

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 CONNECTING EUGENE,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF EUGENE,  
10 *Respondent,*

11 and

12  
13 OREGON STATE BOARD OF  
14 HIGHER EDUCATION, and EUGENE  
15 AREA CHAMBER OF COMMERCE,  
16 *Intervenors-Respondents.*

17  
18 LUBA No. 2010-022

19  
20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from City of Eugene.

25  
26 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of  
27 petitioner. With her on the brief was Western Environmental Law Center.

28  
29 Emily N. Jerome, City Attorney, Eugene, filed a response brief and argued on behalf  
30 of the respondent.

31  
32 Steven E. Shipsey, Assistant Attorney General, Salem, filed a response brief and  
33 argued on behalf of intervenor-respondent Oregon State Board of Higher Education. With  
34 him on the brief were Erin Donald, Assistant Attorney General and John R. Kroger, Attorney  
35 General.

36  
37 Bill Kloos, Eugene, represented intervenor-respondent Eugene Area Chamber of  
38 Commerce.

39  
40 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,  
41 participated in the decision.

42  
43 AFFIRMED

07/08/2010

44  
45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals a city hearings officer decision modifying a conditional use permit (CUP) to allow an additional three years to complete development of a research park.

**MOTION TO INTERVENE**

The Oregon State Board of Higher Education, and the Eugene Area Chamber of Commerce move to intervene on the side of the respondent. There is no opposition to the motions, and they are granted.

**FACTS**

The subject property encompasses 67 acres of land north of the University of Oregon (University) campus bordering the Willamette River. In 1988, the University applied for approval of a CUP for the Riverfront Research Park master plan, which was intended to be developed over a 15 to 20 year period. The CUP decision was appealed to LUBA, and LUBA affirmed the city’s decision on October 10, 1989. *Stotter v. City of Eugene*, 18 Or LUBA 135 (1989). LUBA’s decision was not appealed.

Because of the extensive nature of the proposed research park, the 1989 CUP authorized a 20-year period to complete construction. In particular, Conditions 14 and 15 provided:

“14. The applicant shall have three years from the date this approval becomes final and is no longer subject to appeal, to begin construction within the first phase. Total completion shall be within 20 years from the date the original Master Site Plan approval is final.

“15. Modifications to the approved Master Site Plan shall follow the procedures for modification of a conditional use permit contained in Sections 9.722 of the Eugene Code.” Record 1108.

The parties agree that the approval became final on October 10, 1989, when LUBA affirmed the city’s CUP approval. Under Condition 14, the University had until October 10, 2009, to complete construction.

1 In 1992, the city and the University entered into a conditional use agreement. The  
2 1992 conditional use agreement repeated the CUP conditions, including the 20 year time  
3 limit to complete construction, with reference to October 10, 1989, the date LUBA's decision  
4 became final. However, the 1992 conditional use agreement also included a paragraph  
5 labeled "Time Schedule" stating:

6 "The construction will commence by October 10, 1992, and total construction,  
7 including landscaping, shall be totally completed on or before October 10,  
8 2012." Record 1102-03.

9 After 1992, the university constructed a number of buildings that were approved in  
10 the CUP and Master Plan, but no buildings have been constructed in the most controversial  
11 area near the river. The University now contemplates constructing several buildings in that  
12 area, as authorized under the 1989 CUP.

13 On October 1, 2009, the University requested that the city either clarify that the  
14 conditional use permit expires on October 10, 2012, as stated in the conditional use  
15 agreement, or in the alternative modify the CUP to extend the construction deadline to  
16 October 10, 2012. The city planning director approved a modification to allow construction  
17 to be completed by October 10, 2012. Petitioner appealed to the city hearings officer, and  
18 the hearings officer found that under the conditional use agreement, the 20-year period for  
19 completing construction did not end until October 10, 2012, and no extension was needed.  
20 In the alternative, the hearings officer authorized a modification of the CUP to allow  
21 construction to be completed by October 10, 2012. This appeal followed.

