

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. 2012-081
18

19 FINAL OPINION
20 AND ORDER
21

22 Appeal from City of Eugene.
23

24 James W. Spickerman, Eugene, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Gleaves Swearingen LLP.
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 was Perkins Coie LLP.
31

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

35 REMANDED

01/22/2013
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 city hearings official’s decision denying its request for approval of a sign permit.

MOTION TO INTERVENE

Goodpasture Partners, LLC (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new issues raised in the intervenor’s response brief. The motion is granted.

FACTS

Petitioner Willamette Oaks, LLC operates a retirement living center on Goodpasture Island in the City of Eugene. Goodpasture Island Road, which runs generally through the middle of the island, is a primary access roadway on Goodpasture Island. Alexander Loop is a local access road that intersects with Goodpasture Island Road and runs approximately 1000 feet south. Petitioner’s retirement center is located at the end of Alexander Loop, approximately 1000 feet from Goodpasture Island Road.

In 1986 petitioner sought city approval for two signs. One of the proposed signs was to be located on the same parcel that is occupied by petitioner’s retirement center. That sign is not at issue in this appeal. The second sign was to be located near the intersection of Alexander Loop and Goodpasture Island Road, on property that was owned at the time by the Sisters of St. Joseph of Peace, Health and Hospital Services (Sisters of St. Joseph). Approval was sought for this second sign because petitioner’s retirement center is difficult to see from Goodpasture Island Road. Record 33. Petitioner also requested a variance in conjunction with the sign permits in 1986. Although the reasons for the 1986 variance are not entirely clear, the variance apparently was required to site two signs on the tract owned by the Sisters

1 of St. Joseph, rather than one, and to allow the two signs to be larger and taller than would
2 otherwise have been permissible under the Eugene Code (EC) in 1986.

3 As noted, the subject of this appeal is the second sign, to be located at the intersection
4 of Goodpasture Island Road and Alexander Loop. A map included in the record shows the
5 sign was to be setback 15 feet from the property lines along Goodpasture Island Road and
6 Alexander Loop. Record 44. However a November 24, 1986 letter in the record from
7 petitioner's representative takes the position that the sign was to be set back only 10 feet
8 from the property line. Record 10. The sign was constructed sometime after the approvals
9 were granted in 1986. There was testimony below that the sign may have been removed and
10 replaced more than once. Record 4. However, there is no dispute that the sign was removed
11 recently pursuant to a city enforcement action, at least in part because the removed sign was
12 constructed within the Alexander Loop right of way.¹ We understand petitioner to seek the
13 sign permit at issue in this appeal in order to install a replacement sign at the location
14 approved by the 1986 sign permit and variance.²

15 As noted, while petitioner was the applicant for the sign permit and variance in 1986,
16 at that time the property was owned by the Sisters of St. Joseph. The record owner of the
17 property today is intervenor Goodpasture Partners, LLC. Intervenor has received city

¹ The hearings official's findings include the following:

“* * * Although the testimony was not completely clear, the hearings official understood the [city's] enforcement action to require removal of the sign because the latest sign was located in the right-of-way. This location was also not where the 1986 variance approved the location for the sign. * * * The appellant did not respond to any of this testimony at the hearing or request the record remain open to respond. These oral statements of fact make sense in the overall context of the facts documented in the paper record, and are undisputed. The hearings official thus accepts these statements as facts supported by substantial evidence.” Record 4.

² As the hearings official noted, petitioner sought approval for an eight-foot tall sign, whereas the 1986 variance only authorized a six-foot tall sign. But the hearings official noted petitioner agreed the hearings official could impose a condition of approval [requiring] the “sign [to] be six feet in height to be in compliance with the 1986 variance.” Record 4.

1 approval to develop the property where the proposed sign would be located.³ Intervenor
2 opposes petitioner’s proposal to erect a sign in the location authorized by the 1986 sign
3 permit and variance.

