

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a conditional use permit and site design permit application for a mixed-use two-story building in a commercial zone.

FACTS

The subject property is a vacant half-acre parcel zoned General Commercial (C-1). The C-1 zone allows as a conditional use “[c]ommercial uses with 2nd floor residential use(s) [apartment(s)].” City of Warrenton Development Code (WDC) 2.5.120.B.11. Intervenor-respondent (intervenor) applied to the city for conditional use permit and site design approval for a two-story building on the subject property, with 12 mini-storage units and six residential garages on the ground floor, and six residential apartments on the second floor. The city approved the applications, and petitioners appealed that decision to LUBA, advancing three assignments of error. LUBA sustained the first and second assignments of error, and remanded the decision to the city to (1) interpret relevant code definitions and in light of that interpretation explain why the apartments are not subject to design standards for “multi-family housing developments,” and (2) adopt adequate findings regarding the conditional use permit standards at WDC 4.4.3.A. *Poe v. City of Warrenton*, __ Or LUBA __ (LUBA No. 2010-092, February 7, 2011) (*Poe I*).

On remand, the city commission held a hearing and adopted additional findings addressing the two bases for remand. The city commission concluded that the design standards for multi-family housing developments do not apply to second floor apartments allowed under WDC 2.5.120.B.11 as a conditional use in the C-1 zone, again approving the applications. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Commercial Use**

3 WDC 2.5.110 lists the uses permitted outright in the C-1 zone, while WDC 2.5.120
4 lists the conditional uses. As noted, WDC 2.5.120.B.11 allows “[c]ommercial uses with 2nd
5 floor residential use(s) [apartment(s)]” as a conditional use in the C-1 zone. WDC
6 2.5.120.B.9 also lists as a conditional use “mini-warehouses or similar storage uses.” To
7 satisfy the requirement for the ground floor “commercial” use for purposes of WDC
8 2.5.120.B.11, intervenor proposed the 12 ground floor mini-storage units, as “mini-
9 warehouses or similar storage uses” under WDC 2.5.120.B.9.

10 In the first sub-assignment of error, petitioners argue that “mini-warehouses or
11 similar storage uses” allowed under WDC 2.5.120.B.9 as a conditional use in the C-1 zone
12 do not qualify as “commercial” uses for purposes of WDC 2.5.120.B.11. Petitioners note
13 that WDC 1.3 defines “commercial” as a “[l]and use involving the buying/selling of goods or
14 services as the primary activity.” According to petitioners, renting the 12 mini-storage units
15 does not involve the buying or selling of goods or services, and is not a “commercial” use, as
16 exemplified by the fact that it is listed as a conditional use in the C-1 zone, not a permitted
17 use.

18 Intervenor responds that no issue was raised below or at any time in this appeal
19 regarding whether the mini-storage units qualify as a “commercial” use for purposes of WDC
20 2.5.120.B.11, and that issue is therefore waived under ORS 197.763(1) and 197.835(3).
21 Petitioners do not respond to the waiver challenge, and we agree with intervenor that the
22 issue raised in this sub-assignment of error is waived. For that matter, because the issue was
23 not raised in the initial appeal leading to *Poe I*, the issue is also beyond our scope of review
24 under the law of the case doctrine set out in *Beck v. City of Tillamook*, 313 Or 148, 153, 831
25 P2d 678 (1992). This sub-assignment of error is denied.

1 **B. Multi-Family Housing Development Design Standards**

2 On remand, the city commission interpreted relevant definitions and code provisions,
3 and concluded that the six proposed apartments do not constitute “multi-family housing
4 development” as that term is defined in the WDC, and are not subject to the site design
5 standards for multi-family housing at WDC 3.18. Petitioners challenge that conclusion.

6 WDC 1.3 defines “multi-family housing development” as

7 “A building or grouping of related buildings that contain four or more
8 dwelling units (total) located on a single legal lot and sharing common walls,
9 floor/ceilings, courtyard, playground, parking area or other communal
10 amenity. Included in this definition is ‘Condominium.’ * * * See WDC
11 Chapter 3.18 for multi-family housing design standards.”

