

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. 2012-064
18

19 FINAL OPINION
20 AND ORDER
21

22 Appeal from City of Eugene.
23

24 Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of
25 petitioner.
26

27 No appearance by City of Eugene.
28

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

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

35 REMANDED

01/17/2013
36

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving, as relevant, applications for final planned unit development approval and tentative subdivision approval.

MOTION TO INTERVENE

Goodpasture Partners. LLC (Goodpasture) moves to intervene on the side of the city. No party opposes the motion and it is allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. The reply brief is allowed.

FACTS

The present appeal is one in a long line of related appeals resulting from Goodpasture’s multi-stage development proposal to develop a planned unit development that will include ten apartment buildings, one assisted living/age restricted building, one commercial building, two club houses, open space and associated infrastructure on its two parcels containing approximately 23 acres that lie adjacent to petitioner’s retirement living facility. As described by Goodpasture’s expert, the soils on its property are a mixture of a surface layer of topsoil, over loose to moderately dense silty sand of variable thickness, over dense sandy gravels, and finally dense sandstone bedrock. The property also contains three areas where buried organics are located. Record 394.

We briefly set out some of the history of previous appeals and a description of the city’s previous decisions that are relevant to the present appeal. In a previous city decision that was appealed in *Willamette Oaks, LLC v. City of Eugene*, 63 Or LUBA 75, *rev’d on other grounds*, 245 Or App 47, 261 P3d 85 (2011) (*Willamette Oaks I*), the city approved Goodpasture’s consolidated applications for a zone change and tentative planned unit development (PUD) approval for its proposed development. Eugene Code (EC) 9.8320(6)

1 applies to applications for tentative PUD approval and requires the applicant to demonstrate
2 at the tentative PUD stage, through a geotechnical analysis that conforms to the requirements
3 of EC 9.6710(2), that “[t]he PUD will not be a significant risk to public health and safety,
4 including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an
5 impediment to emergency response.”¹ Goodpasture provided a geotechnical analysis that
6 identified loose (“under-consolidated”) organic rich soils in some areas of Goodpasture’s
7 property.² Petitioner submitted its own geotechnical reports that called into question some of
8 Goodpasture’s evidence and geotechnical analysis. In its decision approving Goodpasture’s
9 application for tentative PUD approval, the city deferred to the final PUD stage making a
10 determination as to whether the proposal complies with EC 9.8320(6).³ The city imposed

¹ EC 9.6710 provides in relevant part:

- “(1) **Purpose of Geological and Geotechnical Analyses.** 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.
- “(2) **Geological and Geotechnical Analysis Required.** Except for those activities exempted under EC 9.6710(3) Exemptions from Geological and Geotechnical Requirements, a geological and geotechnical analysis, prepared by an Oregon licensed Engineering Geologist or an Oregon licensed Civil Engineer with geotechnical experience, conforming with standards, procedures and content as defined in the Standards for Geological and Geotechnical Analysis adopted by the city in the manner set forth in EC 2.019 City Manager - Administrative and Rulemaking Authority and Procedures, is required for any of the following:
- “(a) All proposed tentative planned unit development, site review, or subdivision applications on properties with slopes equal to or greater than 5%.
- “(b) All proposed development that includes dedication or construction of a public street or alley or the construction of public drainage systems or public wastewater sewers.”

² As we understand it, under-consolidated soils are soils that are generally too loose and unstable to build buildings on without additional support for foundation loads using piers or piles that extend into the sandstone layer beneath the loose soils. Record 395.

³ In *Willamette Oaks I*, we quoted the city planning commission’s findings that explained the city’s rationale for deferring a determination regarding EC 9.8320(6) to the final PUD stage of approval. *Id.* at 100. We quote them again here:

1 conditions 13 and 14.⁴ We concluded that such a deferral was permissible. *Id* at 101. We
2 discuss that deferral and conditions 13 and 14 later in this opinion.

