

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 KENNETH McNERN, M. SCOTT MATER and
5 MATER INVESTMENT,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF CORVALLIS,
11 *Respondent.*

12 LUBA No. 2000-197

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15 FINAL OPINION
16 AND ORDER

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18 Appeal from City of Corvallis.

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20 Richard D. Rodeman, Corvallis, filed the petition for review and argued on behalf of
21 petitioners.

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23 James K. Brewer, Corvallis, filed the response brief and argued on behalf of
24 respondent. With him on the brief was Fewel & Brewer.

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26 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,
27 participated in the decision.

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29 AFFIRMED

03/29/2001

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31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.
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NATURE OF THE DECISION

Petitioners appeal a decision by the City of Corvallis to approve a Willamette River Greenway conditional development for the Riverfront Commemorative Park Master Plan and Riverbank Ecological Restoration Plan.

FACTS

The subject property includes approximately 17.5 acres located on the west bank of the Willamette River in downtown Corvallis. The property is zoned central business and is subject to a Willamette River Greenway District overlay. The subject property includes the land from the river’s edge to the west side of the First Street right-of-way, which parallels the river. The property extends for approximately 12 blocks from north to south along the river. The city owns the property, and the application was jointly submitted by the city’s public works department and parks and recreation department.

The current use of the property is for a city park pursuant to the Riverfront Commemorative Park Master Plan. Among other things, the park currently includes open space, numerous trees, a multi-use path, and memorial areas. Although the First Street right-of-way extends the length of the property, it has not been extended through the narrow middle segment of the property, and that segment is not currently accessible to public vehicles. The subject proposal is for stabilization of the riverbank and development of park facilities throughout the property.

The key components of the Riverbank Ecological Restoration Plan are to: (1) stabilize a segment of the riverbank with pilings; (2) allow retention of some existing trees; (3) modify placement of rip-rap to allow for revegetation of native plants; and (4) stabilize selected pockets of erosion. The key components of the Riverfront Commemorative Park Master Plan include a new pedestrian and bike multi-use path, new plazas, public artwork, new river viewing areas, park benches, and restrooms. The subject proposal will realign the

1 current multi-use path, widen and extend First Street to allow two-way traffic for the length
2 of the park, and modify the existing memorials, including the removal of numerous large
3 trees and landscaping located in the public right-of-way.

4 Petitioners own land next to the subject property and established one of the
5 memorials affected by the proposal, the Mater Memorial, pursuant to a Greenway
6 Conditional Use permit obtained in 1980. Petitioners opposed the proposal before the
7 planning commission, which approved the proposal with 12 conditions. The decision was
8 appealed to the city council, which held a *de novo* hearing and affirmed the decision of the
9 planning commission. This appeal followed.

10 **FIRST ASSIGNMENT OF ERROR**

11 Under the first assignment of error, petitioners include numerous subassignments of
12 error based upon the city’s alleged failure to comply with the federal Endangered Species
13 Act (ESA).¹ A threshold issue, however, is whether the ESA applies to the city’s decision in
14 the way petitioners assume that it does.

15 As pertinent to petitioners’ arguments, section 9(a)(1)(B) and (C) of the ESA
16 prohibits actions that result in the “take” of threatened or endangered species.² Section 4(d)
17 of the ESA authorizes the National Marine Fisheries Service (NMFS) to issue rules
18 (hereafter 4(d) rules) to conserve threatened and endangered species. NMFS has issued 4(d)
19 rules. As pertinent to this case, the rules provide the city the option of obtaining approval for
20 a project that might result in an unintended taking of threatened or endangered species.
21 Compliance with the 4(d) rules provides a safe harbor from penalties that might otherwise be
22 imposed under the ESA. Petitioners argue that the city violated the ESA by not obtaining

¹ Petitioners argue that the city failed to comply with federal law, failed to follow proper procedures, failed to adopt adequate findings, and failed to support the decision with substantial evidence.

² Conduct that causes a “take” is defined as an action to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 USC §1532(19).

1 approval of the project pursuant to the 4(d) rules.