## 22 **SECOND ASSIGNMENT OF ERROR**

23 As noted, the challenged decision adopted alternative theories for setting an October  
24 10, 2012 date for completion of construction of the research park, and petitioner challenges  
25 both theories. If the city prevails under either alternative theory, we must affirm the  
26 decision. In the second assignment of error, petitioner challenges the hearings officer's  
27 modification of the CUP to extend the construction deadline.

1 Eugene Code (EC) 9.8110 sets out the approval criteria for modification of CUP  
2 permits:

3 “After the effective date of the approval of the conditional use permit,  
4 modifications to the approved conditional use permit may be considered \* \* \*.  
5 The planning director shall approve the request only if it complies with the  
6 following criteria:

7 “(1) The proposed modification is not materially inconsistent with the  
8 conditions of the original approval; and

9 “(2) The proposed modification will result in insignificant changes in the  
10 physical appearance of the development, the use of the site, and impact  
11 on the surrounding properties.

12 “If the requested modification does not meet the criteria for approval, the  
13 application will be denied. \* \* \*”

14 The hearings officer found that the proposed modification satisfied both EC 9.8110(1) and  
15 (2).

16 **A. Modification Not Materially Inconsistent With Original Conditions**

17 At the local level, petitioner argued that the phrase “conditions of the original  
18 approval” in EC 9.8110(1) refers to the conditions on the ground and surrounding property  
19 when the original approval was granted in 1989. The hearings officer rejected that  
20 interpretation and interpreted “conditions of the original approval” to mean the *conditions of*  
21 *approval* attached to the decision approving the CUP in 1989.<sup>1</sup> To the extent petitioner

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<sup>1</sup> The hearings officer’s findings state:

“[Petitioner’s] argument claims that because the original hearing official stated that the primary consideration in setting time limits on development under a conditional use permit is whether surrounding conditions might change rendering the development no longer appropriate for the area, the term ‘conditions of the original approval’ as used in EC 9.8110(1) must refer to conditions on the ground in this case. The hearings official disagrees.” Record 13.

The hearings officer went on to explain that “the original approval” refers to the 1989 CUP approval and that the words “conditions of” refer to conditions of approval that were attached to that 1989 CUP approval. The hearing officer concluded:

1 challenges that interpretation of EC 9.8110(1), we agree with the hearings officer that the EC  
2 9.8110(1) is correctly interpreted to refer to the original conditions attached to the CUP.

3 On appeal, petitioner’s primary argument is that modifying Condition 14 to allow a  
4 23-year period to complete construction is “materially inconsistent” with Condition 14,  
5 which originally imposed a 20-year period. Petitioner argues that the 1989 CUP did not  
6 contemplate extensions to the 20-year deadline imposed by Condition 14, and that any  
7 extension of that deadline at all is therefore “materially inconsistent” with the condition. The  
8 hearings officer adopted the following reasoning in rejecting that categorical argument  
9 below:

10 “[Petitioner] argues that because the proposed extension would allow  
11 development beyond the 20-year time period specified in Condition 14 of the  
12 original decision for construction of the Master Plan, the extension is *a priori*  
13 inconsistent with the conditions of the original approval, and therefore does  
14 not comply with EC 9.8110(1). The hearing[s] official disagrees. Applying  
15 EC 9.8110(1) in this manner does not give meaning to Condition 15 of the  
16 original hearing[s] official decision, which allows modifications to the Master  
17 Site Plan. Reading the two conditions to give meaning to both is analogous to  
18 another of the maxims of statutory construction in ORS 174.010 (\* \* \* ‘and  
19 where there are several provisions or particular[s] such construction is, if  
20 possible, to be adopted as will give effect to all’). Condition 14 cannot be  
21 interpreted to prohibit modifications that condition 15 allows. Applying EC  
22 9.8110(1) as [petitioner] suggests would also not give meaning to EC 9.7340,  
23 which specifically authorizes an extension of the expiration date of a  
24 conditional use permit. \* \* \*” Record 12.

