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

LEAGUE OF WOMEN VOTERS OF CORVALLIS
and ELIZABETH FRENKEL,
Petitioners,

vs.

CITY OF CORVALLIS,
Respondent,

and

BRET FOX and THOMAS FOX
PROPERTIES, LLC,
Intervenors-Respondents.

LUBA No. 2011-002

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

Corinne C. Sherton, Salem, filed the petition for review and argued on behalf of petitioners. With her on the brief was Corinne C. Sherton PC.

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

Michael C. Robinson, Portland, filed a response brief and Seth J. King argued on behalf of intervenors-respondents. With him on the brief was Perkins Coie LLP.

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

REMANDED 06/28/2011

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a commercial planned development.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new matters raised in the city’s response brief. The reply brief is allowed.

FACTS

The subject property is comprised of three tax lots, 400, 500, and 600, that are zoned Mixed Use Community Shopping (MUCS). Tax lot 400 lies immediately to the north of tax lot 500 and to the east of tax lot 600. All of tax lot 400, and approximately the northern half of tax lots 500 and 600 are designated as a protected wetland, protected riparian corridor, and/or a protected floodplain on the city’s comprehensive plan maps. Dunawi Creek runs east to west along the northern part of tax lot 600 and along approximately the middle of tax lot 500.

Intervenor applied to develop approximately 179,319 square feet on the 6.64 acres comprising tax lots 500 and 600, including 43,000 square feet of retail and restaurant uses in seven buildings to be located on tax lot 500, and other transportation and stormwater infrastructure to be located on portions of tax lots 500 and 600. As part of the development intervenor also proposed to construct a 12-foot wide path within a 45-foot wide easement running east and west across tax lots 500 and 600, to the north of Dunawi Creek, within the protected wetland/riparian corridor/floodplain. The planning commission approved the applications, and petitioners appealed that decision to the city council. The city council approved the applications, and this appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 For nonresidential properties that are designated as protected wetlands, riparian
3 corridors, or floodplains, Corvallis Land Development Code (LDC) 4.11.50.02.b provides a
4 Minimum Assured Development Area (MADA) that is calculated by multiplying the acreage
5 of the site by the MADA per acre that is shown in LDC 4.11.50.02 Table 4.11-2 –
6 “Determining Minimum Assured Development Area (MADA) for Nonresidential Zones.”
7 Under LDC 4.11.50.02.b. and Table 4.11-2, the MADA for the site equaled 90,968 square
8 feet. In addition, LDC 4.11.50.02.c allows the MADA to be increased (MADA credits) in
9 certain circumstances beyond what is calculated according to LDC 4.11.50.02.b, including as
10 relevant here:

11 “c. **Additional Allowances for Determining the Minimum Assured**
12 **Development Area of Residential and Nonresidential Sites** - The
13 Minimum Assured Development Area calculated in Section
14 4.11.50.02.a and Section 4.11.50.02.b may be increased above the base
15 MADA by adding the areas determined by the provisions below:

16 “ * * * * *

17 “2. The area of Wetland mitigation that is required by the
18 Department of State Lands and/or the U.S. Army Corps of
19 Engineers when infrastructure must be extended through a
20 Wetland. The area credited shall be based upon the written
21 requirements of the associated permit approval of the
22 Department of State Lands and/or the U.S. Army Corps of
23 Engineers, whichever is greater;

24 “ * * * * *

25 “4. Trails required by the Corvallis Transportation Plan or the City
26 of Corvallis Park and Recreation Facilities Plan, or necessary
27 to provide public access to or through designated open space
28 areas.” (Bold in original.)

29 The city allowed MADA credits for the development so that the total of developable area
30 (MADA plus MADA credits) of the site equaled 180,728 square feet. The city adopted
31 findings that determined that the proposed path running from east to west along tax lots 500
32 and 600 was eligible for MADA credits totaling 24,776 square feet: 12,388 square feet for

1 the path itself, and 12,388 square feet for the area of wetland and riparian area mitigation that
2 the city concluded would be required to offset the effects of the path on the wetlands and
3 riparian areas.¹

4 In their first subassignment of error under the first assignment of error, petitioners
5 argue that the city’s findings are inadequate to explain why the city determined that the path
6 qualifies for MADA credit under LDC 4.11.50.02.c.4, *i.e.*, either that the path is “required
7 by” the city’s transportation plan or Park and Recreation Facilities Plan (PRFP), or that it is
8 “necessary to provide public access to or through designated open space areas.” In their
9 second subassignment of error, petitioners argue that the city’s findings are inadequate to
10 explain why the city awarded 12,388 square feet of MADA credit under LDC 4.11.50.02.c.2
11 for a mitigation area for constructing the path.

