

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 WILLAMETTE OAKS LLC,
5 *Petitioner,*
6

7 vs.
8

9 CITY OF EUGENE,
10 *Respondent,*
11

12 and
13

14 GOODPASTURE PARTNERS LLC,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2011-027
18

19 FINAL OPINION
20 AND ORDER
21

22 Appeal from City of Eugene.
23

24 Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock PC.
26

27 No appearance by the City of Eugene.
28

29 Michael C. Robinson, Portland, filed the response brief and
30 Seth King argued on behalf of intervenor-respondent. With him on the brief was Seth King
31 and Perkins Coie LLP.
32

33 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
34 participated in the decision.
35

36 REMANDED 08/09/2011
37

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

NATURE OF THE DECISION

Willamette Oaks, LLC (Willamette) appeals a decision by a hearings officer approving three applications that were submitted by Goodpasture Partners, LLC (Goodpasture) for (1) modification of a previously approved tentative planned unit development, (2) final planned unit development approval, and (3) tentative subdivision approval.

REPLY BRIEF

Willamette moves for permission to submit a reply brief. There is no opposition to the reply brief and it is allowed.

FACTS

A. Background

In Willamette Oaks, LLC v. City of Eugene, __ OR LUBA __ (LUBA Nos. 2010-060/061/062, March 8, 2011) (*Willamette Oaks I*), we remanded the city’s June, 2010 decision approving (1) a zone change for the subject property from Medium Density Residential (R-2) to Limited High Density Residential (R-3) and (2) tentative planned unit development (Tentative PUD) approval to create a 5-parcel mixed use development. LUBA’s decision in *Willamette Oaks I* was appealed to the Court of Appeals, and review is pending as of the date of this decision. *CA A148149*.

B. The Challenged Decision

In July, 2010, after the city’s decision approving the Tentative PUD was appealed to LUBA, Goodpasture applied for: (1) modification of the Tentative PUD, (2) final planned unit development (Final PUD) approval, and (3) tentative subdivision approval. In the modification application, Goodpasture proposed to modify the approved TPUD so that the building on Parcel 4 would contain 89 assisted living and memory care units and 22 age-restricted apartments, rather than a 125-unit age-restricted apartment unit as previously

1 approved in the June, 2010 decision that was appealed in *Willamette Oaks I*. The modified
2 proposal also changed the location of the main entrance of the building on Parcel 4 to a
3 second floor entrance, reconfigured the location and number of parking spaces, added a
4 retaining wall, and eliminated a bicycle parking structure on Parcel 4.

5 The planning director approved all three applications, and Willamette appealed the
6 decision to the hearings officer. On February 24, 2011, the hearings officer issued a decision
7 approving all three applications. This appeal followed.

8 Before turning to the parties' arguments, we note that in *Standard Insurance Co. v.*
9 *Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d
10 1315 (1989), LUBA held that the county in that appeal did not have jurisdiction to take
11 further action concerning a land use decision while an appeal of a LUBA decision that
12 remanded that land use decision remained pending at the Court of Appeals. No party argues
13 that the city may have lacked jurisdiction to adopt any part of the decision that is before us in
14 this appeal under the holding in *Standard*, since Willamette's appeal of the city's June 2010
15 decision that rezoned and granted Tentative PUD approval remains pending before the Court
16 of Appeals. Because no party raises that issue, we do not consider the issue.

17 **TENTATIVE PLANNED UNIT DEVELOPMENT MODIFICATION APPLICATION**
18 **(FIRST ASSIGNMENT OF ERROR)**

19 **A. Applicable Criteria and Decision**

20 Eugene Code (EC) 9.8335 provides the criteria for modification of an approved
21 TPUD:

22 "Modifications to Approved Tentative Planned Unit Development. The
23 applicant may apply for a modification of the approved PUD tentative plan
24 following the Type II process. The planning director shall approve the request
25 only if it complies with the following criteria:

26 "(1) The proposed modification is consistent with the conditions of the
27 original approval.

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

4 “If the planning director determines that the proposed modification is not
5 consistent with the above criteria, the proposed modification may not occur.
6 Nothing in this section shall preclude the applicant from initially submitting
7 the requested modification as a new tentative PUD application.” (underlining
8 in original).

9 The city’s decision considered and approved all three applications together and incorporated
10 findings from various parts of the decision into other parts of the decision, and for that reason
11 the city’s decision on the proposed Tentative PUD modification is somewhat difficult to
12 follow. The planning director found that EC 9.8335(1) was met by relying on the findings
13 and conclusions in support of the concurrent decision approving the Final PUD:

14 “The concurrent final PUD (PDF 10-3) which is evaluated below addresses
15 each of the [29 conditions of the original approval.] In this concurrent final
16 PUD application it is found that as modified the proposal either; 1) Meets the
17 conditions of approval; 2) The conditions will be met at a future time by
18 including the condition in the performance agreement; or 3) A new condition
19 has been established to ensure consistency with the condition of the original
20 approval. As such, the findings, evaluation and conditions of approval found
21 in the Final PUD Evaluation are included here by reference, ensuring
22 compliance with this criterion.

23 “* * * Revised conditions of approval in regards to conditions of approval 25
24 and 18 are included in the concurrent Final PUD, incorporated here by
25 reference.” Record 973-74.

26 The hearings officer quoted the above findings in his decision, found that Willamette’s
27 arguments regarding why the proposed modifications are inconsistent with the original
28 conditions of approval were “too vague” for the hearings officer to respond, and denied
29 Willamette’s appeal on that issue.¹ Record 11-12. In so finding, we understand the hearings

¹ After quoting the planning director’s finding, the hearings officer found:

“This appeal issue does not state with any particularity how the modification is inconsistent with the conditions of the original approval. The reference in the appeal to ‘as is set forth below’ is insufficient for the hearings official to determine what aspects of the proposed

1 officer to have agreed with the planning director’s finding that EC 9.8335(1) is met because
2 the modification is consistent with conditions of approval that the city imposed in approving
3 the Final PUD.

