

Understanding the LUBA decision on MiCAP

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Updated the “Immediate effect” section related to status of amendments following the decision.

Background

On August 11, 2008, the City Council approved two ordinances that included code amendments related to lot and development standards that are of particular importance to promoting infill compatibility.

- Ordinance 20417
 - Added an additional goal for the administrative Stormwater Management Manual.
 - Added the City’s Growth Management Policies to the purpose statement for the land use code.
 - Changed calculation of residential density.
 - Redefined “building height” and “flag lot” and added definitions for “alley-access-only lot” and “residential character.”
 - Applied flag lot standards to R-2, R-3, and R-4 zones.
 - Clarified prohibition against new alley-access-only lots.
 - Revised lot width and frontage requirements in R-2, R-3, and R-4 zones.
 - Required opportunity for early input by surrounding property owners on some development projects.
 - Changed distance measurement for multi-family open space credit for nearby parks.
 - Excluded area of private streets from residential lot areas.
- Ordinance 20418
 - Revised maximum R-3 and R-4 building heights in the South University area.
 - Increased multi-family parking requirements in the South and West University area to take into account the number of bedrooms.

The Home Builders Association (HBA) of Lane County appealed both Ordinances, citing nine assignments of error related to three of the amendments: In Ordinance 20417, the Stormwater Management Manual goal; and in Ordinance 20418, the university area R-3 and R-4 maximum building heights and parking requirements.

None of the amendments in Ordinance 20417 were in affect during the appeal; both amendments in Ordinance 20418 *were* in affect during the appeal.

On June 12, 2009, the State Land Use Board of Appeals (LUBA) issued its decision.

This document explains the important elements of that decision as they relate to future code amendments to implement infill compatibility standards.

Immediate effect

Note: This section reflects the City Attorney's review.

LUBA affirmed Ordinance 20417, and all the amendments in Ordinance 20417 will become effective July 4, 2009, if the decision is not appealed before that date.

LUBA remanded Ordinance 20418, and the two amendments in Ordinance 20418 will no longer be effective as of July 4, 2009, if the decision is not appealed before that date.

If Ordinance 20418 is not appealed, the amendments will not be in effect unless and until the City Council takes action to address the reasons for remand.

Any party to the LUBA appeal can, of course, appeal the LUBA decision to the Court of Appeals.

Summary of LUBA bases for decisions

In affirming Ordinance 20417, LUBA found the new goal for the administrative Stormwater Management Manual had no effect on approval criteria since it was merely a goal and is not referenced by any other section of the Eugene Code.

LUBA agreed with the City that the next time the Stormwater Management Manual is amended would be the appropriate time to raise appeal issues. LUBA made no substantive findings on how the HBA's claims would be considered in the future.

In remanding Ordinance 20418, LUBA required the City to address three questions:

- Under the Fifth Assignment of Error, subassignment A. LUBA found:

*“Although we agree with the city that West University Neighborhood Refinement Plan Policy 3 need not be interpreted to preclude the city from adjusting how the city chooses to implement that policy [related to parking], **the city needs to explain how a decision to increase off-street parking is consistent with a policy that calls for reducing off-street parking.**”*
- Under the Sixth Assignment of Error, subassignment C. LUBA found:

*“Although it seems unlikely to us that the prior maximum building height limits in the R-3 and R-4 zone played much of a role when the city’s comprehensive plan and land use regulations were acknowledged as complying with Goal 12 and the TPR [i.e., the Transportation Planning Rule], we cannot be sure that it played no role in facilitating “transit oriented developments (TODs) on lands along transit routes,” as OAR 660-012-0045(5)(a) requires. And in any event it seems entirely possible that the prior one off-street parking space requirement for multiple family dwellings played a role when the city’s comprehensive plan and land use regulations were acknowledged to comply with OAR 660-012-0045(5)(c)(A) requirement that the city have a parking plan which “[a]chieves a 10% reduction in the number of parking spaces per capita in the MPO.” **Without expressing any view on whether those prior EC provisions [i.e., R-3 and R-4 max building height and multi-family parking requirements] were adopted to comply with the TPR or were relied on to secure acknowledgment, and without expressing any view on whether the disputed amendments adopted by Ordinance 20418 may cause the***

EC to be inconsistent with OAR 660-012-0045(5), we agree with petitioner that the city's decision must be remanded so that the city can address those questions."

