



# AGENDA

**Meeting Location:**

Harris Hall  
Lane County Public Service Building  
125 East 8<sup>th</sup> Avenue  
Eugene, Oregon 97401

Phone: 541-682-5481  
[www.eugene-or.gov/pc](http://www.eugene-or.gov/pc)

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The Eugene Planning Commission welcomes your interest in this agenda item. Feel free to come and go as you please at the meeting. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours' notice prior to the meeting. Spanish-language interpretation will also be provided with 48 hours' notice. To arrange for these services, contact the Planning Department at 541-682-5675.

**TUESDAY, JULY 28, 2015 – 6:00 P.M.**

**I. PUBLIC HEARING:**

**OAKLEIGH CO-HOUSING (City File No. PDT 13-1)**

The Planning Commission will hold a public hearing on a tentative planned unit development application which was previously approved by the Planning Commission and subsequently remanded by the Land Use Board of Appeals.

Lead City Staff: Gabe Flock, 541-682-5697  
[gabriel.flock@ci.eugene.or.us](mailto:gabriel.flock@ci.eugene.or.us)

**Public Hearing Format:**

The Planning Commission will receive a brief City staff report followed by an opportunity for public comment. Time limits on testimony may be imposed. The Planning Commission may seek a response to testimony from City staff. At the end of the hearing, the Planning Commission Chair will announce whether the record is closed, the record will be held open, or the public hearing will be continued.

Commissioners: Steven Baker; John Barofsky; Bree Nicoletto; John Jaworski (Vice-Chair); Jeffery Mills; Kristen Taylor; William Randall (Chair)

**AGENDA ITEM SUMMARY**  
**July 28, 2015**

**To:** Eugene Planning Commission

**From:** Gabe Flock, Senior Planner, City of Eugene Planning Division

**Subject:** Remand Hearing: Oakleigh Cohousing PUD (City File PDT 13-1)

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**ACTION REQUESTED**

To hold a public hearing on remand from a decision of the Land Use Board of Appeals (LUBA). The hearing is being held to provide Simon Trautman an opportunity to participate in the appeal of the Eugene Hearings Official's approval of a tentative planned unit development (PUD), Oakleigh Cohousing PUD (PDT 13-1).

Following the public hearing, the Planning Commission will deliberate on how to proceed with LUBA's remand on the landscape screening issue.

**BACKGROUND INFORMATION**

Proposal

The proposal for Oakleigh Meadows Co-Housing PUD includes the development of 29 dwelling units, including a common house with shared kitchen facilities. The subject property is a vacant 2.3 acre site, located at the end of Oakleigh Lane, east of River Road near the Willamette River. The east boundary of the subject property abuts undeveloped City parkland, which abuts the Willamette River further to the east.

Prior Decisions

On November 12, 2013, the Eugene Hearings Official issued a decision on the applicant's proposal for approval of a PUD at the end of Oakleigh Lane. The Hearings Official approved the request, but imposed a condition that required screening along the eastern property line to buffer the proposed development from an adjoining public park. Opponents appealed the decision to the Eugene Planning Commission, and raised numerous issues, including several related to transportation and required improvements to Oakleigh Lane. The Planning Commission affirmed the approval but removed the requirement for landscape screening along the eastern property line.

Opponents then appealed the Planning Commission's approval to the Land Use Board of Appeals (LUBA). At that time, it was discovered that several individuals who had submitted testimony to the Hearings Official had not received notice of the Hearings Official's decision or of the Planning Commission appeal hearing. One of those individuals, Simon Trautman, attempted to participate in the LUBA appeal and argued that he should have been allowed to testify before the planning commission. LUBA declined to allow him to participate as a party in

the LUBA appeal. On the substance of the appeal, LUBA affirmed the Planning Commission's decision on all issues but one—LUBA determined that the Planning Commission's decision removing any requirement for landscape buffering on the east side of the property failed to satisfy an applicable approval criterion.

On appeal to the Court of Appeals, the Court determined that LUBA should have allowed Mr. Trautman to participate as a party before LUBA. LUBA then remanded the matter to the City to provide Mr. Trautman the notice that it should have provided in the first instance. The City has since provided that required notice to Mr. Trautman.

The Hearings Official's decision, Planning Commission's Final Order, and the related LUBA and Court of Appeals decisions are attached for ease of reference.

## **PLANNING COMMISSION'S REVIEW ROLE**

### Public Hearing

The purpose of the public hearing is to remedy the procedural error that occurred in 2013 and to allow Simon Trautman to testify before the Planning Commission. Accordingly, presentation of testimony is limited to Mr. Trautman and the applicant. All others who appeared on the interested parties list during the initial proceeding were provided notice of the hearing and may attend the hearing, but are not entitled to testify at the hearing. Mr. Trautman is entitled to testify on any issue that was raised in the local notice of appeal even though his original written testimony, dated September 1, 2013, to the Hearings Official related only to the safety of Oakleigh Lane.

