

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 LEATHERS OIL COMPANY,
4 *Petitioner,*

5
6 and

7
8 ANDY PATEL,
9 *Intervenor-Petitioner,*

10 vs.

11
12 CITY OF NEWBERG,
13 *Respondent,*

14
15 and

16
17 FRED MEYER STORES INC.,
18 *Intervenor-Respondent.*

19 LUBA No. 2010-093

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Newberg.

25
26 Jennifer M. Bragar, Portland, filed the petition for review and Jennifer M. Bragar and
27 Carrie R. Richter argued on behalf of petitioner. With her on the brief were Edward
28 Sullivan, Carrie R. Richter and Garvey Schubert Barer PC.

29
30 Andy Patel, Newberg, represented himself.

31
32 Terrence D. Mahr, City Attorney, Newberg, filed a joint response brief and argued on
33 behalf of respondent. With him on the brief were Steven W. Abel and Stoel Rives LLP.

34
35 Steven W. Abel, Portland, filed a joint response brief and argued on behalf of
36 intervenor-respondent. With him on the brief were Stoel Rives LLP, Sarah Stauffer Curtiss,
37 Eric L. Martin and Terrence D. Mahr.

38
39 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
40 participated in the decision.

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42 AFFIRMED

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44 03/29/2011

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

NATURE OF THE DECISION

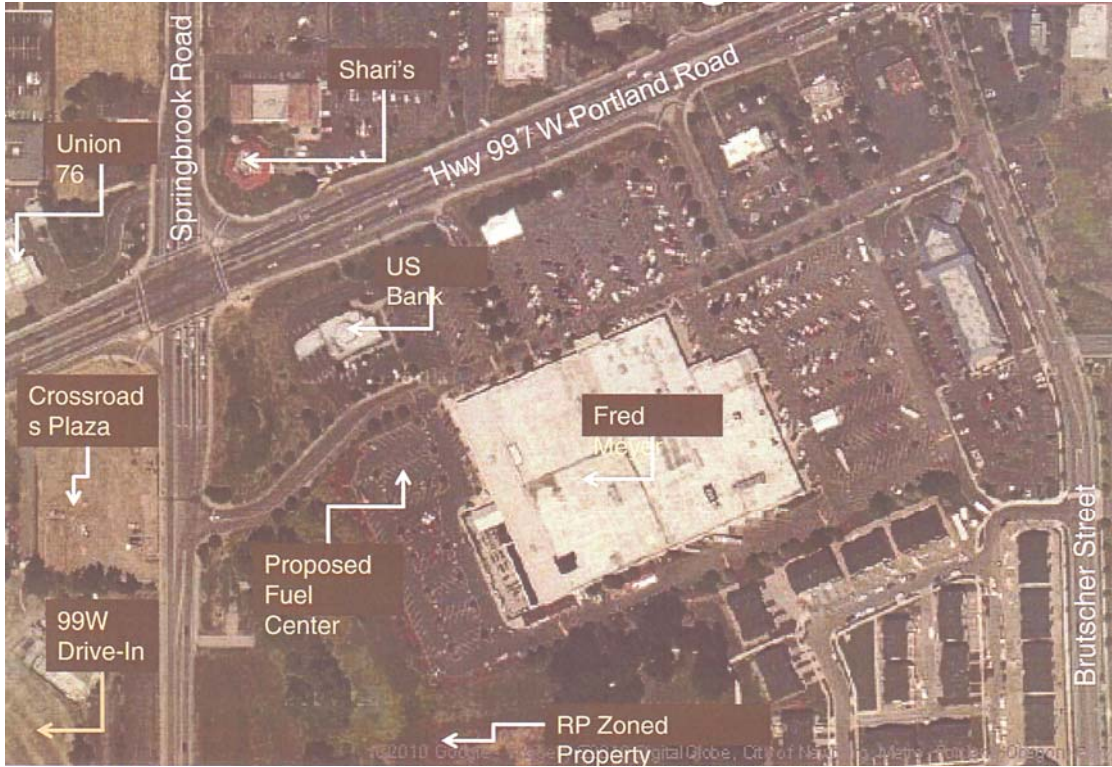
Petitioner appeals a city decision approving a conditional use permit and design review for construction of a fueling station.

FACTS

Intervenor-respondent Fred Meyer Stores, Inc. (intervenor) applied for a conditional use permit and design review to construct a fueling station that is proposed to be located on the west side of an approximately 17-acre property that contains an existing 147,000-square foot Fred Meyer store located along the southern boundary of the property. The proposed fueling station includes several gas pumps and a 96-square foot cashier’s kiosk to be located within a 5,530-square foot area covered by a canopy. The subject property is zoned Community Commercial (C-2), and a fueling station is an allowed use in the C-2 zone, subject to certain design standards that apply to retail uses where the total square footage of one commercial building on a site exceeds 30,000 square feet or the total of all commercial buildings exceeds 50,000 square feet.¹

The west portion of the subject property, where the fueling station is proposed to be located, is bounded by Springbrook Road, with the Crossroads Plaza shopping center and a drive-in movie theater located on the other side of Springbrook Road. On the north the subject property is bounded by Highway 99 W (Portland Road) with a gas station and an auto service shop on the other side of Portland Road. The entire 17-acre property is also bounded by Brutscher Street on the east, with commercial and light industrial uses on the east side of Brutscher Street, and by residential townhome development to the south. To assist in setting out the facts, we include below an aerial photo found at Record 652.

¹ As we discuss in our resolution of the third and fifth assignments of error, an applicant can deviate from those design standards by securing approval of a proposed development through a conditional use permit process. Newberg Development Code (NDC) 151.196(H). Intervenor submitted a conditional use permit application in order to deviate from NDC 151.196(H).



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On February 12, 2009, the planning commission held its initial hearing on the application for the proposed fueling station. The hearing was continued to February 26, 2009, but that hearing was subsequently canceled and rescheduled for May 14, 2009, which hearing was also cancelled, at the request of the applicant. Almost ten months later, on March 10, 2010, the applicant submitted additional information regarding transportation issues to the planning commission, which held a public hearing on May 13, 2010.