12 WDC Chapter 3.18 includes a number of site design standards for multi-family housing,
13 including a requirement that 20 percent of the site be common open space. Petitioners
14 argued in *Poe I*, and again in the present appeal, that the six apartments fall within the
15 definition of “multi-family housing development” and are therefore subject to the site design
16 standards in WDC Chapter 3.18. Petitioners note that the six dwelling units with two-car
17 ground floor garages constitute 75 percent of the total floor area of the proposed
18 development, and argue the development as a whole must be considered residential rather
19 than a commercial use. Because the development is primarily residential in nature,
20 petitioners argue, and the residential component meets the definition of “multi-family
21 housing development,” the design standards at WDC Chapter 3.18 apply.

22 In *Poe I*, the city rejected that argument, concluding that the ground floor commercial
23 use was the “primary” use and the second floor apartments the “secondary” use, and that
24 characterization meant that the general standards for commercial uses in WDC chapter 2.5
25 apply rather than the specific standards for multi-family housing in WDC chapter 3.18. We
26 remanded to the city to reconsider that conclusion in light of pertinent code definitions the

1 city did not consider, specifically code definitions of the terms “primary” and “apartment.”¹
2 As the term is defined and used in the WDC, an “apartment” is a “secondary and accessory
3 use of a portion of an otherwise nonresidential building,” although the code recognizes that
4 as the term “apartment” is commonly used, it can also refer to an individual unit in a multi-
5 family dwelling.

6 On remand, the city concluded:

7 “[B]ased on Warrenton’s Development Code definition of an apartment as a
8 ‘secondary use’ when contained in a portion of an ‘otherwise non-residential
9 building,’ the fact that the [applicant’s] proposed ground floor and primary
10 approach is dominated by the commercial mini-storage use, and Warrenton’s
11 Development code’s specific allowance for second floor apartments in the C-1
12 zone, the conclusion is that although the commercial use may not occupy the
13 majority of the [applicant’s] proposed square footage, it is nonetheless the
14 ‘most substantial’ element on the property, and therefore the primary use.”
15 Record 15.

16 Because the commercial component of the development is the “primary” element, the city
17 concluded, the multi-family housing design standards at WDC chapter 3.18 do not apply.

18 Petitioners repeat their argument, rejected above, that the mini-storage use is not a
19 “commercial” use as that term is defined in the WDC. As explained, that argument is
20 waived. The only other challenge petitioners advance to the above-quoted finding is an
21 argument that WDC 3.02 requires that “[a]ll developments within the City must comply with
22 the applicable provisions of Chapters 3.1 through 3.20.” Based on WDC 3.02, petitioners

¹ WDC 1.3 defines “primary” as “[t]he largest or most substantial element on the property, as in ‘primary’: use, residence, entrance, etc. All other similar elements are secondary in size or importance.”

WDC 1.3 defines “apartment” as

“A portion of a building which is occupied or which is intended or designed to be occupied as an independent dwelling unit and contains separate housekeeping facilities for living, sleeping, cooking and eating. *As used in this Code, apartment refers to a secondary and accessory use of a portion of an otherwise nonresidential building, although apartment, as it is commonly used, may refer to an individual unit within a multi-family dwelling.*”

WDC 1.3 also defines the term “accessory use,” a term used in the definition of “apartment,” as “[a] use incidental and subordinate to the primary use of the property and located on the same lot.”