In other words, LUBA did *not* find that the City had erred in either amendment, but rather that the City need to explicitly explain its actions on these three points.

LUBA also made explicit that the West University Neighborhood Refinement Plan Policy 3 did *not* necessarily preclude the City from increasing parking requirements in the West University area. LUBA was also clear that it was not making any finding on the merits of the HBA's claims regarding the TPR rule.

City response to remand

Note: This section is preliminary, pending the City Attorney's review.

LUBA's remand of Ordinance 20418 simply requires the City to provide findings that address one question related to max building heights and two questions related to parking requirements.

The question related to max building heights is:

Did the specific maximum building height limits in the R-3 and R-4 zone play a significant role (i.e., in facilitating "transit oriented developments (TODs) on lands along transit routes) when the city's comprehensive plan and land use regulations were acknowledged as complying with Goal 12 and the TPR?

Unless the answer to this question is "Yes," the City can satisfy the LUBA requirement by a single-sentence finding that the prior max building height did *not* play a significant role.

The two questions related to parking requirements may require more extensive explanation.

At this point, the City's best strategy would be to adopt two separate ordinances (one for each amendment) along with the findings that address LUBA's remand. This would avoid the potential for both amendments being further delayed if the HBA challenges only one of the re-adopted amendments.

Summary of LUBA's rejection of other HBA claims

Other than the three items described in the preceding section, LUBA denied all the other HBA claims.

- **First Assignment of Error (Special Area Zone).** LUBA found the City acted properly by implementing maximum building height standards and parking requirements specific to areas around the university without creating a Special Area Zone.
- **Second Assignment of Error (Using neighborhood association boundaries).** LUBA found the City acted properly by specifying the limits of particular code provisions by referring to neighborhood association boundaries.
- **Third Assignment of Error (Needed Housing and plan density).** LUBA found:
"By reducing the 50-foot and 120-foot maximum building height maximum in the 16-block area, petitioner argues the city has effectively downzoned this area in a way that is inconsistent with the Metro Plan and OAR 660-008-00025. We understand petitioner to

argue the new off-street parking requirements have the same effect for the larger South and West University Neighborhoods.

Petitioner's argument is without merit. ...

Even if OAR 660-008-0025 could be read to preclude new land use regulations that might have the indirect effect of making it difficult to achieve the densities called for under the Metro Plan, petitioner comes nowhere near showing that is the case here."

- **Fourth Assignment of Error (“Bedroom” definition).** LUBA found the City did not need to define “bedroom” in order to implement multi-family parking requirements that are based in part on the number of bedrooms in each dwelling.¹
- **Fifth Assignment of Error (Metro Plan and refinement plan).** LUBA found the revised max building heights and parking requirements were consistent with the density range of the Metro Plan “High-Density Residential” designation that applies to the affected areas (Policy A.9).

LUBA also found the revised standards did not conflict with Metro Plan Policy A.14 requiring the City to “review local zoning and development regulations periodically to remove barriers to higher density housing and to make provision for a full range of housing options.” (See “LUBA Findings on Goal 10 (‘Needed Housing’) issues,” below.)

LUBA also found the revised standards did not necessarily increase impervious surfaces or increase storm water runoff (Metro Plan Policy G.17).

Notably, LUBA criticized the HBA for misrepresenting Metro Plan policies on these claims:

“As was the case with petitioner’s reading of Metro Plan Policy A.14, petitioner misreads Metro Plan Policy G.17 to require something that it does not require.”

- **Sixth Assignment of Error (Goal 12, TransPlan).** LUBA rejected the HBA’s claim “If you park them they will come” and found:

“Ordinance 20418 will not significantly affect West and South University Neighborhood transportation facilities.”