12 The city responds initially that petitioners failed to raise the issues presented in the
13 first assignment of error, and under ORS 197.763(1) and ORS 197.835(3) are precluded from
14 raising the issues for the first time at LUBA. In response to petitioners’ first assignment of
15 error, the city maintains that no participant below ever raised an issue regarding whether the
16 path met the requirements for an award of MADA credits under LDC 4.11.50.02.c.4 and .2.

¹ The city adopted the following findings:

“[A party] contended that the number and extent of MADA credits associated with the development was ‘especially troubling’ and not consistent with the intent of the LDC. The Council finds that [intervenor] presented substantial evidence in the Application that the Project qualified for MADA credits. The Council further finds that City staff properly applied the provisions of the LDC in calculating credits. * * *

“ * * * * *

“[A]s part of the complete land use applications filed, the applicant has provided calculations which indicate that the base MADA permitted in the underlying * * * zone, as well as the additional MADA credits warranted under LDC 4.11.50.02.c, contribute to a total MADA allowance of 180,728 square feet, and that the proposed development plan impacts approximately 179,319 square feet of the development site. The Council finds that the proposed development area falls within the MADA allowance for the site.” Record 80-81, 84.

1 In their reply brief, petitioners respond that the issue of compliance with LDC
2 4.11.50.02.c.4 and .2 was raised at Record 270, where a participant stated that MADA credits
3 should not be awarded for the path under “LDC 4.11.50.02.c.” In *Lucier v. City of Medford*,
4 26 Or LUBA 213, 216 (1993), we held that in order to challenge the adequacy of adopted
5 findings, a petitioner must challenge the proposal’s compliance with a relevant criterion
6 during the local proceedings. We explained:

7 “The references in ORS 197.763(1) and 197.835[3] to ‘issues’ are references
8 to issues concerning the substantive and procedural requirements that must be
9 satisfied in rendering the challenged decision. Therefore, if a petitioner wishes
10 to argue that a particular approval criterion or procedural requirement is not
11 satisfied by a proposed land use action, the petitioner must raise the ‘issue’ of
12 compliance with that criterion below. However, contrary to respondent’s
13 suggestion, a petitioner is *not* required to anticipate the actual findings a local
14 government ultimately adopts in support of its final decision or question the
15 adequacy of the evidence accepted into the record to support such findings.

16 “In order to preserve the right to challenge at LUBA the adequacy of the
17 adopted findings to address a relevant criterion or the evidentiary support for
18 such findings, a petitioner must challenge the proposal’s compliance with that
19 criterion during the local proceedings. Once that is done, the petitioner may
20 challenge the adequacy of the findings and the supporting evidence to
21 demonstrate the proposal complies with the criterion. The particular findings
22 ultimately adopted or evidence ultimately relied on by the decision maker
23 need not be anticipated and specifically challenged during the local
24 proceedings.” (Emphasis in original.)

25 We agree with petitioners that the issue of whether the path qualifies for an award of MADA
26 credits under LDC 4.11.02.50.c.4 and .2 was raised at Record 270 with sufficient specificity
27 to allow petitioners to argue that the city’s findings regarding the proposal’s compliance with
28 LDC 4.11.50.02.c.4 and .2 are inadequate. *See also Columbia Riverkeeper v. Clatsop County*,
29 58 Or LUBA 190, 213 (2009) (where issues regarding compliance with approval criteria
30 were raised below, petitioners may challenge the adequacy of findings adopted regarding
31 those approval criteria).