1 argue that the city must apply the multi-family housing design standards at WDC 3.18.
2 However, petitioners read too much into WDC 3.02, which is a very general introductory
3 provision that does not specify which particular design standards in WDC 3.1 through 3.20
4 are “applicable” to particular types of development. It adds nothing to WDC 3.18.1, which
5 specifically describes the applicability of WDC chapter 3.18 design standards for multi-
6 family housing.² In turn, WDC 3.18.1 repeats the terms of the WDC 1.3 definition of “multi-
7 family housing development” that petitioners cite to. There is no dispute that, if WDC 1.3
8 and WDC 3.18.1 are read in isolation, the residential component of the proposed
9 development seems to fall within the definition of “multi-family housing development.” But
10 that does not necessarily answer the question of whether the WDC 3.18 standards for multi-
11 family housing are applicable to the use category of “[c]ommercial uses with 2nd floor
12 residential use(s) [apartment(s)]” for purposes of WDC 2.5.120.B.11.

13 As we understand it, the gist of the city’s interpretation of the relevant code
14 provisions, including the definitions of “apartment” and “primary,” is that the “apartments”
15 allowed as a secondary use on the second floor of a building with a ground floor commercial
16 use under WDC 2.5.120.B.11 are part of a hybrid use category that is separate and distinct
17 from “multi-family housing,” regardless of the relative square footage of the commercial and
18 residential components of that hybrid use. That view is consistent with the WDC 1.3
19 definition of “apartment,” which uses the term narrowly as a term of art, specific to such
20 hybrid developments. See n 1. The WDC 1.3 definition acknowledges that the term
21 “apartment, *as it is commonly used*, may refer to an individual unit within a multi-family

² WDC 3.18.1 provides:

Applicability – Multi-family housing developments shall comply with the standards of this Chapter. Multi-family housing means housing that provides four or more dwelling units on a single legal lot and sharing common walls, floor/ceilings, courtyard, playground, parking area or other communal amenity. Condominiums are considered multi-family housing developments.”

1 dwelling.” *Id.* That acknowledgment suggests that the term “apartment” as used in the
2 WDC has a different meaning than the term as used in common parlance; as used in the
3 WDC, “apartment” is a term of art reserved for the secondary residential component of the
4 kind of hybrid development allowed under WDC 2.5.120.B.11. That is consistent with how
5 use categories are employed under the WDC. As far as we can tell, the city does not allow
6 “apartments” as such as a separate use in any of its zones, including residential zones. The
7 city’s high-density residential district, however, does allow “Multi-family housing
8 development subject to standards of Chapter 3.18.” WDC 2.4.110.F. This scheme of use
9 categories supports the city’s conclusion that “apartments” allowed under WDC 2.5.120.B.11
10 are not “multi-family housing” for purposes of WDC 3.18.

11 Under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 266, 243 P3d
12 776 (2010), we are required to defer to a governing body’s interpretation of local land use
13 legislation if the interpretation is consistent with the express language of the legislation being
14 interpreted, or stated differently if the interpretation is “plausible,” considering relevant text
15 and context. We cannot say that the city council’s interpretation of the relevant code
16 provisions, to the effect that “apartments” allowed under WDC 2.5.120.B.11 are not “multi-
17 family housing” for purposes of WDC 3.18, is inconsistent with the text and context of the
18 relevant code provisions, or implausible.

19 Although it is less clear, petitioners can be understood to dispute the city’s conclusion
20 that the proposed development qualifies as a “[c]ommercial use[] with 2nd floor residential
21 use(s) [apartment(s)]” for purposes of WDC 2.5.120.B.11, based on the fact that the
22 residential component of the proposed use totals 75 percent of the total floor area. We
23 understand petitioners to argue that, regardless of whether the development as a whole is
24 subject to the multi-family housing standards at WDC chapter 3.18, the development does
25 not qualify under WDC 2.5.120.B.11 because the commercial component is not the

1 “primary” use and the apartments are not a “secondary and accessory” use, based on the
2 disparity in floor area.

