petitioners argue the city erred in approving the  
28 variation to the block perimeter standards. Petitioners argue that the city erred in referring to  
29 the approved 2003 CDP/DDP in determining that the existing street pattern has already been  
30 established through approval of the 2003 CDP/DDP. Petitioners argue that in so finding, the

1 city applied standards from the 1993 LDC, and as such, petitioners argue, violated ORS  
2 197.763(3)(b) because the notice of the hearing did not list any criteria from the 1993 LDC.

3 The city responds that the city council did not apply 1993 LDC approval criteria in  
4 rendering the disputed decision. In addition, the city points out that ORS 197.763(3)(b)  
5 requires that a local government list the applicable criteria from its land use ordinances and  
6 comprehensive plan that apply to an application in the notice of hearing it provides. ORS  
7 197.835(4) allows a petitioner at LUBA to raise issues that were not raised below and that a  
8 petitioner would otherwise be precluded from raising under ORS 197.763(1) regarding  
9 applicable criteria that were omitted from the notice. Although failure to list all applicable  
10 criteria in the notice could potentially lead to prejudice to the petitioner's substantial rights, a  
11 mere allegation that the notice omitted applicable criteria does not, in itself, provide a basis  
12 to reverse or remand a decision. Other than their challenge under ORS 197.763(3),  
13 petitioners do not explain why the alleged omission of standards from the notice prejudiced  
14 petitioners' substantial rights. In any case, we agree with the city that reference in the  
15 findings to the 2003 CDP/DDP does not mean that the city applied any standards from the  
16 1993 LDC or that any standards in the 1993 LDC were "applicable criteria." As such,  
17 petitioners' arguments provide no basis for reversal or remand of the decision.

18 Petitioners also argue that there is not substantial evidence in the record that a larger  
19 block is necessary to "minimize impacts to \* \* \* slopes greater than 15%" as set forth in  
20 LDC 4.0.60.n.2(c). However, we understand the city to have approved the variation to the  
21 block perimeter and block face lengths under LDC 4.0.60.n.2(c) in order to "minimize  
22 impacts \* \* \* to existing street patterns," not to "minimize impacts \* \* \* to slopes greater  
23 than 15 percent." As such, petitioners' argument provides no basis for reversal or remand.

24 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In their second assignment of error, petitioners argue that the city could not approve  
3 the requested Major Modification because the 2003 CDP/DDP had expired prior to  
4 intervenor submitting its application in the present appeal. In the first subassignment of  
5 error, petitioners argue that the 2003 approval expired in 2006 because construction had not  
6 begun within three years after the 2003 approval, as required by 1993 LDC 2.5.50.07.a:

7 “Approval of a Detailed Development Plan shall be valid for a 3-year period  
8 from the date of approval. If the applicant has not begun construction within  
9 this time frame, all approvals shall expire. At its discretion and without a  
10 public hearing, the Commission may extend the approval one time for a  
11 period not to exceed 2 additional years.”

12 In response to petitioners’ arguments below, the city found that the 2003 CDP/DDP had not  
13 expired because construction had begun within three years after the date of the 2003  
14 approval.<sup>3</sup> However, the city also found in the alternative that the 2003 CDP/DDP had not  
15 expired because the approved CDP/DDP was modified two times by minor modification  
16 approvals in 2004 and again in 2006, and those modifications had the effect of extending the

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<sup>3</sup> The city found:

“\* \* \* The Council notes that development activities related to [the approved CDP/DDP] were initiated within the three (3) year period of approval \* \* \*. The Council notes that these development related activities include a Minor Land Partition approved by the city \* \* \* as well as the submittal of a Public Improvement by Private Contract (PIPC) permit application on June 20, 2003. The Council notes that while the term ‘construction’ is not defined in [the 1993 LDC], the term ‘development’ is defined as follows:

“‘Development – making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, changing the land use designation, or creating or terminating a right of access. Where appropriate to the context, development refers to the act of developing or the result of development.’

“The Council notes that the act of submitting applications for permits necessary to make a ‘material change in the use or appearance of a structure or land’ or for ‘dividing land into two or more parcels’ is a mandatory step in the land use process for making such material changes through construction or development. Therefore the council finds that the [2003 CDP/DDP] remains valid as a result of either submittal for PIPC permits or as a result of submittal and final recording of the Minor Land Partition \* \* \*.” Record 62-63.

1 expiration of the DDP for an additional two years for each modification.<sup>4</sup> Because we agree  
2 with the city that the 2004 and 2006 modifications extended the effective period of the 2003  
3 CDP/DDP, we need not address petitioners' first subassignment of error, that the city erred in  
4 determining that construction had begun within three years under 1993 LDC 2.5.50.07.