32 The city and intervenor next respond by pointing to findings that the city adopted that
33 the path should be allowed to be developed in riparian and wetland areas under LDC

1 4.13.50.b.2 and LDC 4.13.80.01.c.2, and in order to comply with LDC block perimeter and
2 pedestrian connection standards, and argues that those findings suffice to explain the path
3 qualifies for MADA credits under LDC 4.11.50.02.c.4. Record 72-73. However, LDC
4 4.11.50.02.c.4 requires the city to address whether MADA credits for the path and for
5 mitigation for the path are justified because the path is “required by” the city’s PRFP or
6 transportation plan or “necessary to provide public access to or through dedicated open
7 space,” and LDC 4.11.50.02.c.2 requires the city to address whether MADA credits for
8 mitigation for allowing the path are justified because the mitigation area is required by the
9 Department of State Lands (DSL) or Army Corps of Engineers (ACOE). Those criteria
10 involve different considerations than the considerations that are required in order for the city
11 to determine whether the path should be allowed in a riparian and wetland area under LDC
12 4.13.50.b.2 and LDC 4.13.80.01.c.2, criteria which we discuss below in our resolution of the
13 second assignment of error. The findings at Record 72-73 do not contain any adequate
14 explanation by the city for why the path qualifies for MADA credit under LDC 4.11.50.02.c.

15 The first assignment of error is sustained.

16 **SECOND ASSIGNMENT OF ERROR**

17 **A. Introduction**

18 As noted above, the path crosses both a wetland and a riparian corridor. LDC
19 Chapter 4.13 contains provisions that are intended to preserve and protect riparian corridors
20 and wetlands. LDC 4.13.10. To that end, LDC 4.13.50.b prohibits building, paving, and
21 grading in riparian corridors and riparian-related areas, except for certain specified purposes
22 and only if the building, paving or grading is designed and constructed to minimize adverse
23 impacts to the riparian area:

24 **“Building, Paving, and Grading Activities** - The placement of structures or
25 impervious surfaces, as well as grading, excavation, and the placement of fill,
26 are prohibited. Exceptions to the drainageway restrictions may be made for
27 the purposes identified in items 1-7 of this Section, provided they are

1 *designed and constructed to minimize adverse impacts to Riparian Corridors*
2 *and Riparian-related Areas.*

3 “ * * * * *

4 “2. The location and construction of streets, utilities, bridges, bicycle, and
5 pedestrian facilities within Highly Protected Riparian Corridors and
6 Riparian related Areas must be deemed *necessary to maintain a*
7 *functional system* by the City Engineer. This Code, City
8 Transportation and Utility Master Plans, and other adopted City plans
9 shall guide this determination. The design standards of Chapter 4.0 -
10 Improvements Required with Development shall be applied to
11 minimize the impact to the subject area[.]” (Bold in original, italics
12 added.)

13 A similar provision, LDC 4.13.80.01.c prohibits building, grading, and paving activities in
14 wetlands except for specified purposes and only if the building paving or grading is designed
15 and constructed to minimize adverse impacts to the wetlands:

16 “**Building, Paving, and Grading Activities** - Within LPW areas, the
17 placement of structures or impervious surfaces, as well as grading, excavation,
18 and the placement of fill, is prohibited, except as outlined below. Exceptions
19 to the LPW restrictions may be made for the purposes identified in * * * ‘2,’
20 below, provided they are designed and constructed to minimize adverse
21 impacts to Wetland Functions.

22 “ * * * * *

23 “2. Activities outlined in sections 4.13.50.b.2, 4.13.50.b.5, and
24 4.13.50.b.6.” (Bold in original.)

25 **B. Minimize Adverse Impacts**

26 The decision approved construction of a “multi-use path” within the 45-foot wide
27 easement area shown on SP1.10, the plan sheet that was included in intervenor’s application,
28 which shows a 12-foot wide path that meanders its location within a 45-foot wide easement
29 that runs east to west across the property. Supplemental Record 1379.² The decision also
30 imposed a condition of approval, Condition 10, which in part requires the path to be

² The PRFP defines “multi-use path” as a “paved path entirely separated from the roadway and used by pedestrians, roller bladers, joggers and cyclists.” PRFP Glossary 2.

1 constructed in accordance with the city Parks and Recreation Facilities Plan (PRFP) Design
2 and Development Policies:

3 “With submittal of the construction cost estimate, the Applicant shall include
4 documentation of an approved fill permit, as required for wetland construction
5 and wetland mitigation by [DSL] and [ACOE], which documents final
6 acceptance by these agencies of the multi-use path construction and
7 alignment. * * *

8 “With submittal of the construction cost estimate, the applicant shall include
9 construction details for the multi-use path that comply with Parks Department
10 trail construction guidelines and DSL requirements, and includes the bench, as
11 identified on Sheet SP1.4, if permitted by DSL. Path construction shall
12 generally follow the ‘Design and Development Policies’ of the adopted
13 [PRFP] (Page 5-2), and final path alignment shall occur so as to minimize
14 removal of significant riparian area and to minimize impacts to the properly
15 functioning condition of the riparian corridor/drainageway. * * *” Record 15.