3 To the extent that is petitioners’ argument, petitioners have not demonstrated that the
4 city erred in concluding that the commercial use is the “primary” use and the residential use
5 the “secondary and accessory” use for purposes of WDC 2.5.120.B.11 under the relevant
6 definitions. WDC 1.3 defines “primary” as “[t]he largest or most substantial element on the
7 property,” as distinguished from other elements, which are “secondary in size or
8 importance.” Size is certainly one way the city could use to determine which element is
9 primary and which is secondary, but it is not the exclusive way. The city can also consider
10 which element is “most substantial” or the relative “importance” of each element. In its
11 findings, the city recites that the commercial mini-storage use “dominates” the ground floor
12 and the primary approach to the development, and concludes that the commercial use is the
13 “most substantial” element. Record 15. Petitioners offer no focused challenge to that
14 finding.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 LUBA remanded the decision in *Poe I* to adopt findings addressing the conditional
18 use permit criteria at WDC 4.4.3.A, and on remand the city did so. Petitioners challenge
19 those findings as inadequate.

20 **A. WDC 4.4.2.B Open Space**

21 The first sub-assignment of error is that “[t]he City erred in concluding that the
22 conditional use process allows it not to apply design standards in WDC Chapter 3.” Petition
23 for Review 11. However, in the text of the subassignment of error petitioners do not cite any
24 applicable WDC Chapter 3 requirements. If petitioners refer to the multi-family housing
25 design standards in WDC chapter 3.18, we have already affirmed the city’s interpretation
26 that the WDC chapter 3.18 standards do not apply to the proposed use.

1 Under the text of the sub-assignment of error, petitioners seem to fault the city for
2 failing to require open space under WDC 4.4.2.B, which provides that in granting a
3 conditional use that involves a housing type such as multi-family dwellings, the planning
4 commission “may” impose conditions that it considers necessary, including “[d]esignating
5 sites for open space.” The city’s findings briefly note that WDC 4.4.2.B gives the city the
6 option of imposing a condition requiring the applicant provide open space, even if the
7 applicable criteria do not require open space, but the city declined to impose such a condition
8 in this case. Record 18. Petitioners do not explain why WDC 4.4.2.B compels the city to
9 require open space in this case. This sub-assignment of error is denied.

10 **B. WDC 4.4.3.A(2) Compatibility and Minimal Impact**

11 WDC 4.4.3.A(2) is a conditional use permit standard requiring a finding that “[t]he
12 location, size, design and operating characteristics of the proposed use are such that the
13 development will be compatible with, and have a minimal impact on, surrounding
14 properties.” On remand, the city found:

15 “The Miller proposal is for a 14,000-square foot, two-story wooden structure
16 on .53 acres. The proposed building will contain 12 ground floor storage
17 units and 6 second story apartments in [the C-1 zone]. Other developments in
18 the immediate vicinity include a variety of similar, relatively low-intensity,
19 one and two-story residential and commercial developments, including the
20 Hammond Marina’s mooring basin, which is approximately 200 feet away.
21 The simple aesthetic design of the proposed building and placement on the lot
22 are appropriate for the surrounding area. The 14,000-square foot building is
23 not unusually large for the C-1 zone and the operating characteristics of both
24 the commercial and residential aspects of the proposal are unremarkable.
25 Testimony in opposition to the Miller proposal identified no aspect of the
26 building’s specific design or location that will have an adverse impact on
27 surrounding properties.

28 “* * * * *

29 “Therefore, we find that the Miller proposal meets [WDC] 4.4.3.A(2)
30 (Conditional Use Permit Criteria). The drawings and photographs showing
31 the location and size of the development have been reviewed; testimony both
32 for and against the operating characteristics of this development have been
33 heard, and after due consideration of the proposed use the City finds that it

1 will be compatible with, and have minimal impact on surrounding properties.”
2 Record 17-18.

3 Petitioners argue that the above findings are inadequate, because they do not describe
4 the “operating characteristics” of the development or its impacts on the livability of the
5 surrounding residences. It is not clear to us that the “operating characteristics” of either the
6 mini-storage use or the apartment use requires much in the way of description, for purposes
7 of determining their compatibility with and impacts on surrounding properties. However,
8 petitioners are correct that the above-quoted findings focus exclusively on size and design,
9 and do not describe the “operating characteristics” of either use or evaluate the impacts of
10 those operating characteristics on surrounding properties. Intervenor cites no other findings
11 that describe operating characteristics or evaluate impacts. Because remand is necessary in
12 any event under the next two sub-assignments of error, we also remand under this sub-
13 assignment of error for the city to adopt more adequate findings describing the “operating
14 characteristics” of the conditional uses and the impacts of those operating characteristics, if
15 any, on surrounding properties, as WDC 4.4.3.A(2) requires. This sub-assignment of error is
16 sustained.