3 Goodpasture next submitted consolidated applications for final PUD and tentative
4 subdivision approval and the city approved the applications. One of the criteria that applies
5 to a tentative subdivision approval application, EC 9.8515(5)(a), requires the city to

“[Condition 14] effectively defers a finding of compliance with the applicable standard. This is a permissible deferral because the record shows that compliance with the approval standard is possible. The Planning Commission finds that EC 9.8320(11)(d) and EC 6.710 require completion of a geological and geotechnical analysis and that, based on the testimony of the applicant’s geotechnical experts and City staff, it is possible to prepare this analysis in accordance with the identified criteria. This deferral is also supported by the fact that the future review will provide the same participatory rights as allowed in the original process.

“With the revised condition of approval, it is ensured that the geotechnical analysis requirements will be met prior to final PUD approval and in a manner that is consistent with Oregon law.”

⁴ Conditions 13 and 14 provided:

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

“ * * * * *

“14. The applicant shall update the geotechnical analysis it has submitted to date to address the points raised in the two GeoScience reports (dated Jan. 18, 2011 and Feb. 10, 2010) which are:

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

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

“If necessary, the applicant shall revise its current geotechnical recommendations to be in accord with the updated information. The City shall confirm that the geotechnical analysis has addressed all of the points in the GeoScience reports prior to final PUD approval.” Record 33, 36.

1 determine that “the proposed subdivision will * * * [n]ot result in unreasonable risk of fire,
2 flood, geological hazards, or other public health and safety concerns.” In *Willamette Oaks*,
3 *LLC v. City of Eugene*, 64 Or LUBA 24 (2011), *aff’d* 248 Or App 212, 273 P3d 219 (2012)
4 (*Willamette Oaks II*), we remanded the city’s decision approving the final PUD in part
5 because we concluded that the city erred in further deferring a determination of compliance
6 with EC 9.8320(6) to a subsequent development phase that did not allow for public
7 participation. *Id.* at 44-45. We did not reach petitioner’s challenges to the city’s approval of
8 the tentative subdivision application because we determined that such challenges were
9 premature given that the validity of the city’s decision approving the subdivision was
10 dependent on the validity of the city’s decision approving the final PUD. *Id.* at 46.

11 To recap, when the dust settled on our decision in *Willamette Oaks II*, the city was
12 required to determine, as relevant to the present appeal, that the tentative PUD “will not be a
13 significant risk to public health and safety, including but not limited to soil erosion, slope
14 failure, stormwater or flood hazard, or an impediment to emergency response” under EC
15 9.8320(6), and that the subdivision will “[n]ot result in unreasonable risk of fire, flood,
16 geological hazards, or other public health and safety concerns” under EC 9.8515(5)(a). We
17 refer to EC 9.8320(6) and EC 9.8515(5)(a) in the opinion as the “EC public health and safety
18 standards.”

19 Following LUBA’s remand in *Willamette Oaks II*, the city held hearings on
20 Goodpasture’s final PUD and tentative subdivision applications, and again approved them.
21 This appeal followed.

22 **ASSIGNMENT OF ERROR**

23 The EC public health and safety standards are similarly worded and require a similar
24 analysis to determine whether the proposed development will present a risk to public health
25 and safety when developed. As explained above, the subject property has geologic
26 constraints in the form of loose, organic rich soils, and as we understand it, development of

1 geologically constrained areas poses significant enough risks to safety that at least some of
2 the risks must be mitigated to comply with the EC public health and safety standards. For the
3 buildings proposed for the subject property, Goodpasture has proposed mitigation, and we do
4 not understand petitioner to challenge Goodpasture's proposed mitigation methods or
5 otherwise argue that the mitigation proposed for the buildings is insufficient to comply with
6 the EC public health and safety standards.