16 In the first subassignment of error and in a portion of their second subassignment of
17 error, we understand petitioners to argue that the city erred in approving the path to be
18 located in riparian and wetland areas because there is not substantial evidence in the record
19 to support a determination that the path will be “designed and constructed to minimize
20 adverse impacts” to the riparian areas and wetlands. According to petitioners, the city could
21 not determine that adverse impacts are minimized without knowing what the use of the path
22 will be, its exact location, and its exact design, and according to petitioners those features are
23 not known. In support of their argument, petitioners point out that the development plan that
24 was approved by the final decision contains a notation that the “Exact Path Location TBD.”
25 Supplemental Record 1365. Petitioners also point to findings adopted by the city that
26 specifically conclude that the city’s decision to approve the proposed planned development
27 that includes the path does not approve the precise design and construction materials for the
28 path. Record 74. Petitioners also argue that in imposing Condition 10, the city improperly
29 deferred finding compliance with LDC 4.13.50.b and 4.13.80.01.c to a later proceeding that
30 does not require notice and an opportunity for hearing.

1 Respondents respond, and we agree, that there is substantial evidence in the record to
2 support the city’s conclusion that as conditioned the path will minimize adverse impacts to
3 the riparian areas and wetlands under LDC 4.13.50.b and 4.13.80.1.c. First, the city
4 approved a planned development that proposes locating a “multi-use path,” a term that is
5 defined in the PRFP, within the 45-foot wide easement area shown at Supplemental Record
6 1379, and required that path to be designed and constructed in conformance with the PRFP
7 design guidelines for multi-use paths. Although petitioners quote some of the guidelines and
8 policies, petitioners do not explain why a multi-use path located within the easement area
9 that is designed and constructed in accordance with those policies will have more than a
10 minimal adverse impact on the protected areas.

11 We also agree with respondents that in imposing condition 10 the city did not defer
12 making a determination of compliance with LDC 4.13.50.b and 4.13.80.1.c to a future
13 proceeding. Rather, in imposing condition 10, the city approved the path in a location within
14 the 45-foot easement area, but allowed intervenor the flexibility to construct the path in the
15 location within that easement area that minimizes adverse impacts to the protected area.

16 **C. Necessary To Maintain a Functional System**

17 **1. Motion to Strike/Motion to Take Official Notice**

18 As explained above, one of the exceptions to the prohibition on development in
19 riparian and wetlands areas is for “[t]he location and construction of * * * bicycle, and
20 pedestrian facilities within Highly Protected Riparian Corridors and Riparian-related Areas”
21 that are “deemed necessary to maintain a functional system by the City Engineer.” LDC
22 4.13.50.1.b.2. The city adopted findings that the path is “necessary to maintain a functional
23 system:”

24 “[League of Women Voters of Corvallis] LWVC conceded that both the
25 City’s Trails Master Plan and [PRFP] depict a trail in this general location;
26 however, LWVC contends that this trail is conceptual only and was adopted
27 prior to adoption of the [Natural Features Inventory] NFI. As such, LWVC
28 contends that the trail designation did not take into account the wetlands

1 identified on the Property in the NFI. City staff responded by testifying that
2 another adopted plan, the West Corvallis/North Philomath Plan ('WCNPP')
3 identifies the Trail location inside of the natural features, thus showing a clear
4 intent to route the Trail there notwithstanding the existence of the resources.
5 Further City staff cited to specific WCNPP policies that support the Trail
6 location in stream corridors as follows:

7 "OS-I-1:

8 "Work with private landowners to obtain dedications of open space lands for
9 trails and preservation of natural systems.

10 "OS-I-7

11 "Where feasible, incorporate trails as part of stream corridors *as identified on*
12 *the Circulation Plan, Figure VI-1.*

13 "OS-I-9

14 "Locate Trails at the edge of riparian buffer zones to minimize impacts on the
15 natural functioning of the stream corridor and to preserve stream capacity.

16 "The Council concurs with the LWVC that standing alone, the conceptual
17 trails depicted in the Trails Master Plan and the [PRFP] may not justify this
18 location for the trail. However, the Council finds that there is additional
19 substantial evidence in the record that supports the proposed Trail location as
20 set forth in the WCNPP.