On July 8, 2010, the planning commission denied intervenor's application for the proposed fueling station. Intervenor appealed that decision to the city council, which held a hearing August 16, 2010. On September 23, 2010, the city council issued its final decision approving the application. This appeal followed.

FIRST, SECOND, AND EIGHTH ASSIGNMENTS OF ERROR

Petitioner's first, second, and eighth assignments of error challenge the city's conclusion that certain design review criteria set forth in Newberg Development Code (NDC) 151.194 are satisfied.

1 **A. NDC 151.194(B)(1)**

2 NDC 151.194(B)(1) requires the city to find that:

3 “*Design compatibility.* The proposed design review request incorporates an
4 architectural design which is compatible with and/or superior to existing or
5 proposed uses and structures in the surrounding area. This shall include, but
6 not be limited to, building architecture, materials, colors, roof design,
7 landscape design, and signage.”

8 The city determined that the fueling station is compatible with uses and structures in the
9 surrounding area, based on comparisons with two immediately adjoining buildings and two
10 buildings across the street from the proposed fueling station.² In its second assignment of

² The city found:

“During design review the City typically compares the proposed building to the existing buildings that would be immediately adjacent to it for the purpose of determining design compatibility. In this case the proposed gas station is only adjacent to two buildings; the main Fred Meyer store, and the bank building to the north (approximately 200 feet away). The next closest building is at Crossroads Plaza, which is over 400 feet away and is west of Springbrook Road. The proposed gas station will consist of a simple metal canopy over seven fuel dispensers, with a small cashier’s kiosk. The canopy will be 18 feet tall, flat-roofed, and 43 feet wide by 126 feet long (5,418 square feet). The cashier’s kiosk is a small simple box structure (96 square feet). The canopy and kiosk will be painted beige and light brown, which are similar to colors used on the existing main store building. The existing Fred Meyer store is a large simple box structure with a flat roof. It has a flat masonry wall along most of the western side and a garden center at the southwest corner. The bank building north of the proposed site has a simple modern style, with a similar simple metal canopy structure over its drive-up ATMs. Across the street is an additional gas station with canopy structure which is very similar to the proposal yet larger. Directly across the street is an auto repair facility, which when all of its six bay doors are open, resembles a shell type structure in some respects similar to a canopy. The applicant has provided site plan and elevation drawings of the proposed gas station, which is sufficient information to determine if the proposed design is compatible with nearby buildings. The City does not require renderings or models for proposed new buildings. The proposed signs will be similar to the existing signs on the site. Exterior lights will be directed onto the site so as to not adversely affect the adjoining properties. The overall design will blend with the surrounding area by the use of landscaping buffering and screening. As proposed, the Fred Meyer gas station proposal is compatible with structures in the surrounding area because the structure has been designed to match the existing Fred Meyer building in style and color, and the canopy is similar in style to the bank building canopy to the north.

“Redevelopment of this portion of the parking lot will take down two large overheard parking lot lights. The applicant has also agreed to shield two lights along the side of the building of the main structure so as to reduce the amount of light generated from this side of the site. All of the new lights utilized by the canopy will be recessed and directed so that the light only shines down. The new light generated from the development will be inconsequential at the property line, and the removal of two parking lights and the shielding of two other lights will

1 error, petitioner argues that (1) the city’s determination that the proposed fueling station is
2 compatible with existing development that is located adjacent to or immediately across a
3 road or highway from the proposed fueling station misconstrues applicable law, and (2) its
4 findings regarding NDC 151.194(B)(1) are inadequate and are not supported by substantial
5 evidence in the record.

6 In support of its first argument petitioner cites the purpose statement for the city’s
7 design review criteria that is set forth in NDC 151.190:

8 “These provisions provide for the review and approval process of the design
9 of certain developments and improvements in order to promote functional,
10 safe and innovative site development compatible with the natural and man-
11 made environment. The following provisions are intended to discourage
12 unsightly development, improve the quality of new development in the city,
13 coordinate the site planning process with existing and proposed development,
14 and provide a pleasant working and living environment in the city.
15 Furthermore, these provisions are intended to coordinate the site development
16 process through review of the architecture of the structure(s), signs,
17 landscaping, and other design elements on the site.”

18 According to petitioner, the purpose statement set forth in NDC 151.190 calls for examining
19 the compatibility of the proposed use with all surrounding uses in a wide area, in order to
20 meet the purpose of “improv[ing] the quality of new development,” and that examination
21 must include the residential uses to the south of the existing Fred Meyer store and the drive-

reduce the amount of light generated by the current site. The applicant also intends to build a fence, and add additional landscaping to the westerly edge of the new development which will further obscure any light intrusion off site.

“The proposed new structures will be of the same color pattern as the current structure. This will allow the new structure to blend in with the current structure. The proposed structure has a very similar design to the two canopies near by (US Bank and gas station) and is similar in nature to the auto repair facility. Its architectural design is compatible and or superior to the surrounding structures. Signage proposed also is of similar style to the signage at these nearby buildings. There is sufficient detail in all of the material provide by the applicant to make this determination. It is not necessary to have a rendering or three dimensional images to assess the compatibility of the development.

“Because of the design features, the Council finds that the architectural design is compatible with and/or superior to existing or proposed uses and structures in the surrounding area in terms of building architecture, materials, colors, roof design, landscape design and signage.”
Record 41-42.

1 in theater to the west of Springbrook Road. We understand petitioner to argue that
2 interpreting and applying NDC 151.194(B)(1) more narrowly is inconsistent with the
3 purpose statement and that interpretation is not required to be affirmed under ORS
4 197.829(1)(b).³ We also understand petitioner to argue that, to be consistent with the
5 purpose statement, NDC 151.194(B)(1) must be interpreted to require a comparison of the
6 proposed fueling station with unspecified buildings that may have been built after 1996,
7 when the new design standards were adopted.

8 The city and intervenor (respondents) respond that the city’s interpretation of NDC
9 151.194(B)(1) is not inconsistent with the purpose of the design review criteria. Moreover,
10 respondents argue, the city’s interpretation of the phrase “surrounding area” used in NDC
11 151.194(B)(1) as the area adjacent to or directly across the street from the proposed fueling
12 station is consistent with the express language of the provision and with the ordinary
13 meaning of “surround.”⁴ Therefore, respondents argue, LUBA should affirm the city’s
14 interpretation under ORS 197.829(1)(a). *See* n 3.

