

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 GOODPASTURE PARTNERS, LLC.,

5 *Petitioner,*

6
7 and

8
9 vs.

10
11 CITY OF EUGENE,

12 *Respondent,*

13
14 and

15
16 WILLAMETTE OAKS, LLC.,

17 *Intervenor-Respondent.*

18
19 LUBA No. 2011-073

20
21 FINAL OPINION

22 AND ORDER

23
24 Appeal from City of Eugene.

25
26 Michael C. Robinson and Seth J. King, Portland, filed the petition for review and
27 argued on behalf of petitioner. With them on the brief was Perkins Coie, LLP.

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

31
32 Nick Klingensmith, Eugene, filed a response brief and argued on behalf of
33 intervenor-respondent. With him on the brief was Bill Kloos and the Law Office of Bill
34 Kloos.

35
36 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member;
37 participated in the decision.

38
39 AFFIRMED

11/08/2011

40
41 You are entitled to judicial review of this Order. Judicial review is governed by the
42 provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

NATURE OF THE DECISION

Petitioner seeks review of a city hearings official’s decision under a section of the Eugene Code (EC) that authorizes the planning director and hearings official to interpret the EC.

MOTION TO INTERVENE

Willamette Oaks, LLC (intervenor) moves to intervene on the side of the respondent. No party objects to the motion, and it is allowed.

FACTS

The city approved intervenor’s multi-phase PUD in 1986, and approved a modification to allow Phase V to be developed as an 80-unit assisted living facility in 1990. Under the EC, PUD developers enter into a performance agreement with the city that sets out the deadlines for commencing and completing PUD construction as established in the PUD approval decision. Intervenor has entered into such a performance agreement with the city. Record 169-77. Phases I-IV of intervenor’s PUD have been completed; Phase V has not.

The city has adopted a number of quasi-judicial decisions to extend the deadlines for commencing and completing construction of Phase V. Those extensions are granted under the EC as modifications of the original PUD approval decision and the corresponding performance agreement. Under the last quasi-judicial modification, construction of Phase V was to commence no later than August 1, 2010 and be completed no later than August 1, 2011. Record 165. Construction of Phase V did not commence before August 1, 2010 and construction of Phase V was not complete by August 1, 2011.

On November 9, 2009 the city adopted Ordinance 20440. That Ordinance became effective December 11, 2009. Record 149. A portion of Ordinance 20440 is set out below:

“Section 2: The expiration dates for all Type II and III land use application approvals in effect on the date this Ordinance takes effect are hereby extended by three years. * * *

1 “**Section 3:** For any Type II or III land use application approval with an
2 executed performance agreement in effect on the date this Ordinance takes
3 effect, each reference to a specific year within the Time Schedule section of
4 said performance agreement (referencing a commencement or a completion
5 year) is hereby extended by three additional years.” Record 152.

6 As far as we can tell it is undisputed that intervenor’s PUD approval was the product
7 of a Type II application and that intervenor’s PUD approval was in effect on December 11,
8 2009 when Ordinance 20440 took effect. Under the above terms of Ordinance 20440, the
9 construction commencement/completion deadlines under the last amendment of intervenor’s
10 PUD approval were extended from August 1, 2010/August 1, 2011 to August 1, 2013/August
11 1, 2014.

12 When petitioner noticed preconstruction activity on intervenor’s property in 2011 it
13 sought an interpretation of the EC pursuant to EC 9.0040(1), which provides:

14 “The planning director is authorized to *interpret* this land use code and
15 decisions issued pursuant to this land use code. Requests for *interpretations*
16 shall be submitted on a written form approved by the city manager and
17 accompanied by a fee established pursuant to EC Chapter 2. Within 10 days
18 of receipt of the written request, the planning director shall make a written
19 *interpretation* and mail or deliver a copy to the party requesting the
20 *interpretation*. Appeals of these *interpretations* shall be heard by a hearings
21 official in the manner set out in EC 9.7600 - 9.7635.” (Emphases added.)¹

22 Petitioner’s requested interpretation is set out below:

23 “Goodpasture requests that the Director issue the following interpretation of
24 [Willamette Oaks PUD approval as modified]: ‘Phase V of the Willamette
25 Oaks PUD has expired and is of no further force and effect. As such, the City
26 cannot process or issue any building, grading, or other site development
27 permits for this phase of the project.’” Record 181.