21 "The Council concurs with City staff findings that the Trail is 'necessary' in
22 this location to 'maintain a functional trail system' as depicted in the adopted
23 WCNPP and as further conceptually depicted in the Trails Master Plan and
24 the [PRFP]. The Council further finds that each of the cited plans was
25 approved by the Council through a public process." Record 72-73 (Emphasis
26 added.)

27 Petitioners attach to the petition for review a copy of Figure VI-1 from the
28 Circulation Plan that is part of the West Corvallis/North Philomath Plan (WCNPP) and that
29 is referenced in the findings quoted above. Petition for Review App. 90. Figure VI-1 is not
30 part of the record. In its response brief, intervenor moves to strike App. 90 and the portions
31 of the petition for review at pages 16-17 that discuss Figure VI-1 and other provisions of the
32 WCNPP that are not a part of the record. After the response brief was filed, petitioners filed
33 a motion for LUBA to take official notice under Oregon Evidence Code (OEC) 202(7) of

1 excerpts from the WCNPP that are attached to petitioners’ motion, including Figure VI.³
2 Intervenor objects to the motion to take official notice to the extent that petitioners
3 improperly seek to use the attached excerpted provisions of the WCNPP to provide evidence
4 that rebuts the city engineer’s conclusion that the path is “necessary to maintain a functional
5 system” under LDC 4.13.50.b.2.⁴

6 Petitioners respond, and we agree, that the WCNPP is a part of the Corvallis
7 Comprehensive Plan (CCP) and under OEC 202(7) is subject to official notice. We disagree
8 with intervenor that petitioners seek to use Figure VI-1 to provide evidence to rebut the city’s
9 determination about the necessity of the path to maintain a functional system. As discussed
10 below, petitioners’ argument based on Figure VI-1 is essentially a legal argument: in
11 determining whether a path must be located in a riparian corridor in order to maintain a
12 functional trail system, as “guided by” city plans presumably including the WCNPP, what
13 legal significance should be attached to the fact that the relevant plans depict a path in the
14 riparian corridor but describe the depicted path or its location as “conceptual.” The answer
15 to that question depends on the city’s interpretation of various provisions of the LDC and the
16 CCP, including the WCNPP. The WCNPP has been adopted as part of the CCP and we may
17 take official notice of it. Accordingly, petitioners’ motion to take official notice is granted
18 and intervenor’s motion to strike portions of the petition for review is denied.

³ OEC 202(7) provides that LUBA may take official notice of “[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state[.]”

⁴ LUBA’s review is limited by ORS 197.835(2)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.835(2)(b). Thus LUBA may not take official notice of facts within documents that are subject to official notice under OEC 202, if notice of those facts is requested for an adjudicative purpose (i.e., to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion that is at issue in the challenged decision). *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100, 103-04 (2005); *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007).

1 **2. Necessary to Maintain a Functional System**

2 As explained above, the city found that the exception to the general prohibition on
3 development in protected areas was allowed because the path is “necessary to maintain a
4 functional system” under LDC4.13.50.b.2 and LDC 4.13.80.01.c.2. In a portion of their
5 second subassignment of error, we understand petitioners to argue that the city misconstrued
6 applicable law in relying on portions of the WCNPP to conclude that the path is “necessary
7 to maintain a functional system.”⁵ According to petitioners, Figure VI from the circulation
8 plan that is a part of Chapter 6 of the WCNPP states that the trail locations are “conceptual
9 and may vary as more detailed plans are drafted,” suggesting that it may not be necessary to
10 locate the trail within the riparian area at all, and therefore it was error for the city to rely in
11 part on those conceptual trail locations to conclude that locating the path in the riparian area
12 is “necessary to maintain a functional system[.]”

13 Intervenor responds that the city’s interpretation of its land use regulations, including
14 LDC 4.13.50.b.2 and the WCNPP is required to be affirmed under ORS 197.829(1) because
15 the city’s interpretation of the relevant provisions is plausible. *Siporen v. City of Medford*,
16 349 Or 247, 259, 243 P3d 776 (2010). It is not entirely clear to us what the city council
17 understood the label “conceptual” to mean, but it apparently disagreed with petitioners that
18 the “conceptual” label means that the plan maps have no bearing on whether the plan
19 anticipates that the path will be located in the riparian area in order to provide a functional
20 trail system. The city clearly believes that plan maps depicting a path within the area of a
21 riparian corridor support a conclusion that a path must be located somewhere in the corridor
22 in order to provide a functional trail system. We cannot say that view is implausible or
23 inconsistent with any relevant plan or code text. The label “conceptual” could plausibly

⁵ The WCNPP has been adopted as a part of the city’s comprehensive plan.