4 **B. EC 9.8335(1)**

5 **1. General Challenge to the City’s Modification Decision**

6 In the first subassignment of error under the first assignment of error, Willamette
7 argues that the city misconstrued EC 9.8335(1) by evaluating whether the modifications to
8 the Tentative PUD were consistent with conditions of approval that were imposed in the
9 portion of the decision approving Goodpasture’s Final PUD application.² According to
10 Willamette, EC 9.8335(1) requires the city to determine whether the proposed modifications
11 to the approved Tentative PUD are consistent with the conditions of the *original* Tentative
12 PUD approval, and nothing in EC 9.8335(1) supports the city’s reliance on conditions
13 imposed in the city’ Final PUD approval, or allows the city to modify original conditions of
14 approval in evaluating a proposal to modify a previously approved Tentative PUD.

15 We review the hearings officer’s decision to determine whether it correctly interprets
16 and applies the applicable law. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323
17 (1988). Although it is not entirely clear, the planning director’s finding quoted above
18 appears to evaluate whether the proposed Tentative PUD modification is consistent with the
19 Final PUD approval conditions that are discussed and imposed later in the portion of the

modifications the appellants believe are not consistent with the original conditions. The appellant’s argument [December 15, 2010 letter from Willamette’s counsel] is also too vague for the hearing official to respond. The hearing official denies this appeal issue. Willamette Oaks does contest specific modifications in appeal issue 4, below. The hearing official addresses those specific claims in response to appeal issue 4.” Record 11.

² As we explain in more detail below, in the challenged decision the hearings officer (1) approved the concurrent Final PUD application and imposed conditions of approval and (2) relied on those Final PUD conditions of approval to find that the criteria applicable to the Tentative PUD modification set forth in EC 9.8335(1) were met. Some of the conditions of that Final PUD approval were modified versions of the conditions of the original Tentative PUD approval. Willamette assigns error to that aspect of the Final PUD approval in its second, third and fourth assignments of error, and we address those assignments of error below.

1 decision approving Goodpasture’s Final PUD application, and not with the “conditions of the
2 original approval.” *See* n 1. In so finding, we understand the planning director and the
3 hearings officer to have determined that EC 9.8335(1), which applies to Tentative PUD
4 modifications, is met because the city approved the *Final PUD* with, at least in some cases,
5 modified versions of the original conditions of approval, and that action resolved any
6 inconsistencies between the conditions of the original approval and the proposed
7 modifications under EC 9.8335(1). If that is what the hearings officer and the planning
8 director determined, then we agree with Willamette. There is simply nothing in EC
9 9.8335(1) that purports to give the planning director or the hearings officer the authority to
10 overlook inconsistency with any “conditions of the *original* approval,” or to modify those
11 original conditions of approval in evaluating the modification proposal for consistency with
12 the conditions of the original Tentative PUD approval under EC 9.8335(1). If EC 9.8335(1)
13 operated as the city apparently understands it to operate, there could never be a proposed
14 modification of an approved Tentative PUD that was inconsistent with the conditions of the
15 original approval, because any such inconsistency could simply be eliminated by modifying
16 or eliminating that original condition. Such a reading would render meaningless the
17 requirement in EC 9.8335(1) that the proposed Tentative PUD modification be “consistent
18 with the conditions of the original approval” in contravention of ORS 174.010 (in statutory
19 interpretation, the court is not to omit what has been inserted, and when possible should
20 adopt statutory construction that will give effect to all particulars of a statute).

21 **2. Conditions 18(b), (c), and (h)**

22 Willamette also argues that the Tentative PUD modification is not consistent with
23 original conditions 18(b), (c), and (h). Petition for Review 7, 14-15. Original condition 18
24 provided in relevant part:

25 “18. Prior to final PUD approval the applicant shall submit revised site
26 plans that:

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“b. Comply with EC 9.6730 Pedestrian Circulation On-Site in regards to building entrances and bicycle parking facilities located in the south portion of the site on parcel 4.

“c. Demonstrate that the bicycle parking structure on parcel 4 and building 7 on parcel 5 complies with the required five-foot interior yard setback.

“* * * * *

“h. Comply with EC 9.6105 on parcel 4 by providing detail[ed] dimensions on bicycle parking spaces, and by providing details of bicycle parking located within garages, lockable rooms, lockable bicycle parking enclosures, or bicycle lockers.” Record 1410-11.

Willamette argues that because the revised site plan that was submitted with the application for Final PUD approval eliminates the bicycle parking facilities on the south side of Parcel 4 that are the subject of Condition 18(b), (c) and (h), the modification is not consistent with those original conditions.

In the findings in support of the decision approving the Final PUD, which are incorporated by reference into the portion of the decision approving the Tentative PUD modification, the city found with respect to condition 18(b), (c) and (h):

“[T]he applicant has complied with the revisions required by Condition 18 *unless otherwise noted below.*

“Testimony provided by [Willamette] asserts that the applicant does not provide compliance with subsection (b) and (c) above in regards to bicycle parking and pedestrian circulation. *The applicant has modified the tentative PUD the proposal now complies with the standards and the revisions are not required.*

“* * * * *

“The hearing official concurs with the planning director’s findings conclusions and recommended conditions of approval relating to condition of approval 18(b), (c), (g), (h) * * *. The hearings official denies this appeal issue.” Record 31-32 (Emphases added.)