4 The ultimate resolution of the sign dispute between petitioner and intervenor will
5 require that at least two issues be resolved. First, petitioner claims that it has an “irrevocable
6 license” or a right through “adverse possession” to site the disputed sign on intervenor’s
7 property. Petition for Review 3; Record 54. Intervenor disputes that claim, and petitioner’s
8 disputed claim that it has an irrevocable license or a right through adverse possession to site
9 the disputed sign on intervenor’s property has not been adjudicated by the Lane County
10 Circuit Court. As we explain later in this opinion, we agree with petitioner that the first issue
11 is not presented in this appeal.

12 The second issue is whether the city should grant land use approval, via a sign permit,
13 to authorize construction of a sign on intervenor’s property. For reasons that are not clear to
14 us, petitioner has decided to seek resolution of the second issue—whether the city should
15 grant a sign permit to site the disputed sign—before seeking final resolution of the first
16 issue—whether petitioner has a license or some other property right to site the disputed sign
17 on intervenor’s property over intervenor’s objection.

18 **INTRODUCTION**

19 The hearings official gave essentially four reasons for denying petitioner’s
20 application. In its four assignments of error, petitioner challenges each of the four bases for
21 denial. In addressing those assignments of error, the parties raise other issues. We attempt
22 below to make clear the issues that we decide and to identify some issues that we do not
23 decide in this opinion.

³ We recently remanded the city decision granting final planned unit development and tentative subdivision plan approval for intervenor’s proposed development of its property. *Willamette Oaks LLC v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2012-064, January 17, 2013).

1 **FIRST ASSIGNMENT OF ERROR**

2 Although the parties have gone to lengths to complicate the issue presented under the
3 first assignment of error, that issue is relatively straightforward. That issue is whether, under
4 the EC, in considering an application for a sign permit, ownership of the property where the
5 sign would be located is a relevant consideration. The answer to that question is not
6 complicated. While many land use regulations do require that the owner of the property that
7 is the subject of a permit application join in the application or authorize the applicant to
8 submit the application, the EC does not impose either requirement. In *Doumani v. City of*
9 *Eugene*, 35 Or LUBA 388, 390 (1999), LUBA concluded that because EC 9.690(2) did not
10 specify who could be an applicant for site review, the city erred by denying an application for
11 site review simply because it was not signed by the record owner. Similarly here, EC 9.6625,
12 which requires sign permits to construct signs in the City of Eugene, and EC 9.6630, which
13 requires that an application for sign permit be submitted to the city, do not limit who can
14 apply for a sign permit. In a normal case, it seems highly unlikely that anyone would devote
15 the time and expense required to seek a sign permit for a sign to be located on land owned by
16 another person who opposes the sign, even though the EC permits such applications. As we
17 have already explained, this is not a normal case.

18 The hearings official and intervenor would rephrase the issue presented under the first
19 assignment of error to ask: does the EC permit the city to approve a sign permit application
20 submitted by a person who does not own the property where the sign would be located, if the
21 property owner opposes the application? However, the hearings official's and intervenor's
22 rephrasing of the issue effectively assumes the answer to a question that has not yet been
23 answered and cannot be answered in this appeal. Whether petitioner actually has an
24 irrevocable license or a property interest that will allow petitioner to actually construct the
25 sign it seeks city land use approval for will have to be resolved by the Lane County Circuit
26 Court, since it seems highly unlikely that petitioner and intervenor are going to reach

1 agreement regarding that issue. By interjecting that unanswered question into the issue, the
2 hearings official and intervenor avoid the real issue that was before the hearings official by
3 confusing it with an issue that was not before the hearings official.

4 We agree with petitioner that under EC 9.6625 and EC 9.6630 it does not matter
5 whether petitioner owns the property on which the sign is to be located or has a license or
6 some other property interest in the property, and it does not matter whether intervenor as the
7 record owner of the subject property opposes the application. The hearings official erred in
8 concluding otherwise. If the city wishes to make the property owner of record's signature or
9 authorization a pre-requisite for applications seeking sign permit approval, it must amend its
10 code to impose that requirement.

11 Before turning to the second assignment of error, we note that in discussing his
12 conclusion that the city could not grant petitioner's application for a sign permit over
13 intervenor's objection, the hearings official made two additional points.