LUBA also found that that the City provided adequate findings that the amendments will not have a negative effect on the city’s ability to achieve desired residential densities and the city’s ability to meet the nodal development performance standard, and that the modest amount of additional off-street parking that will be required under Ordinance 20418 does not conflict with the city’s nodal development policies.

- **Seventh Assignment of Error (Goal 6, Air, Water and Land Resources Quality).** LUBA found the HBA’s claim that the revised standards would force students to live off campus and commute by car (thus increasing air pollution and global warming) “*has little or no support in the evidentiary record There is simply no credible evidence to support petitioner’s contention.*”

LUBA also found:

¹ Interestingly, the Department of Land Conservation and Development has a “Model Code” posted on its Web site that bases parking requirements on bedrooms.

“There is no credible evidence that a material number of students are discouraged from bringing their cars under the current limited requirement for off-street parking and would be induced to bring their cars to the neighborhood by the new off-street parking standard.”

- **Eighth Assignment of Error (Storm water).** LUBA found that:

“[All] Ordinance 20417 does is add some additional goals that the City Manager must consider. The goals set out in EC 9.6790(6) do not themselves apply to needed housing and because they do not apply to needed housing they could not be impossible to comply with. Neither do they have any effect on the city’s inventory of residential, commercial or industrial lands.”

- **Ninth Assignment of Error (Notice of zone changes).** LUBA found that Ordinance 20417 did not meet the statutory definition of a “rezoning,” and the City had provided proper “rezoning” notice for Ordinance 20418.

LUBA Findings on Goal 10 (Needed Housing) and density-related issues

The centerpiece of the HBA appeal was that the revised max height standards and parking requirements in the university area would reduce achievable density levels to a degree that would conflict with Goal 10 requirements for adequate residential buildable lands.

LUBA rejected *all* of the HBA’s arguments related to Goal 10, as well as *all* other density-related claims. LUBA further repudiated the HBA’s evidence which was based primarily on developer Gordon Anslow’s testimony:

*“We agree with intervenors-respondents that **petitioner appears to significantly overstate the impact of the disputed amendments.** In particular, we agree that the reduced maximum building heights in the R-4 step down areas need not result in a direct or proportional reduction in development density and need not preclude development that achieves the permissible maximum residential density per net acre. As far as we can tell, the precise impact of the disputed changes on the ability of a particular applicant to achieve the maximum permissible residential development densities will depend on a number of variables. However, based on our review of the evidence cited by petitioner and intervenors-respondents, while it may be more expensive to construct underground parking and achieving the maximum allowed residential density in the R-4 zone may be more difficult, particularly where the maximum building height is 35 feet, **the record simply does not support petitioner’s contention that the disputed amendments necessarily will preclude achievement of maximum residential development densities in the 16-block area and the two university neighborhoods**”*

Summary and implications

Although LUBA remanded Ordinance 20418, the remand was based *only* on needing more information from the City. The one item related to max building heights in R-3 and R-4 zones appears to be easily addressed. The two items related to parking requirements may require more analysis relating to a specific West University Refinement Plan policy and the presence of a potential nodal area.

In general, LUBA swept aside the HBA's major claims that lowering max building heights and increasing parking would reduce density to impermissible levels and that additional off-street parking in the university area would lead to more car ownership and driving.

LUBA also rejected several attempts by the HBA to misstate Metro Plan policies.

Overall, the LUBA findings are a significant affirmation of the City's first code amendments to address infill compatibility issues and should be seen as very encouraging for future proposals.

That said, the HBA appeal and LUBA's findings also highlight the importance of Planning staff doing a better job of providing substantive findings to support code amendments that may have impacts on development, especially those likely to be challenged by developers. It shouldn't escape notice of staff, the Planning Commission and City Council, that it was *neighborhood advocates*, not Planning staff, who gathered the data and wrote the supporting arguments in the Intervenor-Respondent's brief that LUBA relied on in rejecting the HBA's claims regarding Goal 10, density and impacts of parking.