17 **C. WDC 4.4.3.A(3) Excessive Traffic and Street Capacity**

18 WDC 4.4.3.A(3) requires findings that (1) the “use will not generate excessive traffic,
19 when compared to traffic generated by uses permitted outright,” and (2) “adjacent streets
20 have the capacity to accommodate the traffic generated.” Petitioners do not dispute the city’s
21 finding that the proposed use will not generate excessive traffic when compared to traffic
22 generated by uses permitted outright in the C-1 zone, but argue that the city’s finding that
23 adjacent streets have the capacity to accommodate the traffic generated is inadequate and not
24 supported by substantial evidence.

25 The city’s finding states:

1 “The record reflects the Miller proposal is estimated to generate a relatively
2 low traffic intensity of 18 trips per day. The record contains no evidence to
3 contradict this estimate. * * *

4 “The primary access for the Miller proposal is via Jetty Street; although the
5 testimonial record reflected concerns about occasional seasonal ponding at the
6 corner of Jetty Street and the undeveloped 4th Avenue (Warrenton right-of-
7 way), the record contains no evidence to support the conclusion that traffic to
8 the Miller development would have a particular need to travel in that
9 direction, or that Jetty Street itself is otherwise inadequate to handle the minor
10 number of trips generated by the Miller proposal. Furthermore, the Planning
11 Commission conditioned its approval of the Miller CUP on provision of
12 stormwater facilities which may reduce the ponding issue at Jetty Street and
13 4th Avenue. Therefore, the Miller proposal meets [WDC] 4.4.3.A(3). We
14 have considered the traffic to be generated by this mini-storage and apartment
15 development and the traffic generated by uses permitted outright in the C-1
16 zone * * *, and find that the use will not generate excessive traffic, when
17 compared to traffic generated by uses permitted outright and adjacent streets
18 do have the capacity to accommodate the traffic generated.” Record 18.

19 Petitioners argue that there is no evidence in the record supporting the finding that the
20 proposed use will generate only 18 trips per day, and no evidence whatsoever regarding the
21 capacity of adjacent streets to accommodate even that assumed number of trips. Petitioners
22 argue that any evaluation of the capacity of adjacent streets to accommodate the proposed
23 use must necessarily be based on substantial evidence (1) estimating the number of trips
24 generated by the proposed use, and (2) evaluating the capacity of the adjacent streets.

25 Intervenor provides no focused response to this argument, except to note that at the
26 remand hearing city staff read aloud the city’s above-quoted statement that “the record
27 reflects the Miller proposal is estimated to generate a relatively low traffic intensity of 18
28 trips per day.” We understand intervenor to argue that that staff reading is testimony that
29 constitutes substantial evidence supporting the city’s ultimate written finding that the
30 proposed use will generate 18 trips per day.³ We reject the suggestion. It is true that a staff

³ Intervenor attaches to his brief a transcript prepared by intervenor from the audio tapes of the June 14, 2011 city council hearing on remand, in which city staff read aloud to the city council excerpts from the May 19, 2011 staff report, which the city council subsequently adopted verbatim as part of its findings on remand.