7 In its assignment of error, petitioner argues that the city's decision that the proposed
8 PUD and subdivision comply with the EC public health and safety standards misconstrues
9 applicable law, because the evidence in the record demonstrates that there are geologic
10 constraints on areas of the property that will not be developed with buildings but will be
11 developed with roads, parking lots, and sewer, electrical and water lines. Petition for Review
12 14. Goodpasture proposes no mitigation for the portions of the property that are to be
13 developed with roads, parking lots, and sewer, electrical and water lines. Petitioner contends
14 that mitigation is required for this development as well.

15 We also understand petitioner to argue that the hearings officer misconstrued
16 applicable law in determining that EC 9.8320(6) is necessarily met because Goodpasture
17 provided the information required to satisfy conditions 13 and 14. Petition for Review 16;
18 *see* n 4. According to petitioner, the hearings officer was required to consider *both* whether
19 conditions 13 and 14 are met, and whether substantial evidence in the record supports a
20 conclusion that EC 9.8320(6) is satisfied and the hearings officer erred in equating
21 satisfaction of conditions 13 and 14 to satisfaction of EC 9.8320(6). Finally, petitioner
22 argues that the hearings officer's findings are inadequate to explain why he concluded that
23 the EC public health and safety standards are met, because the findings do not explain why
24 areas of the property that contain geologic constraints and that are proposed to be developed
25 with roads, parking and utilities can be developed without mitigating the significant risk from
26 those geologic constraints. Petition for Review 14.

1 Goodpasture responds initially that petitioner is precluded from raising an issue
2 regarding whether the proposed subdivision application satisfies EC 9.8515(5)(a) because
3 petitioner failed to specifically cite that EC provision in raising the issue during the
4 proceedings below, and that the hearings officer was not required to address the issue raised
5 in the assignment of error because the argument was raised in a 22-page document that
6 contained multiple arguments. To the extent we understand Goodpasture’s arguments, we
7 disagree with them. The argument set forth in the assignment of error was presented at
8 Record 343 and the city was obligated to address it in determining whether the public health
9 and safety standards are met.

10 As we explain above, in the city’s previous decision approving the tentative PUD
11 application, the city imposed conditions 13 and 14, which required Goodpasture to (1) submit
12 recommendations for mitigation of the geotechnical constraints on Parcels 1, 2, 3 and 5 and
13 to implement Goodpasture’s geotechnical engineer’s (K & A’s) recommendations regarding
14 building foundations during the building phases of the development, (2) update its
15 geotechnical reports to respond to petitioner’s experts’ (GeoScience’s) reports, and (3) revise
16 its reports and address all of the points raised in GeoScience’s reports. *See* n 4. As we
17 explained above, the planning commission adopted findings that explained that “[condition
18 14] effectively defers a finding of compliance with the applicable standard * * *” to the final
19 PUD stage. *See* n 3.

20 In the portion of the challenged decision that addresses condition 13, the hearings
21 officer found that “satisfying conditions 13 and 14 ensures compliance with * * * EC
22 9.8320(6).” Record 34. The hearings officer then summarized in detail the reports submitted
23 by Goodpasture’s experts, K & A, and explained K & A’s recommendation for “construction
24 methods * * * and materials taking account of the areas with buried organics.” Record 34.
25 The hearings officer found:

1 “The hearings official’s role in this matter is to consider whether the applicant
2 has submitted the information required in condition 13 and thus whether the
3 application complies with EC 9.8320(6). The hearings official concludes that
4 the applicant has submitted the information required in condition 13 and based
5 on the entire record, the applicant has continued to address the concerns raised
6 by GeoScience. Even though differences in professional judgment still
7 remain, the August, 2011, May 2012 and June 2012 reports, and follow up
8 letter on July 12, 2012, all from K & A, contain detailed geotechnical
9 information on Parcels 1, 2, 3, and 5 along with specific recommendations for
10 mitigation of the geologic constraints consistent with this condition of
11 approval, * * * and with EC 9.6710.” Record 35-36.