2 The applicable approval criteria for a Willamette River Greenway conditional
3 development permit are set out at Corvallis Land Development Code (LDC) 2.3.30.04 and
4 3.30.40.³ The applicable approval criteria do not require a demonstration of compliance with

³ LDC 2.3.30.04 provides:

“Requests for Conditional Developments shall be reviewed to assure consistency with the purposes of this chapter, policies of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council. In addition, the following compatibility factors shall be considered:

- “a. Basic site design (organization of uses on the site);
- “b. Visual elements (scale, structural design and form, materials, and so forth);
- “c. Noise attenuation;
- “d. Noxious odors;
- “e. Lighting;
- “f. Signage;
- “g. Landscaping for buffering and screening;
- “h. Traffic;
- “i. Effects on off-street parking;
- “j. Effects on air and water quality.”

LDC 3.30.40 provides:

“Conditional development within the Willamette Greenway District may only be approved where the Planning Commission, after considering cumulative effects within the City’s Greenway, finds that:

- “a. Public access to and along the river shall be provided to the maximum extent practicable and to the extent that public access does not interfere with established uses on the property.
- “b. Significant fish and wildlife habitats shall be protected.
- “c. Significant natural and scenic areas, viewpoints, and vistas shall be preserved.
- “d. The quality of air, water and land resources in the Greenway shall be protected to the maximum extent practicable.

1 the ESA, and petitioners have not identified any other relevant land use criteria that require
2 such a demonstration prior to issuing a Willamette River Greenway conditional development
3 permit.

4 Although LDC 3.30.40(b) requires that significant fish and wildlife habitat be
5 protected, the city adopted findings explaining how that criterion is satisfied. Petitioners do
6 not challenge those findings under this assignment of error, other than to fault the city for not
7 complying with the ESA. We agree with the city that while obtaining approval for the
8 project under the 4(d) rules might be persuasive evidence that significant fish and wildlife
9 habitat will be protected, LDC 3.30.40(b) does not require such approval under the 4(d)
10 rules. The city adopted adequate findings, supported by substantial evidence, that significant

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- “e. Areas of annual flooding, flood plains, and wetlands shall be protected in their natural state to the maximum extent practicable to maintain their natural, physical, and biological functions.
 - “f. The natural vegetative fringe along the river shall be protected and enhanced to the maximum extent practicable to assure scenic quality, protection of wildlife, protection from erosion, and screening of uses from the river.
 - “g. Any public recreational use or facility shall not substantially interfere with established uses on adjoining property.
 - “h. Maintenance of public safety and protection of public and private property, especially from vandalism and trespass, shall be provided to the maximum extent practicable.
 - “i. Extraction of aggregate deposits shall be conducted in a manner designed to minimize adverse effects on water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise and safety, and to guarantee necessary reclamation.
 - “j. Development, change or intensification of use shall provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.
 - “k. Development shall be sited to maximize distance from the river to the greatest extent practicable.
 - “l. In applying ‘a’ – ‘k’ above to development proposals within the Willamette River Greenway, consideration should be given to the Future Focus 2010 Vision Statement text, Comprehensive Plan, Streetscape Master Plan, Riverfront Master Plan, and other applicable City documents. However, where conflicts arise, direction must be taken from the Corvallis Comprehensive Plan and Land Development Code.”

1 fish and wildlife habitat will be protected.⁴

2 The city concedes that it must comply with federal law, including the ESA.
3 However, petitioners do not identify any local approval criterion or federal law requirement
4 that the city must, as part of the challenged decision, demonstrate that the proposal complies
5 with the ESA, the 4(d) rules, or any other federal law or rule. Therefore, petitioners'
6 allegations concerning the ESA provide no basis for reversal or remand. *Frankton Neigh.*
7 *Assoc. v. Hood River County*, 25 Or LUBA 386, 389 (1993).⁵

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioners argue the city council's findings inadequately address the criteria that
11 appear at LDC 3.30.40(b), (f) and (g). *See* n 3. Petitioners contend the city council's
12 findings fail to address the criterion set out at LDC 3.30.40(c) at all.⁶ Petitioners' challenge
13 is directed at the city council's 45-page findings document, which appears at Record 14-58.

14 Respondent argues that the city council's 45-page findings document does not
15 constitute all of the findings that the city council adopted in support of its decision.
16 According to respondent, one of the findings in that document expressly incorporates and
17 adopts other findings that were prepared earlier in the city's proceedings. Record 21-22
18 (finding no. 1). In its brief, respondent cites and relies on portions of these incorporated
19 findings to respond to petitioners' argument under the second assignment of error.