Testimony before the Planning Commission in a local appeal hearing from the hearings official is limited to evidence that was presented to the hearings official. Accordingly, the planning commission should not accept new evidence during this public hearing. Further, testimony is limited to those issues that were raised in the original notice of appeal, which is attached for reference.

## **DELIBERATIONS ON REMAND**

### Trautman Testimony

The Planning Commission initially approved the PUD with a number of conditions, including the condition of approval regarding landscape screening on the eastern boundary of the property. LUBA then affirmed that decision except for the landscape screening condition of approval. The Planning Commission must consider the new testimony presented by Mr. Trautman and determine whether that testimony changes any of the findings it adopted with regard to the application when it first heard the appeal. The Planning Commission may choose to confirm its previous findings, or it may adopt revised findings based on Mr. Trautman's new testimony.

### Landscape Screening Issue

With regard to the landscape screening issue, which LUBA remanded, the Planning Commission will have to determine how it wishes to proceed.

As part of its approval of a PUD, the City must find that “[t]he PUD will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height.” EC 9.8320(3). The Hearings Official determined that the site plan submitted as proposed by the applicant was insufficient to screen the proposed development from the view of those individuals using the park and bike path to the east. However, the Hearings Official determined that, with a condition of approval requiring some screening, the application could be approved. He imposed the following condition of approval (Condition #15):

“Prior to final PUD approval, the applicant shall revise the final site plan and landscaping plan compliant with EC 9.6200 to provide landscape screening along the eastern property boundary \* \* \*.”

On appeal, the Planning Commission determined that the landscape screening along the eastern property boundary was not necessary (“Additional landscape screening is not required along the eastern property boundary.” Revised Condition #15). LUBA disagreed with the Planning Commission and determined that the applicable approval criterion, EC 9.8320(3), requires the applicant to provide landscaping to screen the proposed development *from* adjacent lands; “it is not concerned with the views the PUD will have *of* adjacent lands.” LUBA held that the Planning Commission’s decision to leave the eastern boundary open to the park failed to screen the PUD from view from the park, as required by EC 9.8320(3).

#### **NEXT STEPS**

Following the public hearing, the Planning Commission will need to determine how to proceed with resolution of the landscape screening issue, including whether or not to reopen the record to new evidence on that sole issue.

Staff’s recommendation is to resolve the landscape screening issue by modifying the Hearings Official’s original condition of approval to provide more specificity about the required landscaping in accordance with the standards at EC 9.6200. The City’s legal counsel will also be available to provide guidance on the available options leading up to our deliberations meeting which is scheduled for August 17, 2015.

#### **ATTACHMENTS**

1. Notice of Planning Commission Public Hearing
2. Original Appeal Statement
3. Hearings Official Decision
4. Planning Commission Final Order
5. LUBA Decision
6. Court of Appeals Decision
7. LUBA Final Order and Opinion on Remand

The full record that was before the Planning Commission in its consideration of the original appeal is being provided to commissioners separately, and will also be made publicly available

on the City's website at: <http://pdd.eugene-or.gov/LandUse/ApplicationDetails?file=PDT-13-0001>. A hardcopy of the complete record is also available for free inspection at the Atrium Building, 99 West 10<sup>th</sup> Avenue, between 9:00 a.m. and 5:00 p.m. Monday through Friday. Copies may also be obtained at cost.

**FOR MORE INFORMATION:**

Please contact Gabe Flock, Senior Planner, City of Eugene Planning Division, at 541-682-5697 or via email at [gabriel.flock@ci.euegne.or.us](mailto:gabriel.flock@ci.euegne.or.us).



**NOTICE OF PLANNING COMMISSION PUBLIC HEARING**  
**LIMITED ISSUES/LIMITED TESTIMONY**

**6:00 pm Tuesday, July 28, 2015**

**Harris Hall, Lane County Public Service Building**  
**125 East 8<sup>th</sup> Ave, Eugene OR 97401**

On Tuesday, July 28, 2015, the Eugene Planning Commission will hold a public hearing to consider an appeal on the following land use application which was approved by the Hearings Official:

**File Name (#):** Oakleigh Cohousing PUD (PDT 13-1)

**Location:** Located at the east end of Oakleigh Lane.

**Application:** Tentative Planned Unit Development for a 29-unit cohousing development.

**Applicant:** Will Dixon, Oakleigh Meadow LLC

**Lead City Staff:** Gabe Flock, Senior Planner, (541) 682-5697

All documents and evidence submitted on these applications will be available for free inspection at the Atrium Building, 99 West 10<sup>th</sup> Avenue, between 9:00 a.m. and 5:00 p.m. Monday through Friday. Copies may also be obtained at cost. The Planning Division staff report to the Planning Commission on this appeal will be provided at least 7 days in advance of the public hearing (available for inspection free of charge or copies provided at a reasonable cost).