1 Goodpasture agrees that its modified proposal that eliminates the bicycle parking
2 facility on Parcel 4 is not consistent with original conditions of approval 18(b), (c) and (h),
3 but Goodpasture explains that the original Tentative PUD decision also approved an
4 adjustment to develop the bicycle parking on Parcel 4 farther from the building entrance than
5 EC 9.6105(3) allowed. According to Goodpasture, all bicycle parking on Parcel 4 is now
6 proposed to be developed to comply with EC 9.6105(2) and (3), such that elimination of the
7 bicycle parking facilities on Parcel 4 that were also the subject of the adjustment obviated the
8 need for original conditions 18(b), (c) and (h).

9 EC 9.6105(2) sets out bicycle parking space standards.³ EC 9.6105(3) sets out
10 bicycle parking location and security standards.⁴ As we understand the original June, 2010

³ EC 9.6105(2) provides, in relevant part:

“Bicycle Parking Space Standards.

- “(a) A minimum of 4 bicycle parking spaces shall be provided at each development site.
- “(b) A bicycle parking space required by this land use code shall be at least 6 feet long and 2 feet wide with an overhead clearance of at least 7 feet, and with a 5 foot access aisle. This minimum required width for a bicycle parking space may be reduced to 18" if designed using a hoop rack according to Figure 9.6105(2) Bicycle Parking Standards. Bicycles may be tipped vertically for storage, but not hung above the floor. Bicycle parking shall be provided at ground level unless an elevator is easily accessible to an approved bicycle storage area.
- “(c) All required long term bicycle parking spaces shall be sheltered from precipitation. Shelters for short term bicycle parking shall be provided in the amounts shown in Table 9.6105(2)(c) Required Sheltered Bicycle Parking Spaces.
- “* * * * *
- “(d) Direct access from the bicycle parking area to the public right-of-way shall be provided with access ramps, if necessary, and pedestrian access from the bicycle parking area to the building entrance.” (Bold and underlining in original.)

⁴ EC 9.6105(3) provides:

“Bicycle Parking Location and Security.

- “(a) Long term bicycle parking required in association with a commercial, industrial, or institutional use shall be provided in a well-lighted, secure location within a

1 decision approving the Tentative PUD, the city found that the proposal for Parcel 4 failed to
2 comply with EC 9.6730(2), which requires pedestrian paths to bicycle parking facilities, as
3 well as with EC 9.6105(2) and (3), which require a specified number of bicycle parking
4 spaces with certain dimensions depending on the proposed use, and in the case of long term
5 bicycle parking, requires covered bicycle parking. Record 1386, 1393. As we understand
6 that decision, the city deferred finding compliance with those EC criteria to the final planned
7 development approval phase and imposed conditions 18(b), (c) and (h) to require
8 Goodpasture to demonstrate compliance with EC 9.6730(2) and EC 9.6105(2) and (3) on
9 parcel 4 “prior to final PUD approval.”⁵

convenient distance of a main entrance. A secure location is defined as one in which the bicycle parking is:

- “1. A bicycle locker,
- “2. A lockable bicycle enclosure,
- “3. Provided within a lockable room, or
- “4. Clearly visible from, and within 30 feet of the employee’s work station.

“Bicycle parking provided in outdoor locations shall not be farther than the closest automobile parking space (except disabled parking). Long term bicycle parking required in association with a multiple-family residential use shall be provided in a well-lighted, secure ground level location within a convenient distance of an entrance to the residential unit. A secure location is defined as one in which the bicycle parking is provided outside the residential unit within a garage, a lockable room, a lockable bicycle enclosure, or a bicycle locker.

“(b) Short term bicycle parking shall consist of a securely fixed structure that supports the bicycle frame in a stable position without damage to wheels, frame, or components and that allows the frame and both wheels to be locked to the rack by the bicyclist's own locking device. The required spaces for each use category are listed in EC 9.6105(4) Minimum Required Bicycle Parking Spaces. Short term bicycle parking shall be provided within a convenient distance of, and clearly visible from the main entrance to the building as determined by the city, but it shall not be farther than the closest automobile parking space (except disabled parking).” (Bold in original.)

⁵ Goodpasture’s application explains:

“As part of the approved Tentative PUD application, several development standards were either modified through PUD proposed non-compliance or through an adjustment. The proposed modification is consistent with all of the development standards either directly

1 We do not know what the relationship between the adjustment that was approved
2 concurrently with the original TPUD and conditions 18(b), (c) and (h) is, and that
3 relationship is not apparent from the language of the conditions, the challenged decision, or
4 the parties' arguments. However, what is apparent is that the city understood the proposed
5 Tentative PUD to include the "bicycle parking facilities" that are referenced in Condition
6 18(b) and (h), and to include the "bicycle parking structure" that is referenced in Condition
7 18(c). We agree with Willamette that the modification proposal that eliminates the bicycle
8 parking facilities on Parcel 4 in the location where they were originally proposed is not
9 consistent with conditions 18(b), (c) and (h) of the original approval. There is nothing in the
10 language of EC 9.8335(1) that allows the city to overlook inconsistency with the original
11 approved Tentative PUD conditions simply because the modification proposes to eliminate
12 the portion of the development that led to the conditions.

13 **3. Condition 18(g)**

14 Willamette also argues that the proposed modification of the Tentative PUD is
15 inconsistent with Condition 18(g). Condition 18(g) provided:

16 "18. Prior to final PUD approval the applicant shall submit revised site
17 plans that:

18 " * * * * *

complied with or which were approved via proposed non-compliance or adjustment *with the exception of one*. Through the Tentative PUD approval an adjustment was granted through the provisions of EC 9.6110 Adjustments to Bicycle Parking Standards to provide for bicycle parking spaces which were located further from the primary building entrance than required by the EC. The proposed modification which is the subject of this application has eliminated these bicycle parking stalls, as they are no longer required to comply with the EC, and therefore the previously approved adjustment is no longer applicable.