⁴ The fifth condition of approval imposed by the city requires that all necessary permits and approvals from other agencies be obtained prior to construction. Record 57.

⁵ Petitioners' challenges to the adequacy of the findings and the lack of substantial evidence also fail because the city is not required to respond to arguments that do not address relevant criteria. *Hunt v. City of Ashland*, 35 Or LUBA 467, 472-73 (1999).

⁶ At oral argument, petitioners withdrew their challenge to the city's findings regarding compliance with the aggregate extraction requirements of LDC 3.30.40(i).

1 At oral argument, petitioners did not challenge the adequacy of the cited finding to
2 incorporate other findings in support of the decision.⁷ Because petitioners do not dispute
3 that other findings were incorporated in support of the decision, we consider the incorporated
4 findings that are identified in the respondent’s brief.

5 The findings cited by respondent address each of the criteria identified by
6 petitioners.⁸ Petitioners neither acknowledge these findings nor make any attempt to
7 challenge them. Accordingly, we agree with respondent that petitioners’ arguments under
8 the second assignment of error fail to demonstrate error.

9 To the extent petitioners attempt to challenge the findings the city did make, the
10 challenge appears to be based upon the city’s alleged failure to comply with mandatory
11 language of LDC 3.30.40, *i.e.* “[s]ignificant fish and wildlife shall be protected.” LDC
12 3.30.40(b). The city adopted the following interpretation of the review criteria of LDC
13 3.30.40:

14 “The Council notes the Land Development Code related to the Willamette
15 River Greenway criteria contains thirteen specific elements that need to be
16 met before a Greenway Conditional Development can be approved. The
17 Council notes that within these criteria is subsection ‘l’ that states, ‘In
18 applying “a” – “k” above to development proposals within the Willamette
19 River Greenway, consideration should be given to the Future Focus 2010
20 Vision Statement text, Comprehensive Plan, Streetscape Master Plan,
21 Riverfront Master Plan, and other applicable City documents. However, when
22 conflicts arise, direction must be taken from the Corvallis Comprehensive
23 Plan and Land Development Code.’ Also, the Council notes that within the
24 Land Development Code are applicable conditional development criteria that
25 state specific compatibility factors that need to be addressed.

⁷ Neither did petitioners request permission to file a reply brief to respond to respondent’s argument concerning incorporated findings.

⁸ Among the incorporated findings identified by respondent are those contained in a planning staff report dated July 12, 2000, which was prepared for the planning commission prior to its consideration of the disputed proposal. This staff report includes findings addressing relevant approval criteria. The planning staff report includes findings addressing each of the criteria identified by petitioners under the second assignment of error. LDC 3.30.40(b) (Record 951-54); LDC 3.30.40(c) (Record 954-55); LDC 3.30.40(f) (Record 960-61); LDC 3.30.40(g) (Record 961-62).

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“The City Council * * * also finds that in reviewing the application against all of the applicable review criteria, some criteria conflict with others in specific situations. Given this situation, the Council finds one specific Comprehensive Plan policy to provide additional direction as helpful in its evaluation of this application. The Council notes Comprehensive Plan Policy 5.1.1 which states, ‘The City shall balance the diverse and potentially conflicting uses of the greenway by protecting, enhancing, and maintaining the natural, hydrological, scenic, historical, archaeological, agricultural, economic, and recreational qualities of lands along the river’ as direction related to consideration of the myriad issues involved with this plan.

“The Council finds that if one of the greenway criteria were considered in isolation of the others, then different decisions may be made. The Council further finds that, on balance, the Riverfront Commemorative Park Master Plan and the Riverbank Ecological Restoration Plan provide a good balance of the competing and sometimes conflicting values associated with the Willamette River Greenway review criteria. * * *” Record 103-05.