15 The city’s interpretation of NDC 151.194(B)(1) is not inconsistent with either the
16 express language or the purpose of the design review criteria as explained in NDC 151.190,

³ ORS 197.829(1) provides in relevant part:

“[LUBA] 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[.]”

⁴ “Surround” means:

“**2:** to be situated or found around, about, or in a ring around, as: * * * **f:** to form a ring around; extend around or about the edge of; constitute a curving or circular boundary for; lie adjacent to all around or in most directions; ENCIRCLE * * *.” *Webster’s Third New International Dictionary* (1981) 2302.

1 and the city’s findings are adequate to explain why the proposal is architecturally compatible
2 with the uses it considered. How far the “surrounding area” extends from the proposed
3 fueling station is not defined in the city’s code, and the city has wide latitude to determine
4 how far the design compatibility analysis must extend. Here, the residential area southeast of
5 the fueling center is located some distance away and on the other side of the Fred Meyer
6 store. We see no error in declining to consider the residential area as part of the
7 “surrounding area” for purposes of the architectural compatibility analysis. The drive-in
8 theater is located southwest of the fueling station, across Springbrook Road, and it appears
9 from maps in the record that the back of the theater screen is roughly the same distance from
10 the fueling station as the two buildings across Springbrook Road and Portland Road that the
11 city did consider. Although the city does not explain why it did not consider design
12 compatibility between the fueling station and the drive-in theater, petitioner does not assert
13 that the back of the drive-in theater has any design or architectural features that could be
14 meaningfully compared. Petitioner has not demonstrated that the city’s interpretation of the
15 extent of the “surrounding area” is implausible or inconsistent with the express language of
16 the code, or that any error in failing to consider compatibility with the drive-in theater is
17 more than harmless error. We agree with respondents that the city’s interpretation of the
18 phrase “surrounding area” is required to be affirmed under ORS 197.829(1)(a). *Siporen v.*
19 *City of Medford*, 349 Or 247, 258, 243 P2d 776 (2010).

20 With respect to the purpose statement, petitioner points to nothing in the language of
21 that purpose statement that requires the city to extend the “surrounding area” to any
22 particular distance or to consider design compatibility with all existing buildings in the
23 vicinity. Moreover, petitioner does not explain how the city’s review of adjacent uses fails to
24 meet the purpose of “improv[ing] the quality of new development” where the design of the
25 fueling station is similar to those other uses, and also includes requirements for landscaping
26 and restrictions on signage and lighting that presumably improve the quality of the new

1 fueling station over existing buildings that were built prior to the design standards' effective
2 date.

3 Petitioner next argues that there is not substantial evidence in the record to support
4 the city's conclusion that the proposed fueling station is compatible with existing uses and
5 structures in the surrounding area because the elevation plan relied on by the city does not
6 specify the location of the support poles for the canopy, or show the proposed landscaping
7 that is referenced in the application narrative. Further, petitioner challenges the city's
8 conclusion that the proposed fueling station is compatible with the drive-in theater merely
9 because intervenor's proposal includes landscaping and a fence on the western edge of the
10 subject property. According to petitioner, that landscaping and fence are not depicted on a
11 landscaping plan that is part of the record and without a depiction of those elements on the
12 landscaping plan, the city had no evidence on which to conclude that the station is
13 compatible with the drive-in theater.

14 Respondents respond that the elevation plan shows the height of the canopy and that
15 height is compatible with the Fred Meyer store and the gas station located across
16 Springbrook Road and Portland Road, and further respond that the height of the proposed
17 sign is similar to the signage in the immediate area.⁵ We agree with respondents that there is
18 substantial evidence in the record, including the site plan and the application narrative that
19 proposes landscaping along the western and southern edges of the subject property in the
20 location that the conditions of approval require, to support the city's determination that the
21 proposal is compatible with surrounding uses.

22 The second assignment of error is denied.

⁵ Respondents also point out that the city imposed conditions of approval that limit the size and height of any signage (condition 6). Those conditions also require submittal of a revised landscaping plan that (1) adds evergreen trees to the western and southern edge of the property to completely shield those property lines from sight and (2) adds a six foot high sight obscuring fence west of the canopy (condition 10). Those conditions further restrict lighting within the canopy, especially during construction (condition 11). Record 64-65.

1 **B. NDC 151.194(B)(2)**

2 NDC 151.194(B)(2) provides in relevant part :

3 *“Parking and on-site circulation. * * * [p]rovisions shall be made to provide*
4 *efficient and adequate on-site circulation without using the public streets as*
5 *part of the parking lot circulation pattern * * *.”*

6 The city found that the proposed fueling station satisfies NDC 151.194(B)(2).⁶ Record 44.

7 The city interpreted NDC 151.194(B)(2) to mean that “vehicles, once entering the site,
8 should not have to exit the site onto a public street in order to access a different potential
9 destination on the site, nor should the public streets serve essentially the same function as the
10 drive aisle in a parking lot.” Record 44.

11 In its first assignment of error, petitioner first argues that the findings are inadequate
12 because they fail to respond to evidence in the record that petitioner maintains shows that
13 vehicles routinely use the adjacent public streets as part of the on-site parking lot circulation
14 pattern.⁷ However, the evidence cited by petitioner relates to the use of adjacent public

⁶ The city found in relevant part:

“The applicant has proposed changes to the on-site pedestrian circulation. The current pedestrian walkway from the NW corner of the Fred Meyer store to the U.S. Bank building is a long diagonal path. The fueling facility is expected to increase the amount of vehicle traffic near the bank driveway, so the diagonal walkway has been changed to two shorter walkways at right angles to vehicle traffic. The total walking distance is longer but should be safer. Stop bars have been added to improve the control of vehicle traffic between Fred Meyer and the bank building. The applicant has also proposed adding another pedestrian walkway at the southeast corner of the site. The SE walkway will help the existing building better meet the pedestrian connectivity standards in the Newberg Development Code.