**Background**

On November 12, 2013, the Eugene City Hearings Official issued a decision on the applicant's proposal for approval of a planned unit development (PUD). The Hearings Official approved the request, but imposed a condition that required screening along the eastern property line to buffer the proposed development from an adjoining public park. Opponents appealed the decision to the Eugene Planning Commission, which affirmed the approval but removed the requirement for screening along the eastern property line.

Opponents then appealed the Planning Commission's approval to the Land Use Board of Appeals (LUBA). An individual who was not one of the appellants, Simon Trautman, attempted to participate in the LUBA appeal. Although Mr. Trautman had testified before the Hearings Official, he was not provided notice of the Hearings Official's decision or of the Planning Commission appeal hearing. Mr. Trautman argued before LUBA that he was prejudiced by the failure to notify him and that he should have been allowed to testify before the Planning Commission. LUBA declined to allow him to participate as a party in the LUBA appeal. On the substance of the appeal, LUBA affirmed the Planning Commission's decision on all issues but one—LUBA determined that the Planning Commission's decision removing any requirement for landscape buffering on the east side of the property failed to satisfy an applicable approval criterion.

On appeal to the Court of Appeals, the Court determined that LUBA should have allowed Mr. Trautman to participate as a party before LUBA. LUBA then remanded the matter to the City to provide Mr. Trautman the notice that it should have provided in the first instance. The City has since provided that required notice to Mr. Trautman.

**Limited Participants**

You are receiving this notice because you were involved in the hearing process when the matter first was presented to the hearings official and planning commission in 2013 and 2014. However, the purpose of this hearing is to remedy the procedural error that occurred in 2013 and to allow Simon Trautman to testify

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before the Planning Commission. Accordingly, presentation of testimony will be limited to Mr. Trautman and to response by the applicant. If you are not Mr. Trautman or a representative of the applicant, you may not testify (either in writing or orally) but may attend and observe the public hearing.

#### **Limited Scope of Testimony**

Testimony before the Planning Commission in a local appeal hearing from the Hearings Official is limited to evidence that was presented to the Hearings Official. The Planning Commission will not accept any new evidence from Mr. Trautman in a local appeal hearing. Further, testimony from Mr. Trautman is limited to those issues that were raised in the original notice of appeal. The original notice of appeal was filed by Bryn Thoms and Jonathan Belcher on behalf of the River Road Community Organization on November 22, 2013 and can be found on-line at: <http://pdd.eugene-or.gov/LandUse/DocumentDetails?file=PDT-13-0001&id=1010928>.

#### **How to Submit Testimony**

Mr. Trautman may attend the public hearing and state his concerns, or he may send a written statement to the Planning Commission, c/o Gabe Flock, via e-mail: [gabriel.flock@ci.eugene.or.us](mailto:gabriel.flock@ci.eugene.or.us), or mail or hand deliver such written statement to: Gabe Flock, City of Eugene Planning Division, 99 West 10<sup>th</sup> Avenue, Eugene, Oregon 97401, so long as the City receives the written statement prior to the date set for the hearing.

Please note that failure to raise an issue at the hearing, in person or by letter, or failure to provide statements with sufficient specificity to enable the decision maker to respond to the issue, precludes further appeal based on that issue.

#### **Conduct of Public Hearing**

This hearing is not the first evidentiary hearing; the order of procedure is as follows:

1. Planning Commission Chair will commence public hearing.
2. Planning Commission chair will ask commissioners to disclose any conflicts of interest, ex parte contacts, and biases, abstentions or challenges to impartiality submitted pursuant to EC 9.7065.
3. Planning Commission will receive the City staff report.
4. Testimony from proponent/applicant.
5. Testimony from Mr. Trautman
6. Staff response to testimony, if any.
7. Questions from the Planning Commission.
8. Rebuttal by the proponent/applicant.
9. Planning Commission Chair will close the public hearing.

#### **Appeal Rights**

The decision of the Eugene Planning Commission will be final at the local level. Persons who appeared before the local government orally or in writing may appeal the decision to the Oregon Land Use Board of Appeals within 21 days of the Planning Commission's decision. Appeals to the Oregon Land Use Board of Appeals are governed by ORS 197.805 to 197.860 and OAR Chapter 661, Division 10.

If you have questions, or would like more information, please contact City staff at the address or phone number listed below.