1 mean that the exact location *within* the riparian corridor has yet to be determined, not that the
2 plans are indifferent as to whether the path is located inside or outside the riparian corridor.

3 **D. Development Associated with MADA**

4 LDC 4.13.50.b.6 provides that one of the seven enumerated purposes that the city
5 may rely on to allow development in a protected area is for “[d]evelopment associated with
6 [MADA] that would be allowed in accordance with [LDC Chapter 4.11] * * *.” In a
7 subassignment of error petitioners argue that the city erred in approving MADA credits for
8 the path and for that reason, LDC 4.13.50.b.6 cannot provide a basis for allowing
9 development in protected areas.

10 It is unclear from the city’s decision whether the city relied on LDC 4.13.50.b.6 to
11 allow development in the protected areas, but one of the incorporated findings at Record 756
12 suggest that the city relied at least in part on that subsection. If that is the case, then we
13 agree with petitioners that without findings justifying the award of MADA credit under LDC
14 4.11.50.02(c), the city may not rely on LDC 4.13.80.02.b.6 to allow development in the
15 protected areas.

16 The second assignment of error is sustained, in part.

17 **THIRD ASSIGNMENT OF ERROR**

18 LDC 4.13.80.01.e provides:

19 **“Department of State Lands and US Army Corps of Engineers**
20 **Notification Required** - In addition to the restrictions and requirements of
21 this Section, all proposed development activities within any Wetland are also
22 subject to Oregon Department of State Lands (DSL) and US Army Corps of
23 Engineers standards and approval. Where there is a difference, the more
24 restrictive regulation shall apply. In accordance with ORS 227.350, as
25 amended, the applicant shall be responsible for notifying DSL and the Corps
26 of Engineers whenever any portion of any Wetland is proposed for
27 development.

28 “No application for development will be accepted as complete until
29 documentation of such notification is provided. Additionally, no site
30 development permits, such as Grading and Excavation Permits, Public
31 Improvements by Private Contract Permits (PIPC), and Building Permits,

1 shall be issued until the City has received verification of DSL and Corps of
2 Engineers approval for development on the subject site.” (Bold in original).

3 In their third assignment of error, petitioners point to the current DSL fill and removal permit
4 for tax lot 500, which contains the following condition (condition 8):

5 “**Deed Restriction Recording.** Before disturbance of any wetland areas,
6 deed restrictions, for the avoided wetlands on tax lot 400 in its entirety * * *
7 and the proposed avoided PFO wetlands on tax lot 500 (202,653 square feet)
8 as shown on Sheet 1 of 1 dated November 16, 2004 shall be recorded with the
9 County Assessor’s office.” Record 350-51 (bold in original.)

10 According to petitioners, LDC 4.13.80.01.e prohibits the city from approving MADA credits
11 for the path and prohibits the city from approving the path until condition 8 has been
12 satisfied.

13 Respondents respond, and we agree, that LDC 4.13.80.01.e merely requires
14 intervenor to notify DSL of the development application in order for the city to deem the
15 planned development application complete, but it does not prohibit the city from approving
16 the application for a planned development on tax lot 500 or the location of the path within
17 the wetlands prior to DSL approval of a new fill and removal permit that approves the path,
18 as long as that approval is conditioned on receiving DSL permits prior to the issuance of any
19 site development permits. Here, the city imposed a condition of approval requiring DSL
20 approval of development activities on tax lot 500 prior to the issuance of site development
21 permits.⁶ That condition prevents the city from issuing site development permits for the

⁶ Condition 4 provides in relevant part:

“Development of the proposed public multi-use path north of Dunawi Creek, the remainder of Phase I * * * and Phase 2 * * * is either not authorized under the scope of the active DSL fill permit or relies on MADA credits associated with DSL approved wetland mitigation that has not yet been authorized. No development permits shall be issued for work beyond the scope of the active DSL fill permit and/or after expiration of the active DSL fill permit, until supplemental documentation, as required in LDC 4.13.80.1.e has been provided to the City. Permits for development that is reliant on DSL-approved wetland mitigation associated with MADA credits under LDC 4.11.50.02.c.2 shall not be authorized until documentation of the approved mitigation has been provided to the City, consistent with LDC 4.11.50.02.c.2.” Record 13.