“This criterion requires adequate on-site circulation without using the public streets as part of the parking lot circulation pattern. The City Council interprets this provision to mean that vehicles, once entering the site, should not have to exit the site onto a public street to access a different potential destination on the site, nor should the public streets serve essentially the same function as the drive aisle in a parking lot. There is no evidence to suggest that vehicle circulation on site will utilize public streets. There is complete access in and around the structures on the site. This includes access completely around the large grocery store structure. With the ability to go in front of or behind the store to access the other sides of the site, there is no rational basis to believe that vehicles will go offsite utilizing a public street to circulate to another part of the site. Once on site, all vehicle trips to other parts of the site will occur on site.” Record 44.

⁷ Petitioner cites record pages 316, 330, 352, 365, 368, and 576.

1 streets before cars enter the subject property and after they exit the subject property and to
2 the resulting traffic impacts from the use of those streets. That evidence does not support
3 petitioner’s contention that vehicles are using public streets to travel within the subject
4 property from one business to another business on the subject property, i.e., “on-site
5 circulation.” To the extent petitioner argues that use of public streets to enter and exit the
6 subject property during a single trip should be considered part of the “on-site circulation * *
7 * pattern” that NDC 151.194(B)(2) is concerned with, we reject that argument.

8 Petitioner also argues that the pedestrian safety improvements described in the
9 findings will require more frequent vehicle stops for pedestrian crossings, and those stops
10 will in turn cause traffic volumes to increase on adjacent public streets. However, for the
11 reasons explained above, increases in neighborhood traffic volume are not relevant to the
12 analysis of whether the development proposes “adequate on-site circulation.”

13 The first assignment of error is denied.

14 **C. NDC 151.194(B)(10)**

15 NDC 151.194(B)(10) provides:

16 *“Traffic study improvements. If a traffic study is required, improvements*
17 *identified in the traffic study shall be implemented as required by the*
18 *Director.”*

19 Intervenor’s traffic study concluded that the intersections of Springbrook Road and Portland
20 Road and Brutscher Road and Portland Road operate during the p.m. peak period above the
21 Oregon Department of Transportation’s (ODOT’s) desired volume to capacity (v/c) ratio of
22 0.75 or lower, and that additional traffic from the development would increase the v/c ratios
23 at those intersections slightly. Record 49. The traffic study discussed lane configuration
24 changes that would improve the v/c ratios at each intersection, although not to levels that
25 would bring their performance below 0.75 v/c during the p.m. peak period, and determined
26 that even with lane configuration changes, overall intersection performance would not
27 improve to ODOT’s desired v/c ratio of 0.75 or lower. Because the changes proposed in the

1 study would not improve overall performance, ODOT also recommended not reconfiguring
2 lanes, and requested that the city instead impose a condition of approval requiring intervenor
3 to contribute towards future improvements at the intersection of Springbrook Road and
4 Portland Road. Record 49-50. The planning director imposed a condition of approval that
5 intervenor contribute a proportionate share to future improvements to the intersection of
6 Springbrook Road and Portland Road contemplated by ODOT, intended to significantly
7 improve the intersection's performance.

8 In its eighth assignment of error, petitioner argues that NDC 151.194(B)(10) requires
9 the city to implement improvements that were identified in a traffic study prepared by
10 intervenor and the city erred in failing to require the specified improvements. Respondents
11 respond, and we agree, that NDC 151.194(B)(10) gives the city's planning director the
12 discretion to require improvements that are identified in a traffic study, and that in exercising
13 that discretion, the planning director determined not to require the lane reconfigurations
14 identified in the traffic study because those reconfigurations would not significantly improve
15 the overall performance of the affected intersections. We agree with respondents that NDC
16 151.194(B)(10) gives the planning director the discretion to require or not require
17 improvements identified in a traffic study, and we reject petitioner's argument that the city
18 erred in failing to require those improvements where the planning director apparently
19 determined not to require them.

20 We also understand petitioner to argue that the city impermissibly imposed a
21 condition of approval that requires intervenor to contribute to future road improvements,
22 without first determining that it is "feasible" for ODOT to fund and construct those future
23 improvements within some particular timeline, in order to ensure compliance with NDC
24 151.194(B)(10), under the reasoning in *Meyer v. City of Portland*, 67 Or App 274, 678 P2d
25 741 (1984). However, as explained above, NDC 151.194(B)(10) grants the planning director
26 the discretion to require improvements identified in the traffic study, or not, as the director

1 sees fit. The director chose not to require the lane reconfigurations identified in the traffic
2 study. There is no approval criterion cited to us that requires the applicant to contribute to
3 ODOT's future improvements or that requires a finding that it is feasible for ODOT to fund
4 and construct those improvements within any particular timeframe, as petitioner suggests.
5 Petitioner's argument on this point does not provide a basis for reversal or remand.

6 The eighth assignment of error is denied.

7 **THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR**

8 NDC 151.196 provides additional design requirements for certain development in the
9 C-2 zoning district. In its third, fourth and fifth assignments of error, petitioner challenges
10 the city's findings regarding NDC 151.196(A), (D), (F), (G) and (H).

11 **A. NDC 151.196(A), (D), and (F)**

12 NDC 151.196(A), (D) and (F) are set out below:

13 “(A) *Building Entrances.* Each building on a lot shall have a primary
14 pedestrian entrance oriented to the primary street. ‘Oriented to a street’
15 means that the building entrance faces the street or is connected to the
16 street by a direct and convenient pathway not exceeding 60 feet in
17 length. ‘Primary street’ means the street which has the highest
18 estimated volume of pedestrian traffic. This requirement does not
19 apply to buildings that are located behind other buildings on the lot
20 such that 50% or more of their building frontage is blocked by the
21 front building, as measured by sight lines that are perpendicular to the
22 street right-of-way. Such rear buildings shall have a primary entrance
23 oriented to an internal sidewalk or pedestrian pathway system which is
24 internally connected and provides a connection to the primary street.