#### **Gabe Flock, Senior Planner**

City of Eugene Planning Division

99 West 10<sup>th</sup> Avenue, Eugene, OR 97401

Phone: (541) 682-5697 E-mail: [gabriel.flock@ci.eugene.or.us](mailto:gabriel.flock@ci.eugene.or.us)

## APPEAL STATEMENT

### RE DECISION APPROVING PLANNED UNIT DEVELOPMENT

#### OAKLEIGH MEADOWS CO-HOUSING – FILE PDT 13-1

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The following statement by appellant, who is a member of the **River Road Community Organization**, a City-chartered neighborhood association, lists the specific issues on appeal and identifies where the Hearings Official's Decision is inconsistent with the criteria applicable to the above captioned application for approval of a planned unit development (tentative).

The River Road Community Organization neighborhood association encompasses the subject property, and the River Road Community Organization members voted to file this appeal.

#### THE HEARINGS OFFICIAL DECISION

On November 12, 2013, the Hearings Official approved a planned unit development (tentative) for the subject property. The Decision was mailed on November 12, 2013.

#### REFERENCED DOCUMENTS<sup>1</sup>

- "Staff Report" – Eugene Planning Staff Report, dated September 2013
- "Decision" – Hearings Official Decision (PDT 13-1, WG 13-1), dated November 12, 2013.
- "Conte 10/9" – Testimony by Paul Conte, dated October 9, 2013
- "Conte 10/16" – Supplemental testimony by Paul Conte, dated October 16, 2013

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<sup>1</sup> Note that references to exhibits in the following sections are intended to assist the Planning Commission in understanding the assignments of error and are not intended as exhaustive references to all relevant evidence in the record.

## FIRST ASSIGNMENT OF ERROR

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(1) The PUD is consistent with applicable adopted policies of the Metro Plan.**

The *Metro Plan* "Transportation Element" states:

### F. Transportation Element

The Transportation Element addresses surface and air transportation in the metropolitan area. The *Eugene-Springfield Metropolitan Area Transportation Plan (TransPlan)* provides the basis for the surface transportation portions of this element and the *Eugene Airport Master Plan* provides the basis for the air transportation portions.

...

Goals and policies in *TransPlan* are contained in this Transportation Element and are part of the adopted *Metro Plan*. *TransPlan* project lists and project maps are also adopted as part of the *Metro Plan*. (*Metro Plan* III-F-1)

The following subassignments of error individually and in combination resulted in the erroneous finding that the application was consistent with the *Metro Plan*.

Whether or not the two unexamined policies, discussed below, are mandatory approval criteria, the Hearings Official was required to evaluate and balance relevant plan provisions in his findings and decision, which he failed to do. *Bothman v. City of Eugene, Or* LUBA 701 (2006). He also failed to consider these policies as relevant context for his findings in regards to the specific approval criteria covered below.

See Conte 10/9 pages 3 to 4.

### SUBASSIGNMENT OF ERROR 1.A

The Decision failed to address the following policy at all:

#### **TransPlan Transportation System Improvements (TSI) Pedestrian Policy #1: Pedestrian Environment** (*Metro Plan* Policy F.26)

Provide for a pedestrian environment that is well integrated with adjacent land uses and is designed to enhance the safety, comfort, and convenience of walking. (*Metro Plan* III-F-9)

Evidence in the record clearly shows that Oakleigh Lane would have to be widened and improved to accommodate the significant increase in vehicular,

bicycle and pedestrian traffic that the PUD would generate and still provide a safe and comfortable environment for pedestrians (including individuals in wheelchairs or with other mobility limitations) using Oakleigh Lane to and from River Road, as well as to and from the public bike/ped path along the river.

The Decision failed to impose adequate condition(s) to ensure there would be sufficient right-of-way, sidewalks and other improvements required for consistency with this policy.

All statements related to pedestrian safety under Subassignments of Error 2.A, 2.B, 3.A, 4.B and 10.A and the Fifth and Sixth Assignments of Error are included herein by reference.

#### **SUBASSIGNMENT OF ERROR 1.B**

The Decision failed to address the following policy at all:

#### **TransPlan Finance Policy #4: New Development** (*Metro Plan Policy F.36*)

Require that new development pay for its capacity impact on the transportation system. (*Metro Plan III-F-13*)

Evidence in the record clearly shows that Oakleigh Lane would have to be widened and improved to accommodate the significant increase in vehicular, bicycle and pedestrian traffic that the PUD would generate and still provide a safe and efficient road for vehicles, including emergency response vehicles, bicyclists, pedestrians and individuals in wheelchairs.

The Decision failed to impose adequate conditions to ensure there would be sufficient right-of-way, sidewalks and other improvements in place at the time the proposed development was occupied so as to be consistent with this policy.

Approval of this PUD without such conditions would thereby cause the other property owners along Oakleigh Lane to face potential condemnation and/or large financial assessments to acquire the necessary right-of-way and construct the required improvements.

All statements related to the necessary right-of-way and improvements under Subassignments of Error 10.A, 10.B and 10.C and the Second, Third, Fourth and Fifth Assignments of Error are included herein by reference.