The city has significant discretion in how it interprets LDC 3.30.40. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992). We will affirm the city’s interpretation of its own ordinance unless it is clearly wrong. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 332 (1996). The city adequately explains the basis for its interpretation, and although petitioners clearly disagree with the city’s interpretation, they do not acknowledge or challenge the city’s interpretation. Petitioners have not demonstrated that the decision violates LDC 3.30.40 as interpreted by the city. Therefore, petitioners establish no basis for reversal or remand. *Freedom v. City of Ashland*, 37 Or LUBA 123, 127 (1999).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city failed to submit and require a complete application. Petitioners allege that the application fails to contain necessary information regarding existing vegetation and topography. The city responds, and we agree, that the necessary information was provided during the public review process. Record 559-664. The omission

1 of required information from an application does not necessarily constitute error if the
2 information is later submitted and included in the record. *McConnell v. City of West Linn*, 17
3 Or LUBA 502, 525 (1989). Because the cited information regarding vegetation and
4 topography is included in the record, petitioners’ arguments provide no basis for reversal or
5 remand.

6 Petitioners also argue that the city did not require the certification of a registered
7 professional engineer as required by the development standards of LDC 3.30.50.⁹ The city
8 concedes that the certification has not yet been obtained. However, the city contends that
9 certification need only be obtained prior to construction. The city specifically interpreted
10 LDC 3.30.50(a) to require that the certification must be provided with the detailed plans and
11 construction drawings that will be required prior to the issuance of building permits. Record
12 27-28. Although petitioners disagree with the city’s interpretation, they again fail to
13 acknowledge or challenge the city’s interpretation. Petitioners have not demonstrated that

⁹ LDC 3.30.50 provides, in pertinent part:

“Proposed development within the Willamette Greenway District shall comply with the following standards, except as provided below:

“a. Site Modifications:

“* * * * *

“2. Disturbance necessary for construction or establishment of a water-related or water-dependant use, as defined in Chapter 1.6, and measures necessary to reduce existing or potential bank and escarpment erosion, landslides, or flood hazard conditions may be permitted upon approval by the Director.

“3. Stability shall be assured considering the stress imposed on the bank and land area between the low water mark of the river and top of the bank.

“* * * * *

“6. If applicable, the applicant shall submit certification of a registered professional engineer that the standards specified in 2 and 3 above have been met. Where necessary to properly evaluate a proposal an applicant may be required to furnish further studies such as a soils survey and analysis, foundation study, or hydrologic study performed by competent professionals.”

1 the city’s interpretation is clearly wrong. Therefore, we defer to the city’s interpretation.
2 ORS 197.829(1).

3 Finally, petitioners appear to mount a substantial evidence challenge to the lighting
4 plan submitted by the city. Petitioners argue that the lighting plan violates Comprehensive
5 Plan Requirement 1.6.10 and LDC 3.30.40(f) and (g).¹⁰ The comprehensive plan merely
6 requires that the city “consider” the impact of lighting as a compatibility factor, which the
7 city clearly did. The city also adopted specific findings and conclusions regarding lighting,
8 and even imposed a condition regarding the lighting plan:

9 “Lighting shall be installed in a manner that minimizes glare impacts on the
10 riverbank and on to the surrounding properties. Lighting shall consist of
11 ‘historical’ style fixtures near the roadway, bollard lighting near the plazas,
12 and shielding or refractors shall be used to direct light away from the
13 riverbank and to minimize shining into the sky.” Record 57.

14 The city’s findings adequately address the lighting issue and are supported by substantial
15 evidence.

16 The third assignment of error is denied.

17 **FOURTH ASSIGNMENT OF ERROR**

18 Petitioners argue that the city violated LDC 3.30.40(j) by approving First Street as a
19 20-foot wide paved road.¹¹ As discussed earlier, the city interpreted LDC 3.30.40 to require
20 that individual criteria under that section must be considered in context with the other criteria

¹⁰ Comprehensive Plan Requirement 1.6.10 provides:

“All special developments, lot-development options, intensifications, changes or
modifications of nonconforming uses, comprehensive plan changes, and district changes shall
be reviewed to assure compatibility with less intensive uses and potential uses on surrounding
lands. Impacts of the following factors shall be considered:

“* * * * *

“- Lighting[.]”

See n 3 for text of LDC 3.30.40(f) and (g).

¹¹ See n 3 for text of LDC 3.30.40(j).

1 in that section and not applied in isolation. In considering how wide the road should be, the
2 city looked at:

3 “* * * one-way versus two-way street design, minimum design standards for
4 emergency vehicle access, function and functionality of streets, sidewalks,
5 multi-purpose trails, use and design of parking facilities, ease of use of
6 facilities, vegetative health and growth characteristics, and safety concerns.
7 * * *” Record 32.