" * * * * *

"The modified site plan for Parcel 4 relocates Bike parking on the South side of the parcel. * * * 21 Stalls are in the lockable enclosure/shed at the north wing lower level and 6 are located on the south end lower level adjacent to the retaining wall. These 6 will be covered by a trellis which will provide protection from the elements. * * * [Condition 18(b)] is satisfied." Record 1077, 1087.

1 “g. Demonstrate bicycle parking spaces will be provided in accordance
2 [with] EC 9.6105 for parcel 1.” Record 29-30.

3 In the portion of the decision approving the Final PUD, the hearings officer found:

4 “In regards to condition of approval 18g. The final PUD plans do not show
5 compliance with EC 9.6105(3) Bicycle Parking Location and Security.
6 Specifically the plans appear to show that some bicycle parking spaces that
7 are further from the closest building entrances than the nearest non-disabled
8 automobile parking space. There should also be some short term bicycle
9 parking spaces placed near the east entrances to the commercial building on
10 Parcel 1. * * * The number of short term bicycle [parking] spaces exceeds the
11 total number of bicycle parking spaces required, but do not appear to provide
12 any of the required long term bicycle parking spaces that must meet EC
13 9.6105(3)(a) standards. To ensure compliance with this tentative PUD
14 requirement the following condition of approval is warranted:

15 “Prior to final PUD approval, the final plans shall be revised to show
16 compliance with EC 9.6105 Bicycle Parking Standards for Parcel 1.

17 “ * * * * *

18 “The hearing official concurs with the planning director’s findings
19 conclusions and recommended conditions of approval relating to condition of
20 approval 18(b), (c), (g), (h) * * *. The hearings official denies this appeal
21 issue.” Record 31-32. *See* n 4.

22 We disagree with Willamette. Condition 18(g) relates only to the bicycle parking on Parcel
23 1, and as far as we are aware there is nothing in the modification proposal that modifies
24 anything on Parcel 1. Thus Condition 18(g) is simply not implicated by the proposed
25 modifications.

26 The first subassignment of error under the first assignment of error is sustained, in
27 part.

28 **C. EC 9.8335(2)**

29 In its second subassignment of error, Willamette challenges the city’s determination
30 under EC 9.8335(2) that the proposed modification will result in “insignificant changes in the
31 physical appearance of the development, the use of the site, and the impact on the
32 surrounding properties.”

1 **1. Physical Appearance of the Development and Impact on**
2 **Surrounding Properties**

3 As explained above, the proposed modifications to development of Parcel 4 include
4 changes to the location of the main entrance for the new assisted living/memory care facility
5 to the second story of the building, adding ramps from the main entrance to the north and
6 south parking lots, and requiring placement of approximately 10,000 cubic yards of fill and
7 construction of retaining walls that will be visible to surrounding properties. The changes in
8 the use of the building also created changes to pedestrian connections and transit facilities,
9 and on-site lighting. The planning director found that the changes to the physical appearance
10 and the impact on the surrounding properties were insignificant, in part because the overall
11 mass and appearance of the building remained within acceptable percentages of deviation
12 from the original proposal and the location of the parking spaces and the main entry
13 remained on the same side of the parcel as the original proposal.⁶ The hearings officer

⁶ The planning director found:

“Appearance - The first portion of the criterion above requires that the proposed modification will result in insignificant changes to the physical appearance of the development. As the applicant has provided in response to EC 9.8335, it is appropriate to evaluate the significance of the physical changes in the context of the entire PUD as well as in the context of the lot on which the proposed modification is proposed.

“The applicant proposes to reduce the building height on parcel 4 from 4 to 3 stories in height. The resulting difference is approximately 7 feet (12 percent reduction). The footprint of the building will be reduced from 49,050 to 42,650 a reduction of 6,400 square feet (13 percent). As evidenced on [the architectural drawings] the architectural elements of the building remain similar to the conceptual elevations approved through the tentative PUD. The overall mass and architecture of the building remain similar to the approved site plan and the orientation of the building does not change. A 7 foot reduction in height in the context of a 50 foot building and a 6400 square foot reduction in building footprint of a 49,000 square foot building are insignificant. * * *

“The applicant is proposing to modify the grade for the driveway on Parcel 4 from an at-grade driveway to a raised grade driveway that will bring vehicles to a second level entry drop off. The number of parking spaces on the lot will be reduced from 148 parking spaces to 98 parking spaces. While the raised driveway and reduction in parking spaces will change the appearance, the change is considered insignificant. The driveway function as approved in the tentative PUD is to provide public and emergency access from the east side of the site, to the primary entrance of the building. This function does not change. The parking spaces provided are in the same area as originally approved (on the east side of the building) and

1 adopted additional findings to respond to issues raised by Willamette regarding the additional
2 fill, retaining walls, and on-site lighting:

3 “The hearing official adds the following additional description of the proposed
4 modifications:

5 “Appearance – The modified entrance to the building on Parcel 4 would
6 require additional fill, retaining walls, and a meandering walking ramp from
7 the original street level. The appearance of the east façade (entry side) of the
8 building would change with the elevated driveway, round-about, and new
9 porte-cochere.

10 “Other development on Parcel 4 would change the physical appearance of the
11 development on Parcel 4. There is a new building on Parcel 4 with a
12 driveway that the applicant describes as a maintenance shed on Sheet FP1.
13 The modified site plan states there would be 35 covered parking spaces, but it
14 does not show or describe any covered parking, so it is unclear if there would
15 be covered parking. The code does not require covered parking; however the
16 absence of covered parking would be a change in physical appearance. For
17 the purpose of this criterion, the hearing official assumes there would be no
18 covered parking. Circulation on the site has changed to accommodate the
19 raised entry and incorporate additional landscaping in place of the reduced
20 number of parking spaces. Lighting has changed to respond to the new
21 circulation pattern.