25 “ * * * * *

26 “(D) *Building mass.* Where building elevations [sic entrances] are oriented
27 to the street in conformance with (A) above, architectural features
28 such as windows, pedestrian entrances, building off-sets, projections,
29 detailing, change in materials or similar features, shall be used to
30 break up and articulate large building surfaces and volumes.

31 “ * * * * *

1 “(F) *Pedestrian-scale building entrances.* Recessed entries, canopies,
2 and/or similar features shall be used at the entries to buildings in order
3 to create a pedestrian-scale.”

4 In its third assignment of error, petitioner argues that the city’s findings that address NDC
5 151.196(A), (D) and (F) are inadequate and are not supported by substantial evidence in the
6 record.

7 **1. NDC 151.196(A) and (D)**

8 The city found that NDC 151.196(A) and (D) do not apply to the proposed fueling
9 station:

10 “The primary street in this case is Portland Road to the north. Portland Road
11 has extensive sidewalks and high pedestrian utilization and Springbrook does
12 not. The site of the kiosk and canopy will be obscured by the U.S. Bank such
13 that 50% or more of the building frontage is blocked by the front building. As
14 a result, this requirement does not apply. The kiosk will be connected to
15 internal pedestrian pathways that are connected to 99W.

16 “The fueling facility is an unusual addition in that it does not have a
17 pedestrian entrance. There is a pedestrian connection to the main store via
18 internal walkways to Springbrook Road and Portland Road. Almost all
19 customers to the fueling facility, however, will naturally be in vehicles. The
20 only pedestrians on the site will typically be the station attendants. The main
21 Fred Meyer building does have a main pedestrian entrance that faces Portland
22 Road.

23 “ * * * * *

24 “The building is not required to meet the building orientation rules of [NDC
25 151.196(A)] (see above). Therefore [NDC 151.196(D)] does not apply.
26 Nevertheless, the proposed building is a canopy and has very little mass. No
27 architectural detailing or off-sets are needed to break up the mass of the
28 building because there are no large building surfaces or volumes. The gas
29 station meets this criterion as proposed.” Record 53-54.

30 Petitioner argues that the city erred in determining that subsections (A) and (D) do not apply.
31 According to petitioner, nothing in the language of those provisions or elsewhere in the NDC
32 allows the city to waive those design standards. Petitioner also argues that the city’s
33 conclusion that the US Bank building obscures more than 50% of the frontage of the
34 proposed fueling station is not supported by the evidence in the record because the site plan

1 in the record does not contain a detailed, scaled rendering of the proposed fueling station in
2 relation to the US Bank structure.

3 Respondents respond that the city’s interpretation that NDC 151.196(A) and (D) does
4 not apply in the circumstance where a building does not have a “primary pedestrian
5 entrance” or any “large building surfaces” should be affirmed under ORS 197.829(1).
6 Respondents also respond that the site plan at Record 156-57 provides substantial evidence
7 to support the city’s conclusion that the US Bank building obscures more than 50% of the
8 frontage of the proposed fueling station.

9 We agree with respondents that the city’s interpretation of NDC 151.196(A) and (D)
10 as not applying in the particular circumstances present must be affirmed under ORS
11 197.829(1). Where the only building proposed as part of the development does not have any
12 pedestrian entrance at all or any large building volumes and will not serve pedestrians who
13 are using the larger shopping center, the city could plausibly interpret the provisions of NDC
14 151.196(A) and (D) as simply not applying. *Siporen*, 349 Or at 258.

15 2. NDC 151.196(F)

16 NDC 151.196(F) requires that “[r]ecessed entries, canopies, and/or similar features
17 shall be used at the entries to buildings in order to create a pedestrian-scale.” The city found
18 that NDC 151.196(F) was satisfied:

19 “The canopy does not have a pedestrian entrance, and the kiosk and is not
20 open to the public. The kiosk building, although not open to the public, is of
21 pedestrian scale (at 96 square feet) and is served by a canopy. This standard
22 is met.” Record 54.

23 Petitioner argues that the city’s findings are inadequate to explain how NDC 151.196(F) is
24 satisfied because the findings do not identify design features that create a pedestrian scale.
25 Although the city’s findings could be clearer, we understand the city to have concluded that
26 NDC 151.196(F) is satisfied because the canopy covering the fueling station covers the
27 kiosk, and that the kiosk is of pedestrian scale (small) even though no pedestrians will use it.

1 Those findings are adequate to explain why the city concluded that NDC 151.196(F) is
2 satisfied.

3 The third assignment of error is denied.

4 **B. NDC 151.196(G)**

5 NDC 151.196(G) provides design standards for windows.⁸ The city determined that
6 NDC 151.196(G) does not apply to the proposed canopy because the canopy does not have
7 walls and therefore does not have windows.⁹ In its findings, the city determined that the
8 kiosk has windows, that it is an active space, and that an exception to any requirement for
9 windows for either the canopy or the kiosk was justified under conditional use permit
10 standards.

⁸ NDC 151.196(G) provides:

“Windows.

“(1) On commercial building facades facing a public street, windows shall comprise a minimum of 40% of the ground floor facade. For large scale buildings and developments meeting the standards under subsection (H) below, windows shall comprise a minimum of 20% of the ground floor façade.

“(2) For large scale buildings and developments meeting the standards under subsection (H) below, 50% of all required window area shall allow view into an active space. An active space is defined as any area within a building that is used for shopping, dining, office space, and so forth. Merchandise display windows with displays that change at least semi-annually shall be considered an active space. Examples of areas that are considered non-active spaces are storage and mechanical equipment areas, and windows that are obscured by shelving or material affixed to the window.”

⁹ The city found:

“The canopy does not have any walls and therefore does not have any windows. It is an active open work space. The cashier’s kiosk is a small building that is not open to the public. It does have windows, and its interior is an active space. The area under the canopy can also be considered an active space. The nature of the structure does not allow the canopy to meet this window standard, but it meets the intent of not allowing a large blank wall on a structure. If the structure was required to add walls and windows then it would be out of character with surrounding development, such as the drive-through canopy on the bank to the north. An exception to this standard is therefore justified under the conditional use permit. The fueling facility helps the main building come closer to meeting this standard by adding activity to a side of the building that is largely a blank wall.” Record 54.