8 Petitioners fault the city for relying on the fire chief’s testimony in favor of 20-foot
9 wide streets in reaching its decision when that testimony was allegedly not based on any
10 safety standard. Although the city considered the fire chief’s testimony, it is clear that the
11 city also considered many other factors in reaching its decision.

12 Petitioners also argue that the city misconstrued LDC 3.30.40(c), which requires that
13 “significant natural and scenic areas, viewpoints, and vistas shall be preserved.” According
14 to petitioners, the modifications to the existing memorials violate this provision. Petitioners
15 apparently assume that the existing memorials fall under the protection of LDC 3.30.40(c),
16 but they fail to explain how. This failure is particularly significant as the city specifically
17 found that the memorials were not regulated by any applicable criteria:

18 “[T]he establishment and design of memorials within the Willamette River
19 Greenway is not regulated by any specific Willamette River provisions or
20 Comprehensive Plan policy. The Council further finds that the appellants
21 have not cited any applicable code criteria or policies related to preservation
22 of memorials.” Record 47.

23 Petitioners fail to acknowledge or challenge the city’s interpretation. Petitioners have not
24 demonstrated that the city’s interpretation is clearly wrong. Therefore, we defer to the city’s
25 interpretation. ORS 197.829(1).

26 The fourth assignment of error is denied.

27 **FIFTH ASSIGNMENT OF ERROR**

28 Petitioners argue that the city’s decision violated local standards and constitutional
29 protections by invalidating petitioners’ previously approved greenway permit. In 1980,

1 petitioners obtained a greenway permit to establish an engineering office building within the
2 greenway. A condition of that permit required petitioners to install certain landscaping
3 improvements. Some of these landscaping improvements were placed in the right-of-way,
4 and will be removed as part of the present application. Petitioners claim that removal of
5 these landscaping improvements will render their existing greenway development
6 nonconforming and leave them subject to enforcement proceedings. Petitioners make
7 numerous subassignments of error based upon this premise. The apparent answer to all of
8 petitioners' arguments is that any landscaping in the public right-of-way removed pursuant to
9 the present application will not affect the status of petitioners' greenway permit. If
10 petitioners are currently violating the conditions of their permit by having placed landscaping
11 in the public right-of-way, as the city asserts, then the removal of the landscaping will not
12 leave petitioners in a nonconforming situation. If petitioners are correct that the city
13 approved the current placement of landscaping, then petitioners satisfied the conditions of
14 the original permit. We agree with the city that any modification of the public right-of-way
15 by the city now would not render petitioners' development under the 1980 permit
16 nonconforming. Given petitioners' reliance on the premise that their development would be
17 rendered nonconforming by the city's approval of the present application, and our contrary
18 resolution of that issue, all of petitioners' arguments under this assignment of error fail.

19 The fifth assignment of error is denied.

20 **SIXTH ASSIGNMENT OF ERROR**

21 Petitioners' sixth assignment of error contains numerous arguments that are not
22 directed towards any identified approval criteria. Petitioners have not developed most of
23 those arguments sufficiently for respondent to address them in its brief or for the Board to
24 review them. We do not consider them further. *Deschutes Development v. Deschutes*
25 *County*, 5 Or LUBA 218, 220 (1982).

1 The only discernible argument directed towards an applicable approval criterion
2 faults the city for violating LDC 3.30.40(k), which requires that “[d]evelopment shall be
3 sited to maximize distance from the river to the greatest extent practicable.” According to
4 petitioners, the city violated this criterion by extending First Street through the park at its
5 narrowest point, which significantly reduces the amount of landscaping. Again, petitioners
6 fail to acknowledge or challenge the city’s finding regarding this issue:

7 “* * * The Council further finds that providing a sidewalk, multi-use path
8 system, road connection and parking is appropriate to provide access to and
9 along the river and maximizes, to the maximum extent practicable, the amount
10 of open space, landscaping and distance from the river. * * *” Record 33.

11 The city explains that this finding is also based on the city’s interpretation, discussed earlier,
12 that the criteria of LDC 3.30.40 are to be considered in context rather than in isolation.
13 Petitioners have not demonstrated that this interpretation is clearly wrong.

14 The sixth assignment of error is denied.

15 The city’s decision is affirmed.