## SECOND ASSIGNMENT OF ERROR

The Decision erred by finding the application met the following approval criterion:

- EC 9.8320(5) The PUD provides safe and adequate transportation systems through compliance with the following:**
- (a) EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways (not subject to modifications set forth in subsection (11) below).**
  - (b) Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. "Nearby" means uses within ¼ mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.**
  - (c) The provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where applicable.**

The Hearings Official erred in finding that the proposed PUD complied with EC 9.8320(5) and would provide a "safe and adequate transportation system." The proposed PUD required multiple exemptions from street standards under EC 9.6815(2)(g). However, those exemptions were based on a local street connection study that considered only partial buildout of the impacted area. For example, the street connection study assumed no infill and only partial buildout of tax lot 200 to the north with flag lots. The local street connection study should have been required to assume full build out of the surrounding area.

In addition, the Hearings Official did not explain how the exception meets EC 9.6815(1)(a) regarding providing a "safe" street design, as well as (e) requiring the street system to "encourage" walking and bicycling, when the remainder of Oakleigh Lane is inadequate to accommodate the new traffic.

The following subassignments of error individually and in combination resulted in the erroneous finding that the PUD would provide safe and adequate transportation systems.

## SUBASSIGNMENT OF ERROR 2.A

The Decision erred by finding the application met the following criterion:

- (a) **EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways (not subject to modifications set forth in subsection (11) below).**

The Decision erroneously found that Oakleigh Lane would meet, or was exempt from, the applicable standards established for a safe and adequate transportation system.

### EC 9.6815(2)

The Decision erroneously found that Oakleigh Lane was exempt from the applicable standards established for a safe and adequate transportation system.

“The applicant’s August 6, 2013 connectivity study provides analysis required to comply with EC 9.6815(2)(g)(1)(b) which allows for alternative street designs if it can be shown that “undeveloped or partially developed properties within a quarter mile can be adequately served by alternative street layouts.” (Decision at 25)

The Hearings Official erroneously found that the applicant’s proposed street design would adequately serve Tax Lot 200, despite severely limiting future development of that lot, which is under ownership of opponents of the PUD.

The Hearings Official’s decision is a clear *exaction* from the owner of Tax Lot 200 to the benefit of the applicant. This decision fails to meet the constitutional standards for such exactions.

Further, in considering the requirements of EC 9.6815(2)(g)(1)(b), the Hearings Official failed to consider and properly apply the substantial evidence provided by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

Further, the Decision cites to the purpose in EC 9.6800, which states:

“Sections 9.6800 through 9.6875 establish standards for the dedication, design and location of public ways to address the purpose of this land use code contained in EC 9.0020 Purpose”

However, the Hearings Official failed entirely to actually evaluate EC 9.0020 Purpose, which states:

“The purpose of the land use code is to protect and promote the health, safety, and general welfare of the public ...”

The proper interpretation is that the purpose of 9.6800 through 9.6875 is to establish standards to “protect and promote the health, safety, and general welfare of the public.” Furthermore, these standards must actually be met in an adequate way to satisfy the intended purpose.

The Decision therefore erroneously limited the scope of EC 9.6800 to “dedications” and neglected to evaluate, and impose conditions, as necessary to ensure the safety of vehicles, bicyclists and pedestrians using Oakleigh Lane would be protected and promoted. Similarly, the required analysis and findings with respect to emergency response vehicles wasn’t done, which failed to “protect and promote” the health and safety of the general public.

See Conte 10/9 pages 12 to 14.

EC 9.6820 Cul-de-Sacs and Turnarounds

The Decision erroneously found that Oakleigh Lane was exempt from the applicable standards established for a safe and adequate transportation system. The Hearings Official relied upon the following staff finding without additional analysis:

“The street connectivity exception also warrants an exception to the 400-foot maximum length of a dead-end street, pursuant to EC 9.6820(5)(b).”

An exception may be granted, where applicable, to one of the following EC 9.6820 requirements:

- (1) Except for streets that are less than 150 feet long and streets that will be extended in the future, all streets that terminate shall be designed as a cul-de-sac bulb or an emergency vehicle turnaround.
- (3) There shall be no cul-de-sacs more than 400 feet long from the centerline of the intersecting street to the radius point of the cul-de-sac bulb.
- (4) Public accessways to provide safe circulation for pedestrians, bicyclists and emergency vehicles shall be required from a cul-de-sac or emergency vehicle turnaround longer than 150' in length when measured from the centerline of the intersecting street to the radius point of the cul-de-sac or to the center point of the emergency vehicle turnaround.

The cited exception at EC 9.6820(5)(b) requires:

“Buildings or other existing development on the subject property or adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection now or in the future, considering the potential for redevelopment.”

