

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

3
4 SAM HOSKINSON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF CORVALLIS,
10 *Respondent,*

11 and

12
13 7TH STREET STATION, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2009-026

17
18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from City of Corvallis.

23
24 Samuel L. Hoskinson, Corvallis, filed the petition for review and argued on his own
25 behalf.

26
27 James K. Brewer, Corvallis, filed a response brief and argued on behalf of
28 respondent. With him on the brief was Fewel, Brewer & Coulombe.

29
30 Daniel Terrell, Eugene, filed a response brief and argued on behalf of intervenor-
31 respondent. With him on the brief were Bill Kloos and the Law Office of Bill Kloos, PC.

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

35
36 AFFIRMED

11/12/2009

37
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, a Tentative Subdivision Plat, and a Plan Compatibility Review for four units containing commercial and residential uses.

FACTS

The subject property is a triangular, .64-acre property zoned Mixed Use Commercial (MUC) with a Planned Development Overlay. The property is located south of Western Boulevard, between 6th Street and 7th Street, and is bounded on two sides by railroad tracks. The north side of the property is bounded by Western Boulevard.

Intervenor applied for a four-lot subdivision and proposed to build four attached units containing ground floor commercial space and upper level residential space, with a mezzanine level.¹ The planning commission approved the applications, and petitioner appealed the approval to the city council, which affirmed the planning commission’s decision. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Corvallis Land Development Code (LDC) Chapter 2.5 contains the standards and procedures for review of applications for planned developments such as Conceptual Development Plans (CDPs). LDC 2.5.40.04 is entitled “Review Criteria” and provides as relevant here:

“Requests for the approval of a Conceptual Development Plan *shall be reviewed to ensure consistency with the purposes of this Chapter*, policies and density requirements of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council. The application shall

¹ As part of the application, intervenor sought “variations” under the Corvallis Land Development Code regarding access, landscaping, sidewalks, and building frontage. Petitioner does not challenge the city’s approval of those variations.

1 demonstrate compatibility in the areas in ‘a,’ below, as applicable, and shall
2 meet the Natural Resource and Natural Hazard criteria in ‘b,’ below:

3 “a. Compatibility Factors -

- 4 “1. Compensating benefits for the variations being requested;
- 5 “2. Basic site design (the organization of Uses on a site and the Uses’
6 relationships to neighboring properties);
- 7 “3. Visual elements (scale, structural design and form, materials, etc.);
- 8 “4. Noise attenuation;
- 9 “5. Odors and emissions;
- 10 “6. Lighting;
- 11 “7. Signage;
- 12 “8. Landscaping for buffering and screening;
- 13 “9. Transportation facilities;
- 14 “10. Traffic and off-site parking impacts;
- 15 “11. Utility infrastructure;
- 16 “12. Effects on air and water quality (note: a DEQ permit is not sufficient
17 to meet this criterion);
- 18 “13. Design equal to or in excess of the types of improvements required by
19 the standards in Chapter 4.10 - Pedestrian Oriented Design Standards;
20 and
- 21 “14. Preservation and/or protection of Significant Natural Features, * * *.”
22 (Emphasis added, footnote omitted).

23 The purposes of Chapter 2.5 are set forth in LDC 2.5.20, which provides in relevant part:

24 “Planned Development review procedures are established in this Chapter for
25 the following purposes:

26 “ * * * * *

27 “(g) Provide greater compatibility with surrounding land uses than would
28 otherwise be provided under conventional land development
29 procedures; and

1 “(h) Provide benefits within the development site that compensate for the
2 variations from development standards such that the intent of the
3 development standards is still met.”

4 In his first assignment of error, petitioner argues that the city failed to adopt findings
5 that address LDC 2.5.20(g). Intervenor and the city (respondents) first take the position that
6 in reviewing an application for CDP approval, the city does not have an affirmative
7 obligation to review the proposal to ensure that it is consistent with each of the purposes of
8 Chapter 2.5 that are set out in LDC 2.5.20, quoted in part above. Respondents maintain that
9 if a proposed CDP satisfies the compatibility factors that are expressly set forth in LDC
10 2.5.40.04, the proposal also complies with the purposes of the planned development chapter.
11 According to respondents, the purpose statements set forth in LDC 2.5.20 must be considered
12 only when a proposal seeks variations from specific development standards, or when there
13 are ambiguities in the standards, and then only in assisting the city to determine whether to
14 approve the requested variation or resolve the alleged ambiguity.² The city’s findings
15 include the following, as relevant:

16 “The City Council notes that the language in LDC 2.5.40.04 * * * requiring an
17 application to be consistent with ‘the purposes of this chapter’ is not intended
18 to make the purpose statements found in LDC 2.5.02 [sic 2.5.20] into
19 independent review criteria. Instead, these purpose statements may be of use
20 in resolving ambiguities or in determining whether to approve a proposed
21 variance from a given LDC standard. The Council notes that LDC 2.5.40.04
22 requires the Council to determine whether the proposal is consistent with the
23 purposes of the chapter and the density and other applicable policies from the
24 [Corvallis Comprehensive Plan] CCP. The city council interprets this
25 language as applying to review of requested [variations] from standards in the
26 [LDC.] If an application complies fully with the standards in the [LDC], the
27 Council finds that it will always be compatible with the purposes of the
28 Planned Development Chapter and it will always be consistent with the
29 policies of the CCP. * * * The Council finds that Comprehensive Plan
30 policies, while informing the interpretation of those LDC provisions (when
31 ambiguities exist), are not in themselves review criteria. References to
32 purpose statements within the [LDC] are similarly valuable for reviewing

² Under the LDC, in planned development review it is possible to grant variations from development standards. These variations are a species of variance.

1 proposed variations from [LDC] standards, but are not, in themselves, review
2 criteria that would apply to an application that otherwise meets [LDC]
3 standards. The Council notes that it is unlikely that any one proposal could
4 be consistent with all of the purpose statements, and notes that some of the
5 listed purposes may conflict with other listed purposes. * * *” Record 25.

6 As the city explains in its brief, the city’s interpretation of LDC 2.5.40.04 appears to
7 reason that only where the LDC requires an application to be reviewed for “compliance”
8 with specified standards are those standards applied as review criteria. Where the LDC
9 requires the city to review an application for “consistency” with LDC provisions, those
10 provisions do not apply as review criteria that require an independent assessment.
11 Respondents argue that under ORS 197.829(1), LUBA must defer to the city’s interpretation
12 of LDC 2.5.40.04 because the city’s interpretation does not conflict with the plain language
13 of that provision, read in context with LDC 2.5.20.³

14 As we note above, LDC 2.5.40.04 is entitled “Review Criteria.” The express
15 language of the provision requires the city to review requests for CDP approval “to ensure
16 consistency with the purposes of [LDC Chapter 2.5],” among other things. It may be true
17 that review of a CDP application for “consistency” with some provisions of the LDC does
18 not involve the same analysis as would be required to review whether an application

³ ORS 197.829(1) provides that:

“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 “complies” with specific development standards such as explicit and easily measurable
2 setback or height requirements. However, whether reviewing to ensure consistency or
3 reviewing to ensure compliance, both types of provisions are applicable criteria against
4 which a proposed development must be measured. The city’s view that it may ignore the
5 obligation to review for consistency with the purposes of LDC Chapter 2.5, except in
6 circumstances where a variation is requested, has no support in any text or context cited to
7 us, and is inconsistent with the plain language of LDC 2.5.40.04. For that reason, ORS
8 197.829(1) does not require us to defer to the city’s interpretation.

9 For the reasons explained above, we do not think the city’s interpretation of the
10 mandatory phrase set forth in LDC 2.5.40.04 set out above is consistent with the express
11 language of the provision. Thus, the city was required to review the application for
12 consistency with LDC 2.5.20(g) and (h).

13 In his first assignment of error, petitioner argues that the city failed to adopt adequate
14 findings addressing whether the proposal is consistent with LDC 2.5.20(g). Petitioner argues
15 that with respect to LDC 2.5.20(g), LDC 2.5.40.04 requires the city to compare the
16 compatibility of intervenor’s proposed use of the land, which requires variations under the
17 LDC, with the compatibility of the maximum development allowed under the zoning code
18 without the requested variations. According to petitioner, without an analysis of whether a
19 proposal that seeks variations is more compatible with surrounding land uses than a proposal
20 that does not seek variations, the city cannot determine that the proposed development is
21 consistent with LDC 2.5.20(g). In particular, petitioner appears to argue that a two-story
22 project would be more compatible with the neighborhood than the proposed three-story
23 structure.

24 Respondents first respond that LDC 2.5.20(g) does not require the comparison that
25 petitioner alleges should be made. We agree. Nothing in the language of LDC 2.5.20(g)
26 suggests that the city must compare the proposed development to different possible

1 hypothetical development options that do not require a variation, as petitioner suggests. In
2 fact, LDC 2.5.20(g) does not mention variations. The most the city must determine under
3 LDC 2.5.20(g) is whether the proposed development is consistent with one of the purposes of
4 planned development review, specifically to provide “greater compatibility with surrounding
5 land uses than would otherwise be provided under conventional land development
6 procedures.” Planned development review allows the city to approve development that
7 differs in certain respects from conventional development. The question under LDC
8 2.5.20(g) is whether the proposed planned development is more compatible with surrounding
9 land uses than similar development allowed under conventional development standards.