22 “ * * * * *

23 “The hearing official concurs with the planning director’s conclusions that the
24 proposed modifications to the appearance, use of the parcel, and impact on
25 surrounding properties would be insignificant, except that the hearings official
26 adds the following additional conclusions addressing the modifications that
27 the hearings official described:

28 “Appearance - The additional fill, retaining walls, and ramped walkway do
29 not affect any views of the Willamette River. The new maintenance shed
30 would be an insignificant (and possibly indistinguishable) change from the
31 original plan for several carports.

32 “ * * * * *

meet the need of the facility as required by code. The grade change is not in an area that will obscure views of the river or near surrounding properties. * * *” Record 12-13.

1 “Impact on surrounding properties: The revised parking layout moves the
2 closest parking spaces further from the property to the north. The visibility of
3 the elevated driveway and retaining walls would be offset by the elimination
4 of carports, several of which were originally closer to the northern boundary
5 of Parcel 4 than the elevated driveway. Modified condition no. 3 ensures that
6 there would be no impact on surrounding properties from any increase in
7 traffic resulting from the modified use of the property.” Record 14-15.

8 According to Willamette, the proposed modification of Parcel 4 and the building
9 located on it will result in more than “insignificant changes in the physical appearance” of
10 the building on Parcel 4, and will result in more than “insignificant changes in * * * the
11 impact on surrounding properties.” The term “insignificant” is not defined in the EC and the
12 hearings officer does not attempt to define the term in the decision.⁷ However, as we
13 understand it, the planning director and the hearings officer concluded that the proposed
14 changes are “insignificant” given the size of the overall development on all of the parcels, the
15 fact that the changes actually decrease the size of the building, and the changes leave the
16 building entry and parking on the same side of the property and do not affect views of the
17 river. Willamette does not explain why the hearings officer’s conclusions set forth in the
18 findings quoted above are incorrect.

19 2. Use of the Site

20 EC 9.8335(2) provides that the modification may not occur unless it results in an
21 “insignificant change[]” in the “use of the site.” Willamette argues that the change in the use
22 of the building on Parcel 4 from an apartment building to an assisted living and memory care
23 facility is more than an insignificant change. Willamette first points out that the change in
24 the use of the building from a use that required no employees to enter and exit the site
25 (independent living apartments) to a use that requires a number of daily employee trips to

⁷ “Insignificant” is defined in Webster’s Third New Int’l Dictionary (1981) in relevant part as:

“a: lacking meaning or import * * *; c: having no importance; d: lacking weight or position
* * *; e: of little size or importance * * *.”

1 and from the site (assisted living and memory care facilities) increases the morning and
2 afternoon peak hour trips to and from the site, and alters the distribution of the trips in the
3 transportation system. Willamette argues that the city’s findings do not address the alteration
4 of the distribution of trips in the system, and argues that the alteration of the distribution of
5 trips throughout the affected intersections results in more than “insignificant changes in * * *
6 the use of the site.” Willamette points to Goodpasture’s traffic consultant’s conclusion the
7 change in the use will increase trips from Parcel 4 during the morning and afternoon peak
8 hours, and argues that the city’s decision does not explain why those increases are not more
9 than “insignificant changes in the use of the site.”

10 The planning director found that the change in the use of the building on Parcel 4 to
11 an assisted living facility is insignificant. The planning director noted that both apartment
12 uses and assisted care facilities are listed as residential uses under the EC and concluded that
13 the use of the site will continue to be “residential” with the change, albeit with an “added
14 medical component.” Record 13. The planning director also found that the changes would
15 reduce the density by 12% on Parcel 4 and by 2.5% when compared to the entire PUD
16 proposal. *Id.* Finally, the planning director found that although morning and afternoon peak
17 hour trips would increase to and from the site compared to the originally proposed use, the
18 projected daily trips from all five parcels within the entire PUD would only increase by 3
19 additional trips.⁸ Record 13-14. The hearings officer concurred with and adopted most of the
20 planning director’s findings regarding the change in the use of the site.

⁸ The planning director found:

“The use on Parcel 4 was proposed and approved to be 125 units of age restricted (55 and older) multi family residences. The modification request would allow for 22 units of age restricted units along with 68 beds of assisted living and 64 beds of memory care. * * *

“The modification will result in a 15 unit reduction in density. This translates to a 12% reduction in density on Parcel 4 and a 2.5% reduction in density in relation to the development as a whole. The use change from age restricted apartments to assisted care is

1 As noted above, the EC does not define the term “insignificant.” However, EC
2 9.8335(2) appears to be concerned with preventing the originally approved uses from being
3 replaced by uses that have impacts significantly beyond what were anticipated and addressed
4 in approving the original Tentative PUD. We agree with Willamette that the city’s findings
5 are inadequate because they do not address issues petitioners raised regarding whether a
6 change in the proposed use that results in an increase in the number of employees and visitors
7 to and from the site, particularly during the morning and afternoon peak hours, an increase in
8 the traffic to and from the site, and an alteration in the distribution of traffic in the affected
9 facilities means that the change in use is “insignificant.” The incorporated findings from the
10 Final PUD portion of the decision that are referenced above do not address the issue, and the
11 incorporated findings from the application do not address the issue. No other findings in the
12 decision appear to address the issue that Willamette presents.

13 The second subassignment of error under the first assignment of error is sustained, in
14 part.

15 **D. Conclusion**

16 EC 9.8335 provides in relevant part that “[i]f the planning director determines that the
17 proposed modification is not consistent with [EC 9.8335(1) *and* (2)], the proposed
18 modification *may not occur*.” (Emphases added.) We determine above that some of the

insignificant. Each of these uses (original and modified) are residential in nature as assisted care is listed under the broad heading of residential in Table 9.2740 and the use meets residential density requirements. The site was approved for residential use and the use of the site will remain as residential with an added medical component. Each of these uses is geared to a specific residential population. The use of assisted care is permitted in the R-3 subject to a CUP or approved final PUD. The applicant provides additional findings regarding the use on pages 2 and 3 in the TPUD modification section of the written statement. These findings are incorporated here by reference as further demonstration of compliance with this criterion.