The Hearings Official erred in granting an exception pursuant to EC 9.6820(5). That provision requires a showing either that (a) “physical conditions preclude development” of the street or (b) “buildings or other existing development . . . physically preclude the street.” Neither condition was met in this case.

Furthermore, even if it were the case that there is no feasible alternative connection between the proposed development and River Road, other than Oakleigh Lane, that situation would justify an exemption *only* to EC 9.6820(3), but *not* to EC 9.6820(1) and (4). EC 9.6820(3) prohibits cul-de-sacs that would exceed a certain length, when that’s avoidable; but that isn’t the situation with Oakleigh Lane. However, EC 9.6820(1) and (4) are clearly meant as requirements that *do* apply to a long, dead-end street, such as Oakleigh Lane, that exceeds the normal length limit.

EC 9.6820(4) makes absolutely clear that the City Council meant to require improvements to long cul-de-sacs in order to “provide safe circulation for pedestrians, bicyclists and emergency vehicles.”

The Hearings Official erroneously exempted the application from providing a public accessway that meets the code’s standards in order to “provide safe circulation for pedestrians, bicyclists and emergency vehicles.”

#### **SUBASSIGNMENT OF ERROR 2.B**

The Decision erred by finding the application met the following criterion:

- (b) Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. “Nearby” means uses within ¼ mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.**

The Decision erroneously found that Oakleigh Lane would meet, or was exempt from, the applicable standards established for safe use by pedestrian and bicyclists using Oakleigh Lane to and from nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks on River Road and beyond.

EC 9.8320(5)(b) requires the applicant to demonstrate a safe and adequate transportation system “to adjacent and nearby” areas. As noted elsewhere in the Hearings Official decision, a 45 foot right of way was required and, “the public interest in safe vehicular, pedestrian and bicycle travel and emergency

response will be at risk” if that minimum right of way is not dedicated. If the dedication is required to adequately protect the public interest on site, it should also be required off-site, otherwise, the PUD is imposing unsafe risks in areas outside of the development.

The Hearings Official failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

In particular, the Hearings Official’s findings are inconsistent with the PWD analysis found in the Staff Report on page 13.

See Conte 10/9 pages 14 to 16.

Furthermore, in his interpretation of the requirements of EC 9.8320(5)(b), the Hearings Official failed to consider the context that clearly shows Council’s intent, specifically the provisions of EC 9.6820(4) that require public accessways to provide safe circulation for pedestrians, bicyclists and emergency vehicles for a cul-de-sac longer than 150’ in length. The statements related to EC 9.6820 under Subassignment of Error 2.A are incorporated here by reference.

#### **SUBASSIGNMENT OF ERROR 2.C**

The Decision erred by finding the application met the following criterion:

- (c) The provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where applicable.**

The Decision erroneously found that no Traffic Impact Analysis was required for the application. The TIA *is* required under the following code provision:

#### **EC 9.8670 Applicability**

...

- (2) The increased traffic resulting from the development will contribute to traffic problems in the area based on current accident rates, traffic volumes or speeds that warrant action under the city’s traffic calming program, and identified locations where pedestrian and/or bicyclist safety is a concern by the city that is documented. (Emphasis added)**

The Hearings Official failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

In particular, the PWD analysis found in the Staff Report on page 13 documented City concerns over pedestrian safety on Oakleigh Lane.

See Conte 10/9 page 16 and Conte 10/16 pages 2 to 3.

Furthermore, in his interpretation of the requirements of EC 9.8320(5)(c), the Hearings Official failed to consider the context clearly showing Council's intent, specifically the provisions of EC 9.6820(4) that require public accessways to provide safe circulation for pedestrians and bicyclists for a cul-de-sac longer than 150' in length. The statements related to EC 9.6820 under Subassignment of Error 2.A are incorporated here by reference.

### THIRD ASSIGNMENT OF ERROR

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(6) The PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response.**

#### SUBASSIGNMENT OF ERROR 3.A

The Decision erroneously found that the PUD would not be a significant risk to public safety.

The Hearings Official provided no evaluation of PWD's own analysis that "emergency response and access will be at risk" unless Oakleigh Lane's right-of-way was widened and the road improved. Instead he relied entirely on staff findings.

In addition, the errors cited under Subassignments of Error 2.A, 2.B, 4.A, 4.B and 4.C, as they relate to the safety of drivers, bicyclists and pedestrians, demonstrate that the PUD would pose significant risk to public safety unless Oakleigh Lane is widened and improved. The relevant arguments in Subassignments of Error 2.A, 2.B, 4.A, 4.B and 4.C are included here by reference.

The Hearings Official and the staff finding both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

See Conte 10/9 page 16.

