

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

3
4 MARK KNAPP,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF CORVALLIS,
10 *Respondent,*

11 and

12
13 MATRIX DEVELOPMENT CORPORATION,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2007-131

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from City of Corvallis.

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24 Jannett Wilson, Eugene, filed the petition for review. With her on the brief was the
25 Goal One Coalition. Mark Knapp, Corvallis, argued on his own behalf.

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

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30 Dana L. Krawczuk, Portland, filed a response brief and argued on behalf of
31 intervenor-respondent. With her on the brief were Megan D. Walseth and Ball Janik LLP.

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

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36 AFFIRMED

12/06/2007

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving a conceptual and detailed development plan and a tentative subdivision plat.

REPLY BRIEF

At oral argument, petitioner made an oral motion to submit a reply brief. OAR 661-010-0039 provides in relevant part that a reply brief must be filed “as soon as possible after respondent’s brief is filed.” The city and intervenor (respondents) object to the reply brief on the basis that it was not timely filed. Respondents argue that allowing the reply brief would prejudice their substantial rights because respondents do not have sufficient time to review the reply brief and prepare a response to it.

The reply brief was submitted at oral argument, and approximately 14 days after the response briefs were submitted. Petitioner has not explained why the reply brief was not filed sooner. We agree with respondents that the reply brief was not filed “as soon as possible after respondent’s brief” was filed, and we agree with respondents that allowing the reply brief would prejudice their substantial rights. We decline to allow the reply brief. *Jacobsen v. City of Winston*, 51 Or LUBA 602, 605 (2006).

FACTS

The subject property is a 95-acre site that is located on the north side of Harrison Boulevard and south of Witham Hills Drive in the city of Corvallis. The property is partially zoned open space and partially zoned low-density residential with a planned development overlay. Intervenor applied to develop 221 lots within 57.7-acres of the portion of the property that is zoned low density residential, and to develop a mixture of single family homes and attached homes on those lots. The planning commission approved the application, and the decision was appealed to the city council. The city council voted to uphold the planning commission’s approval. This appeal followed.

1 **ASSIGNMENT OF ERROR**

2 Corvallis Land Development Code (LDC) Section 4.6.20 requires residential
3 subdivisions to be designed to provide “solar access protection,” defined in LDC 1.6 as the
4 “[r]ight to unobstructed Solar Access for at least four hours between 9 a.m. and 3 p.m. on
5 November 21 of each year.”¹ Intervenor conducted a solar study that concluded that the
6 proposed site design could not meet the requirements set forth in LDC 4.6.20, and
7 consequently intervenor requested a waiver of the solar access standards. LDC 4.6.30 allows
8 the planning commission to waive the solar access requirements in subdivisions as follows:

9 “A waiver from the requirements of Section 4.6.20 above may be granted by
10 the Planning Commission to the minimum extent necessary to:

- 11 “a. Preserve existing vegetation;
- 12 “b. Reflect physical land development constraints related to the shape or
13 topography of the site;
- 14 “c. Accommodate north-facing slopes of 10 percent or more; or
- 15 “d. Meet City design requirements for provision of streets, drainageways,
16 utilities, landscaping, and location of buildings consistent with
17 minimum setbacks.”

18 In addition, LDC 4.6.50 allows the planning commission to waive the solar access
19 requirements for residential planned developments:

¹ LDC 4.6.20 provides:

“Residential subdivisions and planned developments on parcels of more than 1 acre shall be designed so that solar access protection * * * is available at ground level to the following:

- “a. South face of existing residential buildings adjacent to the development;
- “b. In residential subdivisions, a minimum of 80 percent of lots with sufficient east/west dimension to allow orientation of the long axis of a building to utilize solar energy; and
- “c. In planned developments, a minimum of 80 percent of the buildings with sufficient east/west dimension to allow the long axis of the building to utilize solar energy.”

1 “For residential planned developments, a waiver from the requirements of
2 Section 4.6.20 above may be granted by the Planning Commission based on
3 the provisions of Section 4.6.30 above or to the minimum extent necessary to:

4 “a. Meet a broad range of residential needs by encouraging use of
5 innovative site development techniques and a mix of dwelling types;
6 or

7 “b. Address future housing needs in the community by encouraging
8 affordable housing * * * to increase housing choices.”