“PM peak hour traffic generated by the modified use would increase by approximately 22 trips, but the overall daily trip generation comparing the new use to the previously approved use is almost identical. * * * The additional 3 trips generated by the change are a less than 1% overall increase in the trips to the building, which is not significant.” Record 13-14.

1 proposed modifications are inconsistent with the original conditions of approval, and under
2 EC 9.8335(1), those proposed modifications “may not occur.” In addition, we conclude
3 above that the city’s findings are inadequate to explain why the change in the use of the
4 building on Parcel 4 is “insignificant.” On remand, the city must evaluate whether the
5 change from independent living apartments to an assisted living and memory care facility is
6 “insignificant,” considering the increase in the number of employees and visitors to the site
7 and the resulting increase in morning and afternoon peak hour trips to and from the site and
8 the alteration of the distribution of those trips within the transportation system.

9 The first assignment of error is sustained, in part.

10 **FINAL PLANNED UNIT DEVELOPMENT APPROVAL (SECOND, THIRD AND**
11 **FOURTH ASSIGNMENTS OF ERROR)**

12 **A. Introduction**

13 Goodpasture sought approval of a Final PUD that includes the proposed
14 modifications to the approved Tentative PUD, and also sought approval of a tentative
15 subdivision plan that includes those modifications. As we explain in more detail below, in
16 order for the city to approve the Final PUD, the Final PUD must conform to the approved
17 Tentative PUD and all conditions of that approval. We conclude in the first assignment of
18 error that some of the proposed modifications “may not occur” because they are inconsistent
19 with the original conditions of approval, and that the city’s findings are not adequate to
20 explain why the change in the use of the building on Parcel 4 is “insignificant.” The city’s
21 decision to approve the Final PUD application and the tentative subdivision application is
22 necessarily dependent on our upholding the modification decision. For that reason we
23 conclude that the city also erred in approving the Final PUD and tentative subdivision
24 applications that include the modifications that “may not occur.”

25 However, it seems likely that the city may take the same approach in reviewing a
26 future Final PUD application as it took in evaluating the current Final PUD application.

1 Therefore to the extent that our consideration of the issues presented in the second, third and
2 fourth assignments of error will provide necessary guidance to the city in evaluating that
3 future Final PUD application, we resolve the remaining assignments of error that relate to the
4 Final PUD application.⁹

5 **B. Applicable Criteria**

6 EC 9.8350 provides:

7 **“Purpose of Planned Unit Development, Final Plan.** The PUD process
8 includes both a tentative and final plan. Final plan approval is required
9 primarily to ensure that tentative plan approval conditions have been met.”
10 (Bold and underlining in original.)

11 EC 9.8365 provides the criterion for final planned development approval:

12 “The planning director shall approve, approve with conditions, or deny a final
13 PUD application. Approval shall include a finding that the final PUD plan
14 conforms with the approved tentative PUD plan and all conditions attached
15 thereto.”

16 EC 9.8360(1) provides that an application for final planned unit development approval must
17 contain:

18 “[F]inal maps and supplemental materials required to demonstrate compliance
19 with tentative plan conditions of approval.”

20 **C. Assignments of Error**

21 In its second assignment of error, Willamette argues that the Final PUD does not
22 “conform[] with the approved [tentative PUD plan and all conditions attached thereto]” as
23 required by EC 9.8365, and that the Final PUD application fails to demonstrate “compliance
24 with the tentative plan conditions of approval” as required by EC 9.8360(1). Willamette
25 argues that because the city’s decision approved a Final PUD that incorporates the proposed

⁹ Under ORS 197.835(9)(a), we are required, whenever possible, to decide all issues presented in an appeal when reversing or remanding a land use decision. The purpose of this requirement is to provide guidance to the local government making the decision, so that it may, if possible, correct all deficiencies in its decision without the need for repeated appeals to this Board. *Standard Insurance*, 17 Or LUBA at 663.

1 modifications, that Final PUD does not “conform[] with the approved tentative PUD * * *,”
2 because the modifications are not part of the “approved tentative PUD.”¹⁰ Where we
3 conclude above that under EC 9.8335, the modification “may not occur,” the “approved
4 tentative PUD” is the Tentative PUD without the proposed modifications. Consequently we
5 agree with Willamette that the Final PUD that incorporates the proposed modifications does
6 not conform to the approved Tentative PUD.

7 Willamette also argues that the Final PUD does not conform to the approved
8 Tentative PUD because the Final PUD increases the unit count on Parcel 2 and Parcel 5,
9 approves a different unit mix on Parcels 1, 2 and 5, and increases bicycle parking on Parcels
10 1 and 5. Goodpasture does not respond to Willamette’s contention in any way that we can
11 understand. Absent any response, we agree with Willamette.

12 **1. Tentative PUD Conditions 18(g) and (o), 21, 25, 27, 28, and 29**

13 Willamette next argues that the city erred where the city’s decision recognizes that
14 the Final PUD does not conform with the approved Tentative PUD and all conditions, but
15 approves the Final PUD by imposing conditions of approval that the Tentative PUD
16 conditions be satisfied in the future. As we explain more fully below, we agree with
17 Willamette.

18 The city’s decision evaluated the proposed Final PUD for compliance with each of
19 the 29 conditions that the city imposed in its original decision approving the Tentative PUD.
20 For conditions 18(g) and (o), 21, 25, 27, 28, and 29, the planning director and/or the hearings
21 officer found that the condition was not met, but approved the Final PUD with conditions of

¹⁰ In response to the same argument below, the hearings officer found:

“This appeal issue duplicates appeal issue 1. This appeal issue raises a general point not related to compliance with any specific approval criterion. Because the hearings official concludes that the proposed modifications comply with the approval criteria in EC 9.8335(1) and (2), and with the conditions of the original approval, the hearing official denies this appeal issue.” Record 19.