**SUBASSIGNMENT OF ERROR 3.B**

The Hearings Official provided no evaluation of PWD's own analysis that Oakleigh Lane would be an impediment to emergency response unless the right-of-way was widened and the road improved. Instead he relied entirely on staff findings.

The Hearings Official and the staff finding both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

See Conte 10/9 page 16.

Furthermore, in his interpretation of the requirements of EC 9.8320(6), the Hearings Official failed to consider the context clearly showing Council's intent, specifically the provisions of EC 9.6820(4) that require public accessways to provide safe circulation for emergency vehicles for a cul-de-sac longer than 150' in length. The statements related to EC 9.6820 under Subassignment of Error 2.A are incorporated here by reference.

**FOURTH ASSIGNMENT OF ERROR**

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(11) The PUD complies with all of the following:**

**(b) EC 9.6500 through EC 9.6505 Public Improvement Standards.**

**EC 9.6505 Improvements–Specifications**

**EC 9.6505(3)(b) Streets and Alleys**

**EC 9.6505(4) Sidewalks**

**EC 9.6505(5) Bicycle Paths and Accessways.**

**SUBASSIGNMENT OF ERROR 4.A**

The Decision erroneously found that Oakleigh Lane, which is not only adjacent to, but also serves as the only vehicular access to and from the development site, would be paved to the specifications in EC 9.6870 (or exempt).

EC 9.6505(3)(b) requires:

The developer shall pave streets and alleys adjacent to the development site to the width specified in EC 9.6870 Street Width, unless such streets and alleys are already paved to that width, provided the City makes findings to demonstrate consistency with constitutional requirements. All

paving shall provide for drainage of all such streets and alleys, and construct curbs and gutters, sidewalks, street trees and street lights adjacent to the development site according to the Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways and Accessways and standards and specifications adopted pursuant to Chapter 7 of this code and other adopted plans and policies.

The Hearings Official relied on his findings for EC 9.8320(5), but fails to provide the required *specific* explanation for how those findings demonstrate compliance with EC 9.6505(3)(b). The discussion under the Second Assignment of Error, above, and which are incorporated here by reference, demonstrates that the Decision is erroneous in this reliance.

The Hearings Official and the staff both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

See Conte 10/9 pages 16 to 17.

#### **SUBASSIGNMENT OF ERROR 4.B**

The Decision erroneously found that Oakleigh Lane, which is not only adjacent to, but also is and will be used by pedestrians to and from River Road and to and from the public bike/ped path along the river, would provide sufficient sidewalks that are located, designed and constructed according to the specifications in Eugene Code and referenced standards.

EC 9.6505(4) requires:

Sidewalks shall be located, designed and constructed according to the provisions of this land use code, the Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways and Accessways, construction and design standards adopted pursuant to Chapter 7 of this code, and other adopted plans and policies.

The Hearings Official relied on his findings for EC 9.8320(5), but fails to provide the required *specific* explanation for how those findings demonstrate compliance with EC 9.6505(4). The discussion under the Second Assignment of Error, above, and which are incorporated here by reference, demonstrates that the Decision is erroneous in this reliance.

The Hearings Official and the staff both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

Furthermore, in his interpretation of the requirements of EC 9.6505(4), the Hearings Official failed to consider the context clearly showing Council's intent, specifically the provisions of EC 9.6820(4) that require public accessways to provide safe circulation for pedestrians and bicyclists for a cul-de-sac longer than 150' in length. The statements related to EC 9.6820 under Subassignment of Error 2.A are incorporated here by reference.

#### SUBASSIGNMENT OF ERROR 4.C

The Decision erroneously found that Oakleigh Lane, which is not only adjacent to, but also is and will be used by bicyclists to and from River Road and to and from the public bike/ped path along the river, would provide sufficient bike accessways that are located, designed and constructed according to the specifications in Eugene Code and referenced standards.

EC 9.6505(5) requires:

Bicycle Paths and Accessways shall be designed and constructed according to provisions of this land use code, the Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways and Accessways, construction and design standards adopted pursuant to Chapter 7 of this code, and other adopted plans and policies.

The Hearings Official relied on his findings for EC 9.8320(5), but fails to provide the required *specific* explanation for how those findings demonstrate compliance with EC 9.6505(5). The discussion under the Second Assignment of Error, above, and which are incorporated here by reference, demonstrates that the Decision is erroneous in this reliance.

The Hearings Official and the staff both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

Furthermore, in his interpretation of the requirements of EC 9.6505(5), the Hearings Official failed to consider the context clearly showing Council's intent, specifically the provisions of EC 9.6820(4) that require public accessways to provide safe circulation for bicyclists for a cul-de-sac longer than 150' in length. The statements related to EC 9.6820 under Subassignment of Error 2.A are incorporated here by reference.

