1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

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4 LAURA HORSEY and STANLEY HORSEY,

5 *Petitioners,*

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7 vs.

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9 CITY OF WEST LINN,

10 *Respondent,*

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12 and

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14 ALMA COSTON and WILLIAM COSTON,

15 *Intervenors-Respondents.*

16

17 LUBA No. 2009-017

18

19 FINAL OPINION

20 AND ORDER

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22 Appeal from City of West Linn.

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24 Charles Swindells, Portland, filed the petition for review and argued on behalf of
25 petitioners.

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27 No appearance by City of West Linn.

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29 David J. Petersen, Portland, filed the response brief and argued on behalf of
30 intervenors-respondents. With him on the brief were James K. Hein and Tonkon Torp LLP.

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

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35 REMANDED 06/18/2009

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a design review and water resource area permit for a 4,200 square foot office building.

FACTS

The challenged decision is the city's decision on remand from *Horsey v. City of West Linn*, __ Or LUBA __ (LUBA No. 2008-051, October 7, 2008) (*Horsey I*). We described the subject property and the proposed office building in *Horsey I*:

> "Intervenors applied for design review approval to construct an approximately 4,200 square foot office building with twelve parking spaces on a 12,700 square foot lot zoned Office-Business Commercial. Ten of the proposed parking spaces are located below the first floor of the building, and two parking spaces are located in the rear of the building. The subject property is located at the north end of Hood Street, a dead-end street that terminates north of the northeast boundary of the subject property. The property is located completely within the protected water resource area of Maddox Creek and parts of the property contain steep slopes." *Id.* at slip op 2.

In *Horsey I*, we sustained petitioner's first assignment of error, agreeing that the city erred in approving the development because, as relevant here, the city failed to consider the additional area that would be developed with the stormwater facilities in its calculation of the total area that "development" would "disturb," as those terms are used in West Linn Community Development Code (CDC) 32.090(A), discussed below. After remand of the decision, intervenors submitted a revised the site plan for the building that depicts the location of the stormwater filtration system that serves the property. The revised site plan also reduces the size of the uncovered portion of the parking area and the size of the two parking stalls in the uncovered parking area, reconfigures the drive aisle behind the westernmost parking stall, and reduces the size of one of the parking area's retaining walls. The city council approved the revised site plan, and this appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 In their first assignment of error, petitioners argue that the city erred in approving the 3 project because it violates CDC 32.090(A), which limits development within the protected 4 riparian corridor of Maddox Creek to no more than 5,000 square feet:

> 5 "Lots located completely inside the water resource area. * * * Development 6 shall disturb the minimum necessary area to allow the proposed use or 7 activity, and in any situation no more than 5,000 square feet of the water 8 resource area, including access roads and driveways * * *."

9 CDC 2.030 defines development as:

> 10 "Development. Any man-made change defined as the construction of 11 buildings or other structures, mining, dredging, paving, filling, grading or site 12 clearing, and grubbing in amounts greater than 10 cubic yards on any lot or 13 excavation. * * *"

14 On remand, the city interpreted the 5,000 square foot limitation on development in 15 CDC 32.090(A) as not applying to "[a]reas temporarily disturbed during construction, but re-16 vegetated to a natural state." Record 10. In doing so, we understand the city to have found 17 that the term "disturb," which is not defined in the CDC, does not include temporary 18 disturbances of areas of the property during construction as long as those areas are returned 19 to their pre-construction state. The city found that intervenors' proposal satisfied CDC 20 32.090(A).[1]

21 ORS 197.829(1) provides that LUBA must affirm a local government's interpretation 22 of its land use regulations unless that interpretation is inconsistent with the express language 23 of the regulation, the purpose of the regulation, or the underlying policy that provides the 24 basis for the land use regulation. In their first assignment of error, we understand petitioners

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[1] The city found:

> "[E]vidence submitted by [intervenors] shows that the total disturbed area, including storm water drainage facilities, is 4,998 square feet." Record 11.

1 to argue that the development violates CDC 32.090(A) because it will disturb, both during
2 construction (temporarily) and after construction (permanently) more than 5,000 square feet
3 of the property.

4 Petitioners argue that the city's interpretation of CDC 32.090(A) is inconsistent with
5 the text of CDC 32.090(A) and the plain ordinary meaning of the term "disturb," and context
6 provided by other provisions of the CDC and for that reason, LUBA need not defer to the
7 city's interpretation. Petitioners argue that nothing in either the definition of "development"
8 as defined in CDC 2.030 or the plain ordinary meaning of "disturb" indicates that an activity
9 is only a disturbance if it results in permanent disruption of the area. Petitioners first point to
10 the plain ordinary meaning of "disturb" as "to break up the quiet or serenity of; agitate (what
11 is quiet or still)." Petition for Review 6 (*citing* Webster's New World Dictionary of
12 American English, Third College Edition, 1994). Petitioners next point out that the CDC
13 definition of the word "development" set forth at CDC 2.030 includes, as relevant, temporary
14 construction activities such as "grading or site clearing, and grubbing in amounts greater than
15 10 cubic yards on any lot or excavation," and argue that the city cannot reasonably interpret
16 the word "disturb" used in CDC 32.090(A) to include only permanently developed areas of
17 the property consistently with the CDC definition of "development." As relevant context,
18 petitioners also point to CDC Chapter 32.050(C), which requires a mitigation plan for any
19 portion of the water resources area that is proposed to be "permanently disturbed" as
20 evidence that the city understands how to distinguish between temporary and permanent
21 disturbances.[2] Petitioners also note that CDC 32.050(F) prescribes a maximum

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[2] CDC 32.050(C) provides:

> "Development shall be conducted in a manner that will minimize adverse impact on water resource areas. Alternatives which avoid all adverse environmental impacts associated with the proposed action shall be considered first. For unavoidable adverse environmental impacts, alternatives that reduce or minimize these impacts shall be selected. *If any portion of the water quality resource area is proposed to be permanently disturbed*, the applicant shall prepare a mitigation plan as specified in CDC 32.070 designed to restore disturbed areas,

"disturbance" width for permanent underground utility facilities and requires mitigation of that disturbance.