1 approval that are either identical or similar to the unmet conditions of the Tentative PUD
2 approval. In so doing, the city relied on the language in EC 9.8365(1) quoted above that
3 allows the planning director to “approve, *approve with conditions*, or deny” a final planned
4 unit development application (emphasis added). Willamette argues that the provision in EC
5 9.8365 that allows the city to “approve with conditions” a final planned unit development
6 does not allow the city to overlook nonconformance with conditions of the Tentative PUD
7 approval and approve a Final PUD that does not comply with the original Tentative PUD
8 conditions of approval by conditioning that Final PUD approval on future satisfaction of
9 those Tentative PUD conditions. According to Willamette, such an approach would render
10 the requirement that the Final PUD “conform[] to the tentative PUD and all conditions
11 attached thereto” meaningless where the city could simply ignore non-conformance or non-
12 compliance by extending a Tentative PUD condition beyond Final PUD approval.

13 We agree with Willamette. Although the city relies on the provision of EC 9.8365
14 that allows the planning director to “* * * approve with conditions * * *” a Final PUD
15 application, that provision must be read in conjunction with the requirement in the same
16 paragraph that the city find that the “final PUD plan conforms with the approved tentative
17 PUD plan and all conditions attached thereto” and the requirement in EC 9.8360(1) that the
18 “final maps * * * demonstrate compliance with all of the conditions” of the Tentative PUD
19 approval. When read together, EC 9.8365(1) and EC 9.8360 do not allow the city to approve
20 a Final PUD that does not conform to the approved Tentative PUD or does not comply with
21 Tentative PUD conditions of approval by conditioning its approval of the Final PUD on
22 future elimination of the non-conforming or non-compliant aspects of the Final PUD. More
23 particularly, where the conditions of the Tentative PUD approval required some action to be
24 taken or some documentation to be provided “[p]rior to final PUD approval,” the city must,
25 in evaluating a Final PUD application, determine whether that action has been taken or that
26 documentation provided. If it has not, then the Final PUD cannot be approved under EC

1 9.8365. Where the Final PUD does not comply with a Tentative PUD condition of approval,
2 the city may not condition approval of the Final PUD on future satisfaction of the Tentative
3 PUD condition of approval.

4 Willamette’s second assignment of error is sustained.

5 **2. Tentative PUD Conditions 13 and 14 (Geotechnical Evaluation)**

6 In *Willamette Oaks I*, we concluded that the city had, in imposing conditions 13 and
7 14 of the original Tentative PUD approval, deferred to the final planned unit development
8 phase making a determination as to whether EC 9.8320(6), which ordinarily applies to
9 tentative planned unit development applications, was satisfied. EC 9.8320(6) requires
10 Goodpasture to demonstrate through a geotechnical analysis that satisfies EC 9.6710 that
11 “the PUD will not be a significant risk to public health and safety, including but not limited
12 to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency
13 response.”¹¹ We determined that such a deferral was permissible, citing *Gould v. Deschutes*
14 *County*, 216 Or App 150, 162, 171 P3d 1017 (2007). *Willamette Oaks I*, slip op 29-30.

15 Conditions 13 and 14 of the Tentative PUD approval provided:

16 “13. Prior to final PUD approval, the applicant shall submit detailed
17 geotechnical information on Parcels 1, 2, 3 and 5 along with specific
18 recommendations for mitigation of the geologic constraints. The applicant’s
19 geotechnical recommendations shall be implemented during the subsequent
20 PEPI, building, and site development permits.”

21 “14. The applicant shall update the geotechnical analysis it has submitted to
22 date to address the points raised in the two GeoScience reports * * * which
23 are:

¹¹ EC 9.6710 provides in relevant part that geological and geotechnical analyses are required on properties with slopes greater than 5%. EC 9.6710(2)(a). EC 9.6710(1) explains:

“The purpose of geological and geotechnical analyses is to ensure that public and private facilities in developments in areas of known or potential unstable soil conditions are located, designed, and constructed in a manner that provides for public health, safety, and welfare.”

1 “To ensure the geotechnical report is internally consistent with respect
2 to boring numbers and elevations.

3 “The geotechnical report shall include information on the development
4 site as required by Eugene Administrative Rule R-9.6710-C through H
5 along with Exhibit A.

6 “If necessary, the applicant shall revise its current geotechnical
7 recommendations to be in accord with the updated information. The City
8 shall confirm that the geotechnical analysis has addressed all of the points in
9 the GeoScience reports *prior to final PUD approval.*” Record 1285, 1409
10 (emphasis added.)

11 In a portion of its third assignment of error, Willamette argues that the city erred in
12 approving the Final PUD without a showing of compliance with conditions 13 and 14 and
13 without determining whether applicable criteria are satisfied.¹² In the challenged decision,
14 the city found that the information that was required to be provided “[p]rior to final PUD
15 approval” by conditions 13 and 14 of the TPUD approval had been provided. Record 24-25.
16 However, as far as we can tell, neither the planning director nor the hearings officer
17 evaluated that information or any other evidence in the record to determine whether EC
18 9.8320(6), the criterion that the city had deferred to the Final PUD stage, was met. Rather,
19 we understand the hearings officer to have deferred that determination for a second time to
20 the “subsequent PEPI, building, and site development” permit stages.”¹³ Such a

¹² Portions of Willamette’s third and fourth assignments of error challenge the city’s approval of the tentative subdivision plan. As we explain below, we do not address those challenges.