1 Petitioner challenges the city’s interpretation that NDC 151.196(G) does not apply to
2 require that the canopy have windows. According to petitioner, the canopy falls within the
3 NDC definition of “building,” and nothing in the text of NDC 151.196(G) supports the city’s
4 conclusion that because a building without walls is proposed, it is exempt from the
5 requirements for windows. Petitioner also argues that the city was not justified in finding
6 that an exception under the conditional use permit standards was warranted.

7 Respondents respond that the city’s interpretation that NDC 151.196(G) does not
8 apply to require windows meeting the standard where the development that is proposed is a
9 canopy with a roof but no walls must be affirmed under ORS 197.829(1). Respondents also
10 argue that even if the city’s interpretation is not required to be affirmed under ORS
11 197.829(1), the city concluded in the alternative that an exception was justified with respect
12 to both the canopy and the kiosk under the conditional use standards, because imposing the
13 window requirement would result in construction that is out of character with surrounding
14 development.

15 We agree with respondents that the city’s interpretation of NDC 151.196(G) as not
16 applying in circumstances where a building with no walls is proposed is a plausible
17 interpretation of the NDC. Moreover, we agree with respondents that the city’s exception
18 with respect to the kiosk was justified, where the findings explain that requiring the kiosk to
19 meet the window requirement would result in construction that is out of character with at
20 least one surrounding building and the evidence in the record supports that finding.
21 Petitioner does not point to anything in the record that contradicts that conclusion.

22 The fourth assignment of error is denied.

23 **C. NDC 151.196(H)**

24 NDC 151.196(H) includes development standards specifically applicable to large-
25 scale development that largely mirror the standards in NDC 151.196(A), (D) and (F). In
26 general, NDC 151.196(H) requires large-scale development to incorporate some combination

1 of a number of design elements, such as awnings, contrasting building materials, or pitched
2 roofs, as well as variations in building elevation and/or landscaping along sides of
3 buildings.¹⁰

4 As explained above, NDC 151.196(H) allows an applicant to deviate from the
5 standards set forth in subsection (H) through the conditional use permit process. Under NDC
6 151.210(A), a conditional use permit can be granted if the following is satisfied:

7 “The location, size, design and operating characteristics of the proposed
8 development are such that it can be made reasonably compatible with and
9 have minimal impact on the livability or appropriate development of abutting
10 properties and the surrounding neighborhood, with consideration to be given
11 to harmony in scale, bulk, coverage and density; to the availability of public
12 facilities and utilities; to the generation of traffic and the capacity of
13 surrounding streets, and to any other relevant impact of the development.”

14 Intervenor submitted a conditional use application in order to deviate from the standards set
15 forth in NDC 151.196(H). The city concluded that the application satisfied NDC 151.210(A)
16 and adopted findings in support of its conclusion. Record 61-62.

17 In its fifth assignment of error, we understand petitioner to challenge the city’s
18 findings regarding NDC 151.210. According to petitioner, where an applicant requests to
19 deviate from NDC 151.196(H) through application of the conditional use permit standards,
20 the findings that address NDC 151.210(A) must still address in a detailed way the substance
21 of the provisions that are addressed by NDC 151.196(H).

22 We reject petitioner’s interpretation of NDC 151.196(H) and NDC 151.210(A).
23 NDC 151.196(H) provides a mechanism for an applicant to elect to satisfy conditional use
24 standards that are more general than the specific design requirements found in NDC
25 151.196(H). The availability to use that deviation mechanism would be meaningless if an
26 applicant was still required to demonstrate, and the city was still required to find, compliance

¹⁰ The text of NDC 151.196(H) is set out at Appendix 39-42 of the Petition for Review and is quite lengthy. Given our disposition of this assignment of error, it is unnecessary to set out the text of NDC 151.196(H).

1 with the specific design requirements set forth in NDC 151.196(H) from which a deviation is
2 sought.

3 The fifth assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 NDC 151.196(H)(9) provides that “[a]ny existing legal conforming site, [that]
6 through future development, exceeds the square footage threshold contained in [NDC]
7 151.196(H) shall follow the standards contained in NDC 151.140 NON-CONFORMING
8 USES AND BUILDINGS.” The existing site already exceeds the square footage thresholds
9 in NDC 151.196(H) because the total square footage of the current buildings on the site
10 exceeds 50,000 square feet. Thus, the city apparently determined that the application was
11 subject to the standards governing “Non-conforming Uses and Buildings” set forth in NDC
12 151.140 *et seq.*

13 NDC 151.144(A) provides in relevant part:

14 “[N]on-conforming buildings or structures with legal, conforming uses may
15 be altered or modified subject to any of the following requirements. * * *.

16 “(A) The addition or modification affects a part of the structure which will
17 meet the current setback, height, yard or similar regulations and the
18 addition or modification will not worsen the non-conforming status of
19 the building.

20 “(B) The addition or modification provides a logical expansion of the
21 building and is within the existing building setback lines where:

22 “(1) In the opinion of the Director, the expansion or modification
23 will not adversely affect neighboring properties;

24 “(2) Building Code requirements can be met;

25 “(3) The expansion or modification proposed is similar to other
26 non-conforming buildings or structures in the area; and

27 “(4) Reasonable provisions have been made to minimize the impact
28 of the non-conforming status of the building or structure.

29 “(C) A building or parking area that is non-conforming to the standards of
30 this code but otherwise conforms to the use provisions of the zoning

1 district, may be expanded, provided that the portion of the building or
2 parking area proposed for expansion complies with the provisions of
3 this code.”

4 The city interpreted the application as proposing an addition, albeit a non-adjointing addition,
5 to the existing Fred Meyer store, and found that the application satisfies NDC 151.144(A).¹¹

¹¹ The city found:

“The existing building and site development is non-conforming because it does not meet some of the standards for large scale retail buildings under NDC 151.196 * * * Some public comments have stated that the existing Fred Meyer store is a non-conforming **use** and therefore cannot be expanded and should have to be brought up to current code. The City Council does not interpret the proposed use to be expansion of a non-conforming **use**. The Development Code distinguishes between non-conforming **uses** and non-conforming **buildings, structures, and parking areas** with legally conforming uses, and has different requirements for the two situations. The existing Fred Meyer store is an allowed use in the C-2 zone. The proposed gas station is an allowed use in the C-2 zone. The city recently changed the large-scale retail design standards, and the existing store does not meet any of these design standards. That makes the existing development a non-conforming **building, structure or parking area** with a **legally conforming use**. This is treated differently from a non-conforming use in the Development Code.