1 report can include statements of facts that can be used to provide supporting evidence for a
2 finding or legal conclusion, but the above-quoted finding is not a statement of fact; it relies
3 upon something in the record (“[t]he record reflects”) to propose a finding (which the city
4 commission ultimately adopted) that the proposed use will generate 18 trips per day. A
5 finding cannot bootstrap itself into evidentiary sufficiency. Because no party identifies any
6 document in the record that supports the finding that the development will generate 18 trips
7 per day, that finding is not supported by substantial evidence. We generally agree with
8 petitioners that an evaluation of the capacity of the adjacent streets to accommodate the
9 proposed use will likely require both (1) some estimate of the trips generated and (2) some
10 estimate of the current capacity of adjoining streets, in order to support a finding that the
11 adjacent streets have the capacity to accommodate the proposed use. Remand is necessary to
12 introduce evidence regarding how many trips the proposed use will generate and compare
13 that trip generation against the capacity of the adjacent streets. This sub-assignment of error
14 is sustained.

15 **C. WDC 4.4.3.A(4) Adequate Public Facilities**

16 WDC 4.4.3.A(4) requires a finding that “Public facilities and services are adequate to
17 accommodate the proposed use.” On remand, the city adopted the following finding:

18 “We received statements from Warrenton’s Public Works Department and the
19 Fire Chief regarding the public facilities and services, and after reviewing
20 these statements, we find that the public facilities and services are adequate to
21 accommodate the proposed use.” Record 19.

22 Petitioners argue that the above-quoted finding is inadequate and not supported by
23 substantial evidence. According to petitioners, there are no written statements in the record
24 at all from the city public works department regarding the adequacy of public facilities and
25 services, and the only written statement in the record is from the fire chief , which states in
26 relevant part that:

27 “It is unknown at this time if the project meets the water supply requirements.
28 Water supply is available from a hydrant located at Jetty Street and Fourth

1 Avenue however, without knowing the exact square footage of the proposed
2 development, and considering the multi-family aspect of the proposed second
3 floor of the project, this hydrant may....or may not provide an adequate fire
4 flow.” Original Record 176.

5 Further, petitioners cite testimony regarding flooding and the inadequacy of storm drainage
6 in the neighborhood, and argue that there is no evidence, and the city made no finding, that
7 the city storm water drainage system in the area is adequate to accommodate the proposed
8 use.

9 Intervenor offers no focused response to these arguments. Intervenor does not cite to
10 any statement in the record from the city public works department regarding the adequacy of
11 public facilities and services, and contrary to the city’s finding the record apparently includes
12 no such statement. Further, petitioners are correct that the letter from the fire chief
13 concludes, with respect to water supply, that is unknown whether the city water supply will
14 be adequate to accommodate the proposed use, because the water demands of the proposed
15 development are unknown. That letter does not support the city’s finding that public
16 facilities are adequate with respect to water supply.

17 With respect to storm water drainage, petitioners note that the application proposed
18 that storm water will be directed into the city storm water drainage system (Original Record
19 223), but argues that there is no evidence in the record that the storm water drainage system
20 in the area can accommodate the proposed use. As petitioners note, the city council decision
21 incorporates a May 27, 2010 staff report to the planning commission, which includes a
22 recommended condition of approval that “[s]tormwater from the structure shall be kept on-
23 site and not run-off onto neighboring properties,” a condition the planning commission
24 ultimately adopted. Record 171, 200.⁴ However, there are no findings and apparently no

⁴ The condition states:

“Stormwater from the structure shall be kept on-site and not run-off onto neighboring properties. If Building Official determines that a ‘stormwater drainage plan’ must be engineered, the property owner shall provide the ‘engineered’ stormwater plan to the

1 evidence in the record regarding how stormwater would be “kept on-site,” and it is not clear
2 whether this condition of approval is intended to obviate the need to consider the adequacy
3 of the city’s storm water drainage system to accommodate the proposed use, as required by
4 WDC 4.4.3.A(4).

5 In sum, we agree with petitioners that the city’s finding that “public facilities and
6 services are adequate to accommodate the proposed use” is inadequate and not supported by
7 substantial evidence. This sub-assignment of error is sustained.

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

9 The city’s decision is remanded.

Building Official and the Planning Director shall select a city-appointed engineer to review the ‘stormwater plan’ (the property owner/developer shall pay for the city-appointed engineer’s review.” Record 171.