¹³ The hearings officer found in relevant part:

“The hearings official is not in a position to decide that one professional’s methodology and interpretation of the geotechnical data is more correct than the other, and it is also not the role of the hearing official to approve the geotechnical analysis. * * * Public Works opined that EC 9.6710 ‘can be met.’ Public Works did not state * * * that EC 9.6710 ‘has been met.’ This is important because Public Works will be reviewing the geotechnical analysis in detail at the time of the PEPI, building and site development permits. Public Works will use the complete geotechnical analysis available for the site, including all of K & A Engineering’s work and all of Geoscience’s work to determine if the geotechnical engineering complies with all the applicable geotechnical standards during the subsequent PEPI, building, and site development permit processes.

1 determination runs afoul of *Gould* because those development stages are not “infused with
2 the same participatory rights” as the Tentative PUD approval phase or the Final PUD
3 approval phase because they do not allow for public review of or participation in the city’s
4 decision. The city must determine whether EC 9.8320(6) is met and it must make that
5 determination after conducting a proceeding that allows for public participation in the same
6 manner that is allowed in the tentative planned unit development phase.

7 Willamette’s third assignment of error is sustained, in part.

8 **3. Tentative PUD Condition 3 (Trip Cap)**

9 Original condition 3 provided:

10 “Prior to final PUD approval, the applicant shall revise the final site plan to
11 add the following note: ‘The maximum development on the site shall be
12 limited so that it would not produce more than 287 trips in the AM peak hour
13 and 321 trips during the PM peak hour as determined by the Institute of
14 Transportation Engineers Trip Generation Manual. The city may allow
15 development intensity beyond this maximum number of peak hour vehicle
16 trips only if the applicant submits to the city and ODOT a traffic impact
17 analysis that demonstrates that the proposed intensification of use would be
18 consistent with [the TPR]. The applicant shall seek and the city shall consider
19 such approval using the city’s Type II land use application procedure.’ Record
20 1407-08.

“Although the reports listed above contain conflicting conclusions, the hearing official concludes that Public Works’ conclusion that the applicable geotechnical standards ‘can be met’ provides the substantial evidence necessary to conclude that the original condition 13 can be met. * * *” Record 25-26.

The hearings officer then imposed a condition of approval on the Final PUD nearly identical to original condition 13:

“The applicant’s geotechnical analysis recommendations regarding foundation support, found on pages 16 through 23 of the June 16, 2010 report from K & A Engineering, Inc. shall be implemented during the subsequent PEPI, building, and site development permits, except that Public Works may require the applicant to conduct additional geotechnical investigation, or develop different recommendations that address the points raised in the geotechnical analysis for the development site submitted after June 16, 2010, and that are part of the record for this Final PUD approval.” Record 25-26.

1 In *Willamette Oaks I*, we summarized Goodpasture’s explanation of how the “trip cap” is
2 intended to function:

3 “[T]he trip cap is monitored and enforced when the city receives an
4 application for a building permit under the final, approved PUD and site plan
5 and then allocates from the trip cap the number of trips associated with a
6 particular use at the time a building permit is issued for that use. According to
7 Goodpasture * * *, after all of the trips within the trip cap have been allocated,
8 no further development of the property can occur unless the trip cap is
9 increased. The city will monitor trips by monitoring the building permits
10 issued as development occurs. While [condition 3] does not provide quite that
11 level of detail about how [it] will be enforced, evidence in the record supports
12 the city’s conclusion that the trip cap is enforceable.” Slip op 21-22.

13 In the challenged decision, the planning director found that condition 3 was met
14 because the Final PUD site plan contained the required note specifying the maximum number
15 of a.m. and p.m. peak hour trips. However, during the proceedings below Goodpasture
16 apparently suggested that its change in the use of the building on Parcel 4 should allow it to
17 allocate less trips to that parcel than originally calculated in its original traffic impact analysis
18 (TIA), by using a different Institute of Transportation Engineer (ITE) code for the building
19 than was originally used in the TIA. Apparently in order to head off that suggestion, the
20 hearings officer imposed a condition of approval on the Final PUD that requires Goodpasture
21 to revise the final “site plan” to specifically use the ITE code that it used in its original
22 Tentative PUD application and original TIA (Code 230-Apartments), that the city relied on in
23 fashioning original condition 3.

24 In a portion of its fourth assignment of error, Willamette argues that the Final PUD
25 does not comply with condition 3 because Goodpasture has attempted to increase the
26 maximum number of trips set out in the trip cap without submitting a new traffic impact
27 analysis that demonstrates compliance with the Transportation Planning Rule as required by
28 original condition 3. We disagree with Willamette. We do not see that, in making the
29 suggestion described above that caused the hearings officer to impose the new condition on
30 the Final PUD approval that specified the applicable ITE Code (230-Apartments),

1 Goodpasture attempted to increase the total number of trips specified in the trip cap. Rather,
2 Goodpasture appears to have been at most attempting to decrease the number of trips that
3 will eventually be allocated to Parcel 4 by asserting that the change to an assisted living
4 facility should result in fewer trips being allocated to that use. The hearings officer appears
5 to have rejected that argument and required Goodpasture to use the ITE code that
6 Goodpasture originally used in preparing its TIA that led to the imposition of the trip cap in
7 the first place.

8 The fourth assignment of error is denied.

9 **TENTATIVE SUBDIVISION APPLICATION (THIRD, FOURTH, FIFTH AND**
10 **SIXTH ASSIGNMENTS OF ERROR)**

11 Because we determine above that the city erred in approving the Final PUD, and the
12 tentative subdivision plan that the city approved is dependent on the Final PUD, challenges
13 to the approved subdivision plan are premature. Accordingly, we do not reach the portions
14 of the third and fourth assignments of error, and the fifth and sixth assignments of error, that
15 challenge the tentative subdivision approval.

16 The city's decision is remanded.