Intervenors respond that LUBA should affirm the decision because the city's interpretation of CDC 32.090(A) is not inconsistent with the purpose and underlying policy of the provision and is not inconsistent with the express language of the provision. ORS 197.829(1). Intervenors first point to the purpose of the water resource area protections found in Chapter 32 of the CDC, to allow limited development but protect the water resource area by limiting areas of development and requiring development to mitigate impacts on the resource area. Intervenors argue that the mitigation for permanent development that is required by Chapter 32 of the CDC eventually places the water resource area in as good or better circumstances as it was prior to development. Intervenors next explain that the city based Chapter 32 of the CDC on the model water resources protection area ordinance drafted by Metro, and argue that the Metro Model Ordinance contains a definition of "disturb" that is consistent with the city's interpretation.[3] Finally, intervenors argue that the city's interpretation of the express language of CDC 32.090(A) as not encompassing areas that are only temporarily "disturbed" is not unreasonable.

There are two problems with the city's interpretation of CDC 32.090(A). First, the express language of the provision read in context with the defined term "development" does not support the city's interpretation. CDC 32.090(A) limits the area that "development" may disturb to a maximum of 5,000 square feet, and the defined term "development" encompasses construction activities that disturb the ground even temporarily, such as site

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either existing prior to development or disturbed as a result of the development project, to a healthy natural state." (Emphasis added.)

[3] Metro's Title 3 Model Ordinance contains the following definition:

> "Disturb – man made changes to the existing physical status of the land, which are made in connection with development. The following uses are excluded from the definition: enhancement or restoration of the Water Quality Resource Area; planting native cover identified in the Metro Native Plant List." Response Brief, Appendix 9.

clearing. We are similarly not persuaded by intervenors' arguments regarding the definition of "disturb" found in the Metro Model Ordinance, *see* n 3, or the purpose and policy of the water resource area protection provisions of the CDC. Those provisions emphasize protection of the resource area by placing an absolute limit of 5,000 square feet on development, independent of any required mitigation or replanting. We do not see that the purpose and policies of CDC Chapter 32 that emphasize protection of the water resource area support the city's interpretation of CDC 32.090(A).

Second, and more importantly, petitioners argue that even under the city's interpretation of CDC 32.090(A), the city erred in failing to include in its calculation the square footage that will be permanently developed with sewer, water and other utility lines. AS explained above, on remand intervenors submitted a site plan that included the storm drainage filtration system in the calculation of the square footage of the development. The city included the system in its calculation, concluding that "[s]torm water drainage facilities, even if underground, come within the definition of 'development' and therefore are included in the calculation of disturbed area required by CDC 32.090(A)." Record 10. However, evidence in the record indicates that the development also includes permanently installed drainage lines from the building to the filtration system, and water and sewer lines may also be located on the property. Record 37, 140. Even if we agreed that the city's interpretation of CDC 32.090(A) was correct, the city has not adequately explained under that interpretation why the storm drainage facilities are considered "development" that "disturb[s]" the water resources protection area, but drainage and underground utility lines that will be similarly permanently installed are not such "development."

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners withdrew their second assignment of error at oral argument.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners argue that the city erred in approving the proposed parking lot because the aisle serving one of the uncovered parking spaces is only 22 feet, 9 inches wide. Petitioners argue that the CDC requires the aisle to be at least 23 feet wide. In support of their argument, petitioners point to CDC 46.150(F). CDC 46.150(F) contains no text; rather, it contains two diagrams. The first diagram (Figure 1) contains diagrams of parking lot configurations and minimum aisle widths for parking lots that contain stalls on both side of the aisle. The minimum width of an aisle to accommodate two rows of perpendicular parking stalls is 23 feet. The second diagram (Figure 2) contains a diagram captioned "Minimum Distance for Parking Stalls" and a table that specifies aisle width and stall width for different parking angles and directions.

The city found that the requirement for a 23-foot wide aisle applies only when parking stalls are located on both sides of the aisle:

> "A figure associated with CDC 46.150(F) shows alternative parking lot layouts with design standards. The standard width for a two-way access driveway with perpendicular parking stalls along both sides is 23 feet. The applicant's proposed access driveway meets this standard under the building, but tapers to a lower width adjacent to the last perpendicular space to minimize the height of the retaining wall adjacent to the drainage way. However, the figure in the CDC speaks to required driveway aisle width when perpendicular parking stalls exist on both sides, and these two parking spaces are located on only one side. Therefore, the figure does not apply to this situation." Record 13.

Intervenors respond that the city's finding that the diagrams in CDC 46.150(F) do not apply to the proposed parking layout is correct. We agree with the city and intervenors that the diagrams at CDC 46.150(F) do not address the circumstances proposed by intervenors' revised site plan, which proposes only one row of two perpendicular spaces, and thus there is no requirement for a 23-foot wide parking aisle found in that provision.

The third assignment of error is denied.

The city's decision is remanded.