28 Petitioner’s April 5, 2011 request goes on to explain the bases for the requested
29 interpretation:

¹ As we explain later in this opinion, the scope of the authority to “interpret” that is granted by EC 9.0040(1) is the dispositive issue in this appeal.

1 “The City has issued a number of quasi-judicial land use decisions for the
2 PUD. Most recently * * * the City approved an extension of the construction
3 schedule for Phase V, which required that the developer commence
4 construction of Phase V by August 1, 2010, and complete such construction
5 by August 1, 2011. It is undisputed that the developer did not commence
6 construction of Phase V consistent with this schedule. Further, the developer
7 did not obtain a site-specific extension of this schedule pursuant to *former* EC
8 9.516(9)(e)(1), which the City has deemed applicable to all prior requests for
9 time extensions for the PUD. Therefore, Phase V of the PUD has expired.

10 “The City’s adoption of * * * Ordinance [20440] on November 9, 2009,
11 purports to provide time extensions for approved developments, including the
12 PUD. As applied to the instant case, * * * Ordinance [20440] purports to
13 extend the construction commencement date for Phase V to August 1, 2013
14 and the construction completion date to August 1, 2016 [sic should be 2014].
15 However, the City’s action was not effective as applied to the instant case,
16 because the City’s legislative adoption of the Ordinance cannot legally amend
17 individual final quasi-judicial approvals such as [intervenor’s] in a manner
18 that is inconsistent with both the EC and the terms and conditions of
19 [intervenor’s PUD approval as amended]. Furthermore, * * * Ordinance
20 [20440] cannot unilaterally amend the performance agreement for Phase V in
21 a manner that is inconsistent with the terms of that document. Quite simply,
22 the City has not validly extended the development schedule for Phase V, and
23 it has expired. [Intervenor] cannot now request, and the City cannot extend or
24 issue, building or site development permits for an expired approval.” Record
25 182 (italics in original).

26 The planning director declined to adopt the requested interpretation. Record 148-50.
27 On appeal, the hearings official also declined to adopt the requested interpretation. Record
28 1-7. This appeal followed.

29 **DECISION**

30 The petition for review includes a single assignment of error that is divided into four
31 subassignments of error. The parties argue at some length about the validity and legal effect
32 of Ordinance 20440. But this appeal is resolved without having to address most of those
33 arguments. The critical facts are undisputed. As its PUD approval was last amended,
34 intervenor was required to commence construction of Phase V of its PUD before August 1,
35 2010 and complete construction before August 1, 2011. Intervenor has not complied with
36 either of those deadlines. But for Ordinance 20440, intervenor’s PUD approval has expired.

1 Ordinance 20440 took effect on December 11, 2009, before either the construction
2 commencement or construction completion deadlines for intervenor’s PUD expired. Under
3 the clear and unambiguous terms of Ordinance 20440, the construction
4 commencement/completion deadlines for intervenor’s Type II PUD approval were extended
5 to August 1, 2013/August 1, 2014, and those deadlines have not yet expired.

6 The dispositive question in this appeal, which makes it unnecessary to address most
7 of the parties’ arguments, is whether petitioner’s requested interpretation is really a request
8 for an interpretation or is a request for something other than an interpretation. By its terms,
9 EC 9.0040(1) only authorizes the planning director and hearings official to “interpret” the EC
10 and decisions issued under the EC. The parties apparently agree that the targets of the
11 requested interpretations are all part of the EC or decisions rendered under the EC. The
12 parties do not agree that the request is accurately characterized as a request for an
13 “interpretation.”