14 *"By granting an approval for a development on another person's property, the*
15 *city would be affecting the rights of that property owner. This case aptly*
16 *demonstrates this problem because here, the city had already issued some*
17 *approvals for a PUD showing development where the sign would be located.*
18 *Thus approving the sign over Goodpasture Island Partner's objection would*
19 *have set up a conflict between two land use approvals with one possible*
20 *outcome that Goodpasture Island Partners could not construct the*
21 *development as already approved for its own PUD. The effect of allowing*
22 *any person to propose a development action on another person's property over*
23 *the landowner's express objection could thus provide a means of collaterally*
24 *precluding development on the landowner's property, even already approved*
25 *development."* Record 5 (emphasis added).

26 We disagree with one of the points made by the hearings official; and, based on the
27 record, we cannot determine whether the second point is legally significant. Turning to the
28 first point the hearings official makes in the emphasized first sentence in the paragraph
29 quoted above, we do not agree that granting the disputed sign permit would have *any* effect
30 intervenor's rights as the record property owner. If the city were to grant approval of the sign

1 permit application, all the city would do is decide that the application complies with all
2 relevant city sign permit approval standards such that the sign *could be* constructed
3 consistently with city land use laws. Such a sign permit approval does not determine that
4 petitioner has a license or property right to actually construct the sign. As we have already
5 explained, responsibility for resolution of the dispute between the parties regarding the
6 existence of such a license or property right in favor of petitioner lies elsewhere, and nothing
7 the city might do in granting a sign permit or that LUBA might do in affirming such a
8 decision would grant petitioner the license or property interest it must have to construct the
9 sign on intervenor's property despite intervenor's objection.

10 The second point made by the hearings official is that the development made possible
11 by the requested sign permit might conflict with or preclude the development that has already
12 been approved by the city for intervenor's property. *See* n 3 and related text. But the
13 hearings official does not clearly find that there would be a conflict or that any such conflict
14 would preclude both developing the PUD and erecting the sign. More to the point, the
15 hearings official did not find that the permit should be denied because of such a conflict.
16 Rather, the hearings official merely speculated that there might be such a conflict and, if so,
17 that possible conflict supported the hearing official's position that under the EC he could not
18 approve the permit application submitted by petitioner because intervenor as record owner of
19 the property opposed the application. Moreover, the suggested conflict would appear to be
20 more imagined rather than real, since even if the city were to grant conflicting land use
21 approvals, the person who owns the controlling license or property interest will be the one to
22 decide whether the sign or the PUD is constructed.

23 Because the hearings official did not find that there would be a conflict between the
24 development approved, the city's PUD approval decisions and development of the sign
25 proposed by petitioner and did not base his decision to deny the sign permit application on
26 such a conflict, we do not consider the question further.

1 Because the hearings official erroneously concluded intervenor’s opposition to
2 petitioner’s application was by itself a sufficient basis to deny petitioner’s sign permit
3 application, the first assignment of error is sustained.

4 **SECOND ASSIGNMENT OF ERROR**

5 In this assignment of error, petitioner assigns error to the hearings official’s reasoning
6 in rejecting an argument made by petitioner below that petitioner has a right to construct the
7 sign in accordance with the 1986 variance, because “the variance runs with the land.”
8 Record 4. The hearings official’s findings are set out below:

9 “[Petitioner] argued that the variance runs with the land—that is, once the city
10 has issued the variance, it must continue to honor the sign allowed by the
11 variance. * * *

12 “Goodpasture Island Partners provided written testimony * * * which points
13 out that if the variance runs with the land, then Goodpasture Island Partners is
14 now the beneficiary of the entitlements in the variance. The hearings official
15 concurs. Allowing the sign would be a license in real property terms, but that
16 license is between persons (or entities in this case), and the current landowner
17 has by its written and oral testimony revoked that license. Thus, if the
18 variance runs with the land (a conclusion the hearings official does not reach),
19 the current holder of the variance entitlement—i.e. Goodpasture Island
20 Partners—would get to choose whether to exercise the right to use the
21 variance, and it has expressly chosen not to do so. So, the argument that the
22 variance runs with the land does not help [petitioner].” Record 4-5.