“The application is to add additional structures and uses on the site. The City Council interprets the provisions of NDC 151.144 regulating non-conforming building or structures with legally conforming uses to apply to this application. Some public comments have argued that because the application does not physically enlarge the existing large retail building on the site, this section regulating modification of non-conforming buildings should not apply. The Council does not take such a strict view of this section. *The language of this section clearly shows that it applies to buildings **and** structures, parking areas, yards, and other site elements, and is not just limited to the enlargements to the existing building.* The application does affect compliance with some of the site design standards for the existing buildings, such as whether parking is in front of a building or whether a building is blocked by other buildings, thus the existing [buildings] are being ‘altered or modified.’ The Council interprets ‘addition’ to include addition of structures to the site, whether or not they are physically attached existing buildings. Thus the application is an addition that may be allowed if it meets the criteria under NDC 151.144.

“* * * Under NDC 151.144(A), additions may be allowed provided that they do not worsen the non-conforming status of the existing building, and the addition otherwise meets standards. The application for a new gas station has addressed the new code requirements, and under the process allowed in the code, applied for a conditional use permit because it has requested an exception to some standards. The gas station will not make the existing site more non-conforming, however, and will make the site come closer to meeting the maximum parking standard, will remove parking between the building and the street, will help hide the blank western wall of the main building, and will create a better landscape buffer along the western and southern edges of the site. The proposal therefore meets criterion [NDC] 151.144(A) for additions or modifications of non-conforming buildings with legally conforming uses.” Record 60 (bold in original, emphasis added.)

1 We understand petitioner to argue that the city’s interpretation is inconsistent with the text of
2 NDC 151.141(B), which provides in relevant part that “[a] non-conforming use of land shall
3 not be expanded or extended in any way either on the same or any adjoining land,” and with
4 the purpose of the NDC provisions governing non-conforming uses and buildings that is set
5 out at NDC 151.140.¹² According to petitioner, those provisions prohibit intervenor from
6 building additional structures on a property where the existing structures do not meet current
7 design standards.

8 Respondents respond, and we agree, that the city correctly interpreted NDC
9 151.141(B) as not applying in the present situation where the proposed *uses* on the site are
10 permitted but the current buildings on the property do not meet newly enacted design
11 standards. Respondents also respond that the city’s interpretation of NDC 151.144(A) as
12 allowing the proposed fueling station as a non-adjoining addition to the existing Fred Meyer
13 store on the site is not inconsistent with the purpose statement found at NDC 151.140 and
14 must be affirmed by LUBA under ORS 197.829(1). We agree with respondents. The
15 purpose statement specifically provides that one of the purposes of the provisions governing
16 non-conforming buildings is to permit non-conforming buildings and structures to exist with
17 additions and modifications where the additions and modifications are in conformance with
18 the provisions of the NDC. The city’s approval of the proposed fueling station under NDC
19 151.144(A) allows the non-conforming building on the site to continue in existence.

¹² NDC 151.140 provides in relevant part:

“(A) Within the zones established by this code, there exist lots, structures, and uses of land and structures which were lawful before this code was passed or amended, but which are now prohibited, regulated, or restricted under the terms of this code and amendments.

“(B) It is the intent of this code to permit these non-conformities until they are removed or abandoned, but not to encourage their survival. Such uses are declared by this code to be incompatible with permitted uses in the zones involved. It is further the intent of this code that non-conformities shall not be enlarged upon, significantly modified, expanded, or extended, except as provided for in this code.”

1 The sixth assignment of error is denied.

2 **SEVENTH ASSIGNMENT OF ERROR**

3 As explained above in our discussion of the fifth assignment of error, NDC 151.210

4 (A) provides that in order to approve a conditional use permit application, the city must find:

5 “The location, size, design and operating characteristics of the proposed
6 development are such that it can be made reasonably compatible with and
7 have minimal impact on the livability or appropriate development of abutting
8 properties and the surrounding neighborhood, with consideration to be given
9 to harmony in scale, bulk, coverage and density; to the availability of public
10 facilities and utilities; to the generation of traffic and the capacity of
11 surrounding streets, and to any other relevant impact of the development.”

12 The city concluded that, with conditions, the lights from the proposed fueling station will be
13 reasonably compatible with and have minimal impact on the drive-in theater located to the
14 west of the fueling station across Springbrook Road:

15 “The location of the facility raised concerns that it might increase the level of
16 ambient light that impacts the drive-in theater to the west. The development
17 will remove two tall parking lot lights and shield two building lights. The
18 canopy facility will only have recessed lights. The project will improve the
19 landscape buffer along the western edge of the site and add a sight obscuring
20 fence. As conditioned, the design will effectively mitigate the impact of light
21 from this development.” Record 61.

22 Petitioner first contends that the city misconstrued the standard by equating a
23 reduction in the current amount of ambient light generated from the entire property with the
24 requirement that the proposed development have a “minimal impact” on surrounding
25 properties. Petitioner also argues as it argued in its first assignment of error that the city’s
26 findings are inadequate because they are not supported by light studies, tests, or other
27 evidence, including a landscaping plan, that support the city’s conclusion that with
28 mitigation measures, the increase in lighting on the site will have minimal impacts on
29 surrounding uses. In addition, petitioner argues that there is no evidence in the record that

1 headlights from vehicles exiting the fueling station onto Springbrook Road will have only a
2 “minimal impact” on the drive-in theater.¹³

3 Respondents respond, and we agree, that the city’s findings are adequate to explain
4 why it found that because light impacts from the fueling station will be minimal and will be
5 further mitigated by landscaping and other conditions of approval, the proposed fueling
6 station is compatible with the drive-in theater. Further, we agree with respondents that the
7 city’s findings are supported by substantial evidence in the record. Intervenor submitted a
8 photometric plan showing the effects of lighting from the fueling station, and also agreed to
9 remove two existing lights in the parking lot and shield two additional lights in the existing
10 Fred Meyer Store. Record 178-79. The canopy lights will be recessed. Finally, condition 10
11 requires intervenor to add trees to the landscape buffer along the western property line and to
12 add a sight-obscuring fence. That evidence is evidence that a reasonable person could rely
13 on to determine that the proposed fueling station will have minimal impacts on the drive-in
14 theater.