10 In the present case, petitioner has not demonstrated that remand is necessary to adopt
11 more adequate findings with respect to LDC 2.5.20(g). While the city adopted no specific
12 findings addressing LDC 2.5.20(g), the city council incorporated a staff report that concluded
13 generally that the proposed development is consistent with the purposes of the planned
14 development chapter. Record 89. Respondents also note that the review criteria set forth in
15 LDC 2.5.40.04(a)(2) through (14) were adopted in part to implement LDC 2.5.20(g) and
16 ensure that the proposal is compatible with surrounding land uses, and the city adopted
17 findings explaining how the proposal satisfies the provisions of LDC 2.5.40.04(a)(2) through
18 (14). Record 35-39. Petitioner does not explain why those findings are inadequate to also
19 address whether the proposed development is consistent with LDC 2.5.20(g). With respect
20 to whether the height of the proposed building is compatible with surrounding uses, for
21 example, the city concluded that even though intervenor was not seeking a height variation,
22 under conventional land development procedures a building up to 45 feet tall would be
23 permitted outright on the property, and that development on surrounding properties zoned
24 High Density Residential (RS-20) and General Industrial (GI) would allow buildings up to
25 65 feet and 75 feet tall, respectively. Record 36. Those findings suggest that the city
26 compared at least some aspects of the proposed development with the type of development

1 that would be allowed under conventional land development procedures. Petitioner has not
2 demonstrated that additional findings are necessary. As such, petitioner’s arguments provide
3 no basis for reversal or remand of the decision.

4 In sum, we agree with respondents that the city’s findings regarding the proposed
5 development’s compatibility with surrounding land uses set forth in the parts of the decision
6 that address LDC 2.5.40.04(a)(2) through (12) are adequate to explain how the proposed
7 development satisfies the purpose of LDC 2.5.20(g).

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 In the second assignment of error, petitioner argues that the city failed to address
11 LDC 2.5.20(h), which provides that one of the purposes of Planned Development review is to
12 “[p]rovide benefits within the development site that compensate for the variations from
13 development standards such that the intent of the development standards is still met.” In our
14 resolution of the first assignment of error, we concluded that, pursuant to LDC 2.5.40.04,
15 LDC 2.5.20(h) is an applicable review standard and that the city was required to determine
16 whether the proposed development is consistent with that provision.

17 The city adopted findings regarding the compensating benefits provided by the
18 application. Record 31-35. We understand petitioner to argue that those findings are
19 inadequate because the city does not in those findings specifically identify or explain the
20 intent of each development standard for which a variation is sought.

21 We disagree with petitioner that the city was required to adopt additional findings
22 explaining or identifying the intent of each development standard for which a variation was
23 sought. *See* n 1. The intent of each development standard for which intervenor sought a
24 variation is reasonably clear on the face of the standard. For example, it is reasonably clear
25 that the intent of the requirement for a landscape buffer is to provide a buffer from the
26 development for the benefit of adjacent uses, in the form of landscaping. We think the city’s

1 findings are adequate to identify the compensating benefits for each variation that ensured
2 the intent of the development standards was met.⁴

3 The second assignment of error is denied.

4 **THIRD ASSIGNMENT OF ERROR**

5 In his third assignment of error, petitioner argues that “[t]he city developmental
6 services staff’s pro-development bias has resulted in the inability of decision makers to get
7 the accurate information needed to correctly enforce Corvallis land use standards.” Petition
8 for Review 14. Petitioner appears to argue that planning staff was biased in favor of the
9 proposal and failed to present accurate information to the decision makers.

10 However, we have held that in order to succeed in reversing or remanding a decision
11 based on an allegation of bias, it is not enough to allege bias on the part of persons who are
12 not the final decision makers when the final decision maker has conducted a separate
13 evidentiary hearing and adopted its own decision. *Trinkaus v. City of Portland*, 56 Or LUBA
14 771, 780 (2008). Petitioner does not allege that any member of the city council was unable
15 to act on an impartial basis. As such, petitioner’s argument provides no basis for reversal or
16 remand.

17 The city’s decision is affirmed.

⁴ To the extent petitioner argues that the findings are not supported by substantial evidence, we reject that argument as well because it is not sufficiently developed for our review.