12 In the portion of the decision addressing condition 14, the hearings officer found:

13 “Finally, the hearings official notes that GeoScience discussed points that it
14 believed K & A did not address adequately. Letter from GeoScience (June
15 28, 2012); K & A responded to those points. Letter from K & A (July 12,
16 2012). Like condition 13, condition 14 did not require K & A to adopt
17 GeoScience’s points and concerns, but rather K & A needed to address those
18 points and revise, as necessary, its recommendations. K & A did so. The city
19 staff confirmed that, and the hearings official also reaches the same
20 conclusion independently. The applicant has satisfied original condition of
21 approval 14 and thus complies with * * * EC 9.8320(6) in this respect.”
22 Record 37.

23 The hearings officer’s findings regarding EC 9.8515(5)(a) simply refer to his findings
24 regarding EC 9.8320(6). Record 67.

25 When the hearings officer’s findings are read together it is reasonably clear that the
26 hearings officer understood conditions 13 and 14 as restricting his obligation to determine
27 whether the tentative PUD will “be a significant risk to public health and safety” under EC
28 9.8320(6) to determining whether Goodpasture had submitted the rebuttal information
29 required to be submitted by conditions 13 and 14. If that is the case, then the hearings
30 officer’s understanding of the relationship between conditions 13 and 14 and EC 9.8320(6) is
31 incorrect. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323 (1988) (we review the
32 hearings officer’s decision to determine whether it correctly interprets and applies the
33 applicable law.)

1 The planning commission adopted findings explaining that it was deferring making a
2 determination of compliance with EC 9.8320(6) to the final PUD stage. *See* n 3. Conditions
3 13 and 14 thus provided additional information submission requirements to assist the city in
4 making its *initial* determination as to whether EC 9.8320(6) is satisfied at the time of final
5 PUD approval.

6 More importantly, even if conditions 13 and 14 could be read to restrict the scope of
7 the city’s determination of compliance with EC 9.8320(6) to determining whether the
8 information required by those conditions to be submitted was in fact submitted, the analysis
9 required to determine compliance with EC 9.8515(5)(a) for the subdivision application is not
10 limited in any way by those conditions, which were imposed at the tentative PUD stage. The
11 hearings officer’s findings regarding EC 9.8515(5)(a) simply refer to the findings addressing
12 EC 9.8320(6) and conditions 13 and 14, and are inadequate to explain why the hearings
13 officer concluded that the subdivision will not “result in unreasonable risk of * * * geologic
14 hazards” under EC 9.8515(5)(a).

15 The EC public health and safety standards are very subjective. The issue under those
16 subjective standards now appears to be limited to soil stability and whether mitigation is
17 required for the construction envisioned by the PUD and subdivision approvals. There
18 appears to be no dispute that (1) construction of the proposed buildings could result in
19 violation of those public health and safety standards, (2) mitigation will be required in
20 constructing those buildings to avoid public health and safety concerns, and (3) the
21 mitigation proposed by the applicant is sufficient to avoid public health and safety concerns
22 so that the proposed buildings may be constructed consistently with the EC public health and
23 safety standards. But what is missing from the city’s findings are finding that address the
24 roads, parking lots, and sewer, electrical and water lines. There is no finding that the EC
25 public health and safety standards do not apply to roads, parking lots, and sewer, electrical
26 and water lines. Assuming the EC public health and safety standards do apply to the roads,

1 parking lots, and sewer, electrical and water lines, there is no finding that these aspects of the
2 proposed PUD and subdivision can be constructed on those loose soils without causing
3 unreasonable or significant public health and safety concerns. If construction of those
4 aspects of the proposed PUD and subdivision could cause unreasonable or significant public
5 health and safety concerns, the hearings officer will need to find that any mitigation measures
6 Goodpasture proposes for those aspects of the development are sufficient to reduce those
7 public health and safety concerns to a level that complies with the EC public health and
8 safety standards.