1 path until DSL has issued a new wetland fill and removal permit for the area of the path and
2 until DSL has approved the mitigation area, if any, that will be required for the path.
3 Petitioners do not challenge condition 4 or otherwise explain why condition 4 is inadequate
4 to ensure that no site development of the path will occur until DSL has approved the
5 development.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Intervenor proposes to locate above-ground stormwater detention facilities on a
9 portion of tax lot 600 that is currently within the 100-year floodplain, and on a portion of tax
10 lot 500 within the riparian easement area.⁷ Supplemental Record 1378.

11 **A. 10-Year Floodplain**

12 LDC 4.0.130.b.1 requires in relevant part that stormwater “[d]etention or retention
13 facilities shall be located outside the 10-year Floodplain or the riparian easement area,
14 whichever is greater.” In their fourth assignment of error, petitioners argue that the city’s
15 findings fail to address petitioners’ argument below that the 10-year floodplain has not been
16 mapped, and without that mapping, the city could not determine whether the facilities will be
17 located outside of the 10-year floodplain boundary.

18 Respondents point to the city’s findings that “[t]he Application includes substantial
19 evidence explaining how the proposed stormwater facilities are consistent with applicable
20 provisions of the LDC, including LDC 4.0.130.” Record 75. Respondents explain that the
21 application includes an illustration showing that after development, the stormwater detention
22 facility on tax lot 600 will be located outside the boundaries of the 100-year floodplain, and
23 explain that the 100-year floodplain includes the 10-year floodplain. Supplemental Record

⁷ LDC 4.13.70.02.d.2 Table 4.13-2 provides that the riparian easement area is 50 feet from the top of the bank of Dunawi Creek.

1 1378.⁸ We agree with respondents that the city’s findings are adequate to explain why the
2 city concluded that the stormwater facilities comply with LDC 4.0.130 and that the evidence
3 in the record supports that conclusion. Supplemental Record 1378 shows that the storm
4 water facility to be located on tax lot 600 is entirely outside of the post-development 100-
5 year floodplain, and is therefore necessarily outside of the 10-year floodplain.⁹

6 **B. Riparian Easement Area Encroachment**

7 LDC 4.13.70.02.d.2 Table 4.13-2 provides that the riparian easement area is 50 feet
8 from the top of the bank of Dunawi Creek. LDC 4.13.70.02.d.4 provides:

9 “If, through the provisions of Chapter 4.11 - Minimum Assured Development
10 Area (MADA), it is determined that encroachment into a Riparian Corridor
11 area is necessary to allow for utilization of the Minimum Assured
12 Development Area, any associated easement requirement shall be relaxed to
13 the extent necessary to allow for the minimum necessary encroachment into
14 the resource area.”

15 Thus LDC 4.13.70.02.d.4 allows encroachment of development into the 50-foot riparian
16 easement area in order for development to meet allowed MADA.

17 Some of the incorporated findings suggest that the city may have allowed
18 development of the stormwater detention facility within the riparian easement area on tax lot
19 500 under LDC 4.13.70.02.d.4. Record 680. In a portion of their fourth assignment of error,
20 we understand petitioners to contend that if their first assignment of error is sustained, the
21 city also erred in relying on LDC 4.13.70.02.d.4 to allow development within the riparian
22 easement area where the total MADA has not yet been determined. We agree with
23 petitioners that without knowing the MADA for the development, the city could not

⁸ According to the plan at Supplemental Record 1378, the detention pond on tax lot 600 will be located outside of the *post-development* 100-year floodplain, which is north of the pre-development 100-year floodplain due to construction of a new culvert.

⁹ As the city explains “[a] 100-year Flood Plain indicates the maximum level of flooding expected to occur every hundred years; in other words, there is a 1% chance of maximum level flooding each year. In a 10-year Flood Plain there is a 10% chance every year of maximum level flooding.” Response Brief of City 28, n 9.

1 determine under LDC 4.13.70.02.d.2 whether “encroachment into a Riparian Corridor area is
2 necessary to allow for utilization of” MADA.

3 The fourth assignment of error is sustained, in part.

4 The city’s decision is remanded.