23 As an initial matter, we do not understand petitioner to take the position in this appeal
24 that it has rights under the 1986 variance because the rights granted by the 1986 variance run
25 with the land. That would be a dubious legal theory to assert in this case. That theory would
26 first have variance rights being granted to the Sisters of St. Joseph in 1986, as the undisputed
27 owner of the property in 1986, even though the Sisters of St. Joseph was not the applicant
28 and was not a party to the 1986 variance application. It would then have those rights run not
29 to intervenor as the current record owner of the subject property, but rather to petitioner, who
30 does not claim to be the current owner of the subject property. Petitioner’s only claim is a

1 yet-to-be-established claim that it has an irrevocable license or a right through adverse
2 possession to construct and maintain a sign on intervenor’s property.

3 Rather than asserting a claim that depends on whether the rights granted under the
4 1986 variance “run with the land,” we understand petitioner to argue that petitioner as the
5 applicant in 1986 (not as the property owner) was granted rights under the 1986 variance that
6 remain viable today because the 1986 variance has not expired under the EC or by the terms
7 of the 1986 variance itself. Therefore, in its second assignment of error, petitioner challenges
8 the findings the hearings official adopted in rejecting a legal theory the petitioner does not
9 assert at LUBA.

10 Because petitioner’s second assignment of error challenges an aspect of the hearings
11 official’s decision that rejects a legal theory that petitioner does not appear to assert in this
12 appeal, we would normally deny the second assignment of error. But in addressing
13 petitioner’s argument below, the hearings official appears to have decided a legal question
14 that is not presented in this appeal—whether petitioner has an irrevocable license or some
15 other right that might permit petitioner to construct and maintain a sign on intervenor’s
16 property over intervenor’s objection. Because we agree with petitioner that that legal
17 question must be answered by the Lane County Circuit Court, to the extent the hearings
18 official attempted to decide that question, he should not have. We therefore sustain the
19 second assignment of error.

20 **THIRD ASSIGNMENT OF ERROR**

21 The hearings official denied the sign permit application, in part, because “the
22 conditions under which the city approved the 1986 variance do not exist today.” Record 5.
23 The hearing official explained that in 1986 petitioner’s retirement center was part of a larger
24 development site and that the variance anticipated that the larger sign authorized by the
25 variance would ultimately be used by three businesses. The hearings official concluded that
26 because the “property on which the sign would be located is no longer part of that common

1 development site, the ultimate sign design (three businesses advertising on one 36 square foot
2 sign) approved by the variance can never exist.” *Id.*

3 Initially, just because the property where the sign is to be located is no longer part of
4 the same development site that existed in 1986, we do not see why it necessarily follows that
5 a sign that advertises three businesses “can never exist.” The hearings official offers no
6 explanation for that conclusion. In any event, we agree with petitioner that the hearings
7 official does not explain why a change in the facts that justified the variance in 1986
8 necessarily means that the 1986 variance is now legally ineffective, as the hearings official
9 appears to suggest. The hearings official cites nothing in the EC or the 1986 variance
10 decision itself that would support that suggestion.

11 Finally, intervenor suggests that petitioner is proposing to locate the sign in a location
12 that is different from the location approved by the 1986 variance. Intervenor-Respondent’s
13 Brief 12-13. However, that does not appear to be the case. The locations shown in the 1986
14 variance application and the current application appear to be the same. Record 44, 57. In
15 any event, the hearings official did not deny the application because petitioner seeks to
16 construct the proposed sign in a different location than was approved in the 1986 variance.

17 The third assignment of error is sustained.

18 **FOURTH ASSIGNMENT OF ERROR**

19 Finally, the hearings official found “the appellant did not submit any evidence
20 showing that a new sign could not be constructed in full compliance with the current city
21 code.” Record 5.

22 Petitioner argues:

23 “Petitioner applied for a sign permit for a sign that exceeded the size and
24 height limitations of the present code based upon an existing variance for such
25 sign approved in 1986. It is irrelevant whether or not a sign complying with
26 the present code could have been placed at this site presently.” Petition for
27 Review 6.

1 We agree with petitioner. The hearings official cites nothing in the EC that would
2 require that an applicant that seeks to construct a sign of a size that was approved in a 1986
3 variance must first demonstrate that it is not possible to construct a sign that complies with
4 current sign size requirements.

5 The fourth assignment of error is sustained.

6 The city's decision is remanded.