25 The hearings officer ultimately concluded:

26 “[The original CUP] was approved subject to 17 conditions of approval. This  
27 criterion compares the request to the 17 conditions of approval. Here, the  
28 proposal is solely a timeline extension. None of the 17 conditions of  
29 approval, and none of the findings in the original hearing[s] official decision  
30 state that the deadlines in the conditional use permit, the conditional use  
31 agreement, or the Master Site Plan cannot be extended. The applicant’s  
32 submittal of a timeline extension request is not materially inconsistent with  
33 these conditions of approval.” Record 15.

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“[Based on a] plain reading of the text, ‘conditions of the original approval’ refers to the 17 conditions listed on pages 1-3 of the original approval.” *Id.*

1           Petitioner argues that the hearings officer erred in construing the “materially  
2 inconsistent” standard to mean essentially “not prohibited by” the conditions of approval.  
3 According to petitioner, a modification can be “materially inconsistent” with the original  
4 conditions of approval even if not expressly prohibited by any conditions. Petitioner  
5 contends that 20 years is not the same as 23 years, and therefore the modification of  
6 Condition 14 is “materially inconsistent” with the original Condition 14. If EC 9.8110(1)  
7 required only that the modification not be “inconsistent” with the original conditions of  
8 approval rather than “materially inconsistent,” we might agree with petitioner’s categorical  
9 view of the code provision. However, the operative word here is “materially.” The  
10 dictionary defines “materially” as “to a significant extent or degree.” *Webster’s Third New*  
11 *Int’l Dictionary* (1981) 1392. The question therefore is whether providing 23 years to  
12 complete the development is *significantly* different than providing 20 years to complete the  
13 development.

14           The condition requiring completion of construction within 20 years was imposed  
15 pursuant to EC 9.710(L) (1988), which authorized conditions for the “[t]ime period within  
16 which the proposed use must be developed.” Record 425. The hearings officer found that  
17 none of the 1989 conditions of approval, nor the findings in the original hearings officer’s  
18 decision approving the CUP and master plan, suggest that that 20-year deadline cannot be  
19 extended. On the contrary, as the hearings officer noted, the 1989 decision expressly  
20 authorized modifications to the master plan, and the code provisions in effect in 1989 and at  
21 the present time both allow for extensions of similar deadlines to initiate construction. We  
22 understand the hearings officer to conclude that nothing in the 1989 decision or the city’s  
23 code suggests that a deadline to complete construction imposed under EC 9.710(L) (1988)  
24 cannot be extended pursuant to the code modification process, like any other deadline or  
25 aspect of the decision.

1 As noted, in order to be “materially” inconsistent, the modified condition must be  
2 *significantly* different than the original condition. Petitioner does not explain why a 23 year  
3 deadline to complete construction is significantly different from a 20 year deadline to  
4 complete construction, other than to advance its categorical argument that any difference is  
5 material, which we rejected above. Petitioner cites to findings in the 1989 decision  
6 explaining that the 20 year deadline was imposed in part to avoid the necessity for “repeated  
7 extension requests.” Record 417. That hardly suggests that deadlines to complete  
8 construction imposed under EC 9.710(L) (1988) cannot be extended, and in fact implies a  
9 great deal of flexibility in applying or extending a deadline to complete construction under  
10 EC 9.710(L) (1988).

11 A 23-year deadline to complete construction represents a 15 percent increase  
12 compared to the 20-year deadline imposed under Condition 14. While an argument can be  
13 made that a significantly longer extension would be “materially inconsistent” with the  
14 original 20-year deadline, petitioner has not established that the hearings officer erred in  
15 concluding that the three-year extension granted in this decision is materially inconsistent  
16 with Condition 14.