15 The seventh assignment of error is denied.

16 **NINTH ASSIGNMENT OF ERROR**

17 ORS 227.178(1) sets forth what is commonly referred to as the “120-Day Rule,”
18 which requires cities to take final action on a permit application within 120 days after the
19 application is deemed complete. If the city does not take final action within 120 days, then
20 ORS 227.179(1) provides a remedy for applicants: the right to seek a writ of mandamus in
21 circuit court to compel the city to approve the permit application.

22 ORS 227.178(5) allows an applicant to extend the 120-day deadline for a final
23 decision on a permit application for a specified period of time for up to 245 days, and

¹³ The map at Record 499 indicates that the exit from the fueling station onto Springbrook Road is a right-out exit, and the location of the drive-in theater tends to indicate that headlights using that right-out exit would not be directed at the drive-in theater.

1 potentially gives the city up to one year to take final action. Only the applicant can seek to
2 extend the 120-day deadline, and such a request or requests must be made in writing.¹⁴ In
3 requesting such an extension or extensions, an applicant allows the city a specific period of
4 additional time to make a decision on a permit application, while retaining the right to seek a
5 writ of mandamus in circuit court under ORS 227.179(1) if an extension expires without final
6 action by the city. *See State ex rel West Main Townhomes, LLC v. City of Medford*, 233 Or
7 App 41, 44, 225 P3d 56 (2009) (applicant sought a writ of mandamus in circuit court to
8 compel the city to approve its application after two separate extensions of the 120-day
9 timeline expired without a preliminary verbal or final written decision by the city).

10 In the present case, intervenor did not seek a written extension from the city to allow
11 the city to issue the decision later than 120 days after the application became complete, under
12 ORS 227.178(5). Instead, the city found and the parties do not dispute that intervenor
13 informed the city, orally, that it “waived” the 120-day deadline. Although ORS 227.178
14 does not expressly provide for “waiver” of the 120-day deadline and the associated right to
15 seek mandamus, ORS 227.178(10) prohibits the city from *compelling* the applicant to waive
16 the 120-day deadline, which suggests that *voluntary* waiver of the deadline is a permissible
17 option. At intervenor’s request, and based on intervenor’s voluntary waiver of the 120-day
18 deadline, the city ultimately took more than 365 days after the application became complete
19 to issue its decision.

20 In its ninth assignment of error, petitioner argues that under ORS 227.178(5) the city
21 lost jurisdiction to take final action on the application when more than 365 days passed
22 between the date the application was deemed complete (January 9, 2009) and the date the

¹⁴ ORS 227.178(5) provides in relevant part:

“The 120-day period set forth in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions * * * may not exceed 245 days.”

1 city took final action on the application (September 23, 2010). According to petitioner, ORS
2 227.178(5) divests cities of jurisdiction to act on applications beyond the maximum time
3 period of 365 days set forth in that portion of ORS 227.178, and such applications essentially
4 become “void.”

5 ORS 227.178(5) does not say that an extension beyond 365 days divests the city of
6 jurisdiction over the application or “voids” the application, and in fact the relevant statutes
7 do not specify what consequences, if any, flow from a written extension of the 120-day
8 deadline beyond the period prescribed in ORS 227.178(5). ORS 227.178(4), which
9 petitioner cites, concerns a different situation, where the applicant fails to provide one of the
10 three permissible responses to the city’s request to provide missing information within 180
11 days of the date the application was submitted, in order for the 120-day deadline to
12 commence.

13 Respondents argue, essentially, that ORS 227.178(5) specifies no consequences for a
14 written extension of the 120-day deadline beyond the 365 days provided in ORS 227.178(5),
15 and in that circumstance the city retains full authority to issue its decision within the
16 extended deadline and, if the city exceeds the extended deadline, the applicant retains the
17 legal right to seek a mandamus remedy under ORS 227.179(1). We need not address that
18 issue, because the present case does not involve a written extension of the deadline for a
19 specified period of time beyond the 365th day. Instead, as explained above, intervenor
20 voluntarily and completely “waived” the 120-day deadline and the associated right to seek a
21 mandamus if the city exceeded that deadline.

22 The city’s findings conclude that intervenor *waived entirely* the provisions of ORS
23 227.178(1) that required the city to make a final decision within 120 days, and petitioner
24 does not challenge those findings. Record 40. We do not understand petitioner to dispute
25 that such a voluntary verbal waiver of the 120-day deadline occurred. As explained above,
26 an applicant is free to waive the 120-day deadline entirely and give up its mandamus

1 remedies under ORS 227.179(1) as a result, and no party disputes that that is what occurred.
2 Nothing in ORS 227.178(5) or anything else cited to us prohibits such voluntary waiver or
3 imposes any express limitation on the city’s ability to act and rely upon such a waiver.

4 We also understand petitioner to argue that the city misconstrued applicable law and
5 committed a procedural error that prejudiced petitioner’s substantial rights in taking final
6 action more than 365 days after January 9, 2009.¹⁵ Petition for Review 45. However,
7 petitioner’s argument that the city committed procedural error is premised on its contention
8 that ORS 227.178(5) divested the city of jurisdiction to make a final decision more than 365
9 days after the application was deemed complete. Because we reject that argument above,
10 petitioner’s argument that the city committed procedural error in making a final decision on
11 the application provides no basis for reversal or remand of the decision.

12 The ninth assignment of error is denied.

13 The city’s decision is affirmed.

¹⁵ ORS 197.835(9)(a)(B) provides that LUBA shall reverse or remand a decision where the local government “[f]ailed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner.”