14 The terms “interpret” and “interpretation” are not defined in the EC. But the
15 commonly understood meaning of those words is to explain the “meaning” of something.
16 *Webster’s Third New International Dictionary* (Unabridged 1981), 1182 (“interpret” means
17 “[t]o explain or tell the meaning of : translate into intelligible or familiar language or
18 terms[.]”); *Black’s Law Dictionary*, 894 (9th ed. 2009) (“interpretation” means “[t]he process
19 of determining what something, esp. the law or a legal document, means; the ascertainment
20 of meaning to be given to words or other manifestations of intention.”). Petitioner did not
21 ask the planning director and hearings official to explain what the EC, including Ordinance
22 20440, and decisions rendered under those laws “mean.” As we have already explained, the
23 deadlines established in the last quasi-judicial amendment of intervenor’s PUD are
24 unambiguous, as are the deadline extensions adopted by Ordinance 20440. And in its request
25 petitioner concedes that Ordinance 20440 “purports” to apply the extended deadlines to
26 intervenor’s PUD approval. Stated differently, petitioner does not dispute that in enacting

1 Ordinance 20440 the city council intended to extend the construction
2 commencement/completion deadline for all Type II land use approvals, including
3 intervenor's. Petitioner requested that the planning director and hearings official determine
4 that Ordinance 20440 is "not effective as applied to the instant case, because the City's
5 legislative adoption of the Ordinance cannot legally amend individual final quasi-judicial
6 approvals such as [intervenor's] in a manner that is inconsistent with both the EC and the
7 terms and conditions of [intervenors PUD approval as amended]. Furthermore, * * *
8 Ordinance [20440] cannot unilaterally amend the performance agreement for Phase V in a
9 manner that is inconsistent with the terms of that document." Record 182. Petitioner may
10 well be correct that Ordinance 20440 is legally defective for one or more of the reasons it
11 advances in the petition for review, but however one wants to characterize petitioner's
12 request it is not a request for an "interpretation." EC 9.0040(1) only authorizes
13 interpretations.

14 Petitioner points out that EC 9.0040(1), unlike some other land use regulations that
15 authorize interpretation of land use legislation, does not expressly require that the land use
16 legislation be ambiguous.² However, we do not read very much into that omission. The
17 commonly understood meaning of the word "interpret" assumes the thing that is to be
18 interpreted is unclear in some way. We certainly do not understand the city council's failure
19 to state expressly that the decisions and legislation to be interpreted under EC 9.0040(1) must

² Petitioner provides two examples:

"Ambiguous or unclear language. Where the language is ambiguous or unclear, the Director of BDS may issue a statement of clarification processed through a Type III procedure, or initiate an amendment to Title 33 as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments." Portland City Code 33.700.070(B).

"The Board of Commissioners may interpret the Community Development Code where ambiguity exists as to the meaning of specific provisions. This interpretation, when made, shall be used to guide staff and the Review Authority in applying the Code to specific situations. The Board by ordinance or resolution and order shall develop procedures for implementing this section."

1 be unclear in some way to give the planning director the unrestrained right to interpret
2 unambiguous EC language to say something other than what it unambiguously says. More to
3 the point, in this case, that omission does not mean that the planning director and hearings
4 official must treat petitioner's request under EC 9.0040(1) as a request for an interpretation,
5 simply because petitioner characterizes the request as a request for an interpretation.

6 Finally, although we need not decide the question, we seriously question whether the
7 city council could grant the planning director or hearings official authority to rule city land
8 use legislation such as Ordinance 20440 invalid or ineffective on a case by case basis. It is
9 one thing to grant the planning director authority to clarify the meaning of the city council's
10 land use legislation; it is quite another to grant the planning director and hearings official the
11 authority to determine that the city council's land use legislation is invalid or legally
12 ineffective on a case by case basis. The hearings official correctly determined that that EC
13 9.0040(1) does not grant the hearings official authority to adopt the position regarding the
14 legal effect of Ordinance 20440 on intervenors PUD approval that petitioner requested.

15 The city's decision is affirmed.