17 This subassignment of error is denied.

18 **B. Modification Will Not Result In Significant Changes**

19 EC 9.8110(2) requires a finding that the proposed modification will “result in  
20 insignificant changes in the physical appearance of the development, the use of the site, and  
21 impact on the surrounding properties.” Petitioner argues that allowing three additional years  
22 to complete construction of the development would result in drastically significant changes  
23 because if no modification is allowed then the proposed development will not occur at all,  
24 and the portion of the property close to the river will remain vacant. Respondents counter  
25 that there will be no change at all, significant or otherwise, because the modification does not



1 authorize any changes at all to the *approved development*, merely additional time to complete  
2 that development.

3 The focus of EC 9.8110(2) is on “changes in the physical appearance of the  
4 development, the use of the site, and impact on the surrounding properties.” The hearings  
5 officer found:

6 “The proposed modification does not involve any changes to the physical  
7 appearance of the development or use of the site. The proposed modification  
8 will only extend the time schedule for construction established within the  
9 executed performance agreement for the original approval.” Record 15.

10 In other words, the hearings officer understood EC 9.8110(2) to be concerned with whether  
11 there is a significant difference between the originally approved development and the  
12 proposed development as modified, with respect to physical appearance, use of the site, and  
13 impacts on surrounding properties. Because the modified time limit does not affect at all the  
14 physical appearance of proposed development, the proposed use of the site or the impact of  
15 proposed development on surrounding properties, the hearings officer found that the  
16 modification complies with EC 9.8110(2).

17 Petitioner argues that the hearings officer’s understanding of EC 9.8110(2) renders  
18 that provision meaningless, because a proposed modification that merely extends a  
19 construction deadline will never affect the physical appearance of development, the use of  
20 the site, or the impacts of development on surrounding properties. However, EC 9.8110(2) is  
21 not rendered meaningless simply because a proposed modification to a time limit does not  
22 implicate its three concerns. Modification involving other aspects of approved development  
23 could obviously involve changes to the development itself, which could create significant  
24 changes from the originally approved development. That a modified time limit is found to be  
25 consistent with those concerns does not demonstrate that the hearings officer misconstrued  
26 EC 9.8110(2).

1           Petitioner next objects that under the hearings officer’s interpretation, the significance  
2 of the changes allowed is measured relative to what is already allowed under the CUP, while  
3 under petitioner’s preferred interpretation, the “significance of the changes is measured  
4 relative to current on-the-ground conditions.” Petition for Review 17. Because the  
5 modification allows controversial development of vacant land near the river, petitioner  
6 argues, the modification allows a “significant change” contrary to EC 9.8110(2).

7           However, we agree with respondents that the hearings officer correctly understood  
8 EC 9.8110(2) to be concerned with whether there is a significant difference between the  
9 originally approved development and the proposed development as modified, with respect to  
10 physical appearance, use of the site, and impacts on surrounding properties. Nothing cited to  
11 us in the text or context of EC 9.8110(2) suggests that the required comparison is between  
12 the development as modified and current on-the-ground conditions. Further, under  
13 petitioner’s preferred theory, almost all modifications of proposed development of currently  
14 vacant land would have to be denied under EC 9.8110(2), because developed land almost  
15 always represents a significant change from vacant land. We decline to adopt petitioner’s  
16 interpretation, and affirm the hearings officer’s interpretation, which gives more meaning and  
17 effect to EC 9.8110(2).

18           This subassignment of error is denied.

19           The second assignment of error is denied.

20           **FIRST ASSIGNMENT OF ERROR**

21           In the first assignment of error, petitioner challenges the hearings officer’s  
22 determination that the original CUP deadline for completing construction expires in 2012  
23 rather than 2009, based on language in the conditional use agreement between the city and  
24 the University. While we tend to agree with petitioner that a contract between the city and  
25 the University could not override the conditions of a land use decision, because we reject

1 petitioner's challenge to the CUP modification, and affirm the decision, we need not address  
2 the first assignment of error.

3           The city's decision is affirmed.