9 In his assignment of error, petitioner argues that the city’s findings are inadequate to
10 explain which of the reasons set forth in LDC 4.6.30 and 4.6.50 the city relied on to grant the
11 waiver. Petitioner argues:

12 “The findings include certain phrases from the code criteria but none that
13 indicate that any of the specific reasons are met. Despite mentioning open
14 space and natural features, the findings do not indicate that any particular lot
15 orientation is required to preserve existing vegetation. (To the contrary, the
16 tree removal plans indicate that nearly all trees in the development area are
17 slated to be removed. * * *) Despite mentioning a need to ‘account for the
18 existing topography,’ the findings do not indicate that any ‘physical land
19 development constraints’ related to any particular topography. (To the
20 contrary, the applicant notes that due to the south facing slopes, the ability to
21 take advantage of year-round passive solar exposure is ‘considerable.’ * * *).”
22 Petition for Review 5.

23 We understand petitioner to argue that the city’s findings are inadequate because they do not
24 refer to specific criteria in the LDC and are not detailed enough.

25 Respondents answer by first noting that the requirements for granting a waiver from
26 the solar access protection standards are disjunctive rather than conjunctive, so that the city
27 was only required to find that one of the listed reasons set forth in LDC 4.6.30 or 4.6.50 for a
28 waiver was met. Respondents maintain that the city found that at least three provisions of
29 the LDC were met. The city found in part:

30 “In support of this request, the applicant points out that a substantial amount
31 of the site has been set aside as open space to protect natural features. The
32 resultant reduction in area of the developable portion of the site has limited
33 the flexibility generally available for orienting streets in a manner that
34 facilitates achieving the solar access standards. Similarly, the reduced area
35 available for development has forced the applicant to account for the existing

1 topography by aligning some of the proposed Local Streets and lots in a less
2 than optimal manner. However, despite these limitations, an effort has been
3 made to provide a mixture of housing options and lot sizes that arguably
4 demonstrate an innovative use of the site.” Record 615.

5 In those findings, the city recognized that the development would “protect natural features”
6 by protecting open space. Although the city did not use the words “preserve existing
7 vegetation” as they appear in LDC 4.6.30(a), we think it is reasonably clear that the city
8 found that the preservation of open space would preserve existing vegetation within that
9 open space. The city also concluded that the development met a variety of residential needs
10 through an innovative use of the site. LDC 4.6.50(a). Petitioner’s argument set forth above
11 does not explain why the city’s findings quoted above are inadequate, but rather disagrees
12 with the conclusion reached in those findings.

13 Respondents explain that the city also found that the proposed site design included
14 the potential for providing affordable housing, one of the allowed reasons set forth in LDC
15 4.6.50 for granting a waiver. LDC 4.6.50(b).² The city concluded that the provision of
16 affordable housing, when combined with other features such as a compact urban design,
17 provide sufficient energy savings to justify the grant of a waiver. Record 616. Petitioner
18 does not challenge those findings in any way that we can understand.

19 As noted above, the relevant provisions of the LDC allow the city to grant a waiver
20 from the solar access protection standards if one of the six circumstances set forth in LDC
21 4.6.30 and LDC 4.6.50 are present. The city found that three of the circumstances set forth
22 in those code provisions were present and were sufficient to support the grant of a waiver.

² A condition of approval required intervenor to construct at least 8 houses of 1,200 square feet or less. As explained by intervenor, condition 2 was imposed to assure that the proposed development met the requirements of Corvallis Comprehensive Plan Policy 9.5.13, which requires 10 percent of the development’s site area to be dedicated to two of the following three alternative types of housing: attached housing, lot sizes at or below the minimum lot size, and dwellings less than 1,200 square feet. Intervenor’s Response Brief 12, n 8.

1 Petitioner has not explained why the findings regarding those provisions of the LDC are
2 inadequate.³

3 The assignment of error is denied.

4 The city's decision is affirmed.

³ The city also argues that petitioner failed to raise the issue set forth in his assignment of error below and therefore is precluded by ORS 197.763(1) from raising the issue for the first time on appeal. Because we do not sustain petitioner's assignment of error, we do not address the city's waiver argument.