9 Also in its response brief, Goodpasture points to the portion of the hearings officer's
10 findings regarding condition 14, quoted above, that refer to a July 12, 2012 letter from K &
11 A. Record 259. Goodpasture argues that those findings demonstrate that the hearings officer
12 chose to accept Goodpasture's evidence set out in that July 12, 2012 letter over GeoScience's
13 evidence and that he concluded that the evidence in that letter supports a conclusion that the
14 applicable criteria are met. We do not read the hearings officer's findings in the same way
15 Goodpasture does. The hearings officer's findings quoted above determine that the July 12,
16 2012 letter from K & A was sufficient to respond to GeoScience's June 28, 2012 letter. But
17 while it is possible that K & A's letter provides at least some of the evidentiary support that
18 would be needed for the hearings officer to make the findings that are required by the EC
19 public health and safety standards with regard to the proposed roads, parking lots, and sewer,
20 electrical and water lines, that letter is not a substitute for the required findings.

21 In its letter, K & A first takes the position that mitigation of safety risks from
22 geologic constraints in areas of the property to be developed with roads, parking lots and
23 utilities is not required because conditions 13 and 14 do not require it. However, we have
24 already explained that that understanding of the effect of conditions 13 and 14 is incorrect
25 with respect to EC 9.8320(6), and that the conditions do not apply at all to restrict the
26 analysis required under EC 9.8515(5)(a). Goodpasture's expert next states that industry

1 standards for buildings do not require such mitigation, and finally, he states that mitigation is
2 not required when there is not a “significant, widespread liquefaction hazard on the site.”
3 Record 259. However, as to the remaining two reasons, it is not clear to us how the
4 unspecified industry standards or lack of a significant widespread liquefaction hazard
5 necessarily means the proposed roads, parking lots, and sewer, electrical and water lines can
6 be constructed on the property’s unstable soils, without any mitigation, without violating the
7 EC public health and safety standards.

8 It is possible that on remand, the city may interpret EC 9.8320(6) and EC
9 9.8515(5)(a) in such a manner that the code provisions do not require the city to consider
10 whether portions of the property that contain geologic constraints but are not proposed to be
11 developed with buildings can be developed without significant risk to public health and
12 safety. But as it now stands, the city has not offered a reviewable interpretation of either EC
13 provision.⁵

14 To sum up, we agree with petitioner that to the extent the hearings officer concluded
15 that the applicant’s submittal of the information required by conditions 13 and 14 necessarily
16 was sufficient to establish that the PUD and subdivision comply with the EC public health
17 and safety standards, the hearings officer’s decision misconstrues the applicable law.
18 Assuming EC 9.8320(6) and 9.8515(5)(a) apply to the proposed roads, parking lots, and
19 sewer, electrical and water lines, we also agree that the hearings officer erred by failing to
20 consider whether those aspects cause public health and safety concerns that violate EC

⁵ Goodpasture offers several arguments in support of an interpretation of the EC public health and safety standards to not require consideration of geologic constraints on areas of the property that are proposed to be developed with roads, parking lots, and utilities. Whether the EC public health and safety standards can be interpreted in the manner Goodpasture suggests is far from clear. Although ORS 197.829(2) authorizes LUBA to interpret a code provision in the first instance where a local government fails to provide an interpretation, we decline to exercise that authority in the present case. *Thomas v. Wasco County*, 30 Or LUBA 302, 313 (1996) (LUBA will decline to interpret a local provision in the first instance under ORS 197.829(2) where the purpose of the provision is unclear and subject to numerous interpretations).

1 9.8320(6) and 9.8515(5)(a), and requiring any mitigation that may be necessary to ensure that
2 those aspects of the PUD and subdivision comply with the EC public health and safety
3 standards. Petitioner's assignment of error is sustained.

4 The city's decision is remanded.