5 In their second subassignment of error, petitioners argue that the city erred in  
6 determining that the 2004 and 2006 minor modifications extended the effective period of the  
7 2003 CDP/DDP. 1993 LDC 2.5.60.05.g governed the 2004 and 2006 modifications and  
8 provided:

9 "The Director's action on the application, including issuance of the notice of  
10 disposition, processing of appeals, *establishment of the effective date and the*  
11 *effective period of the [minor modification]* shall be in accordance with  
12 sections 2.12.30.07 through 2.12.30.11 of Chapter 2.12 – Lot Development  
13 Option." (Emphasis added.)<sup>5</sup>

14 Petitioners do not dispute that the 2003 CDP/DDP was modified in 2004 and in 2006 through  
15 the then-applicable procedures for minor modifications. However, petitioners argue that the  
16 city's finding that the two minor modifications processed under 1993 LDC 2.5.60.05.g had  
17 the effect of extending the approved CDP/DDP is inconsistent with the text of 1993 LDC  
18 2.5.50.07, which, as explained above, provides that an approved DDP will expire if

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<sup>4</sup>The city found:

"The Council notes that, per [1993 LDC 2.5.60.05 and 1993 LDC 2.12.30.11] an approved Minor Modification is valid for a period of two (2) years from the date of the approval. \* \* \* The Council notes that if the relationship between a Conceptual and Detailed Development Plan and Minor Modification were not intended to result in the extension of the period of approval for a Conceptual and Detailed Development Plan, [1993 LDC 2.5.60.05.g] would have to indicate that was the case with a disclaimer shortening the effective period of the modification, such as 'except that in no case shall approval of a Minor Modification extend beyond the effective period of approval of the associated [DDP].' The Council notes that [1993 LDC 2.5.60.05.g] contains no such disclaimer. The Council finds that absent such a disclaimer, the plain language of the 1993 LDC extends the effective period of approval of the [2003 CDP/DDP] to that of the associated minor modification approval (November 13, 2008)." Record 63.

<sup>5</sup> 1993 LDC 2.12.30.11, referenced in 1993 LDC 2.5.60.05.g, provided that the effective period of approval of a Lot Development Option approval was two years from the date of approval.

1 construction has not begun within three years. In support of their argument, petitioners point  
2 to 1993 LDC 2.5.60.01.a., which sets out the purposes of planned development  
3 modifications: to “[p]rovide a limited amount of flexibility with regard to site planning and  
4 architectural design for approved Conceptual or Detailed Development Plans[.]” Petitioners  
5 argue that based on that language, the purpose of a minor modification is expressly “limited”  
6 in scope and does not include extensions of time, and therefore the city erred in interpreting  
7 the 1993 LDC to allow minor modifications to extend the effective period of a DDP  
8 approval. Petitioners also argue that the reference to the Lot Development Option section of  
9 the 1993 LDC demonstrates that the purpose of modifications is limited and does not include  
10 extensions of the effective period of a DDP. However, other than a general unexplained  
11 assertion regarding the Lot Development Option, petitioners do not explain how a reference  
12 to the Lot Development Option provisions means the city erred in interpreting 1993 LDC  
13 2.5.60.05.g to have extended the approved CDP/DDP.

14 First, the city and intervenor respond that the city council correctly concluded that the  
15 reference in 1993 LDC 2.5.60.05.g to provisions of the 1993 LDC’s chapter on Lot  
16 Development Options merely sets forth the effective period for a minor modification by  
17 referencing the effective period of a Lot Development Option approval. The city maintains  
18 that the reference in 1993 LDC 2.5.60.05.g to the Lot Development Option chapter was a  
19 shorthand way of saying that the effective period of a minor modification approval is the  
20 same effective period as a Lot Development Option approval. Although inartfully drafted,  
21 we agree with the city that 1993 LDC 2.5.60.05.g incorporates the effective period of a lot  
22 development option approval and provides that the effective period of a minor modification  
23 is two years.

24 We also agree with intervenor and the city that the city’s interpretation of the plain  
25 language of 1993 LDC 2.5.60.05.g as providing a modification of a detailed development  
26 plan with its own duration that necessarily extends the effective period of a detailed

1 development plan is not inconsistent with the express language of 1993 LDC 2.5.50.07, and  
2 for that reason the interpretation must be affirmed under ORS 197.829(1).<sup>6</sup> 1993 LDC  
3 2.5.50.07 specifies when an approval will expire, but that does not foreclose the possibility  
4 that an approval can be further extended where another provision of the same LDC chapter  
5 provides for an extension through a different mechanism.

6 In a portion of the second subassignment of error, petitioners argue that the city erred  
7 in processing the modification because LDC 2.5.50.07 vests sole authority to approve an  
8 extension of a Detailed Development Plan in the planning commission, and that the city's  
9 interpretation of the 1993 LDC as allowing an approved DDP to be extended through  
10 approval of a minor modification is inconsistent with that provision.<sup>7</sup> 1993 LDC 2.5.50.07.a  
11 allows a discretionary extension by the planning commission:

12 “\* \* \* At its discretion and without a public hearing, the Commission may  
13 extend the approval one time for a period not to exceed 2 additional years.”

14 We understand petitioners to argue that the exclusive mechanism for extending an approved  
15 DDP is by a request to the planning commission. We have already explained above that the  
16 city's interpretation of the 1993 LDC as allowing an extension of an approved DDP through  
17 the modification process is not inconsistent with 1993 LDC 2.5.50.07.

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<sup>6</sup> ORS 197.829(1) provides that LUBA shall affirm a local government's interpretation of its land use regulations unless that 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.”

<sup>7</sup> Petitioners also cite Corvallis Comprehensive Plan Section 1.2, but do not explain why that comprehensive plan provision applies directly to the application or why the city's interpretation is inconsistent with that provision if it does apply to the application.

1           Also in support of their second subassignment of error, petitioners assert that the  
2 city's interpretation of the 1993 LDC should not be affirmed under ORS 197.829(1)(d). *See n*  
3 6. Petitioners do not explain which goals the city's interpretation violates or how the city's  
4 interpretation violates any of the goals. Petitioners' arguments under this portion of the  
5 second subassignment of error are not sufficiently developed for review.

6           The second assignment of error is denied.

7           The city's decision is affirmed.