## FIFTH ASSIGNMENT OF ERROR

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(12) The proposed development shall have minimal off-site impacts, including impacts such as traffic, noise, stormwater runoff and environmental quality.**

The Decision erroneously found that the PUD would have minimal off-site traffic impacts.

The Hearings Official did not properly interpret the meaning of “minimal off-site impacts.” Among the errors were: not following the proper analysis to interpret “minimal”; not following the proper analysis of “impacts” as set out in *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990)<sup>2</sup>; and incorrectly narrowing the meaning to impacts on traffic, and failing to evaluate impacts from traffic (safety, noise, etc.).

Further, the Hearings Official’s apparent assumption that “when none of the conditions exist that would trigger a TIA under EC 9.8670, it is reasonable to question whether EC 9.8320(12) is implicated as to traffic” would rob EC 9.8320(12) of any meaning or purpose with respect to impacts from traffic, which is an impermissible interpretation under ORS 174.010.<sup>3</sup> This finding conflicts even with the Hearings Official’s earlier statement that: “In interpreting related statutes or local code provisions, an interpretation must be sought that harmonizes those provisions and does not leave one provision as redundant or meaningless.” (Decision at 52)

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- <sup>2</sup> “In this case, if there was testimony in the proceedings below which focused on an issue arguably relevant to the qualities of livability and appropriate development in the neighborhood surrounding the proposed medical office complex, the city is required to address that issue in its findings. In addressing such an issue, the city must either (1) explain why the issue is not relevant to the qualities of livability and appropriate development in the surrounding neighborhood, or (2) identify the issue as relevant to determining the livability and appropriate development in the surrounding neighborhood and assess the impacts of the proposed development with regard to the issue.”
- <sup>3</sup> “In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

The Hearings Official and the staff findings both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

See Conte 10/9 pages 17 to 20 and Conte 10/16 page 12 (Item #7).

## SIXTH ASSIGNMENT OF ERROR

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(13) The proposed development shall be reasonably compatible and harmonious with adjacent and nearby land uses.**

The Decision erroneously found that the PUD would be reasonably compatible and harmonious with adjacent and nearby land uses, despite the substantial impacts of traffic and/or street widening and improvements on the nearby residents and single-family home owners.

With respect to traffic, the Hearings Official addressed only the requirement for the development to be “reasonably compatible” and neglected to address the requirement that the development’s substantial increase in traffic, which will make numerous round trips out and back along the entire length of Oakleigh Lane, is “harmonious” with the nearby residents. Decision at 55.

ORS 174.10 requires that both terms be given meaning, and the Hearings Official may not “omit what has been inserted” into the criterion by City Council.

The Hearings Official relied on his findings for EC 9.8320(12), but failed to provide the required *specific* explanation for how those findings demonstrate compliance with EC 9.8320(13). The discussion under the Fifth Assignment of Error, above, and which is incorporated here by reference, demonstrates that the Decision is erroneous in this reliance.

The Hearings Official and the staff finding both failed to consider and properly apply the substantial evidence provide by the Public Works Department (PWD) analysis. (See the discussion under Subassignment of Error 10.A, which is incorporated here by reference.)

See Conte 10/9 page 20.

Further, the Hearings Official’s finding that there was “no evidence” of traffic issues in the record also ignored the evidence of Mr. Simon Trautman regarding a significant accident on River Road at the intersection of Oakleigh Lane. The accident was due to the short windows to get onto River Road.

That issue will only become more likely as the trips increase on Oakleigh Lane.

The Hearings Official also failed to understand the off-site impacts require the proposed PUD to be viewed in context - a development that creates 164 new vehicle trips per day may have minimal impact when access is off of a collector street or arterial, but when the development dumps that traffic onto a low volume residential street, doubling the number of trips, the impacts of that development are not "minimal."

Further, the proposed "screening" is inadequate and does not ensure the development is compatible and harmonious with nearby used. The discussion under the Seventh Assignment of Error is included here by reference.

Further, the proposal pushes building, garages, barns and other structures to the edge of the property, requiring modifications to the setbacks on three of its sides. The proposal uses a concrete wall as its main face to the neighborhood to the west. The proposal pushes its buildings into the setbacks to the north and to the south. The Hearings Official relies on size of buildings, density calculations, height limits and other factors; however, those limitations are already imposed by code, so they provide no basis to find this criterion is met. Moreover, the Hearings Official calculation of size is erroneous and does not understand the context of the neighborhood, which includes smaller homes. This proposal is not harmonious and reasonably compatible with the neighborhood. It will stick out like a sore thumb.

## SEVENTH ASSIGNMENT OF ERROR

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(3) The PUD will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height.**

The Hearings Official erred in finding that the proposed PUD would comply with EC 9.8320(3) requiring "adequate screening" from surrounding properties. The Hearings Official appears to have only considered height, but the criterion requires consideration of "building location [and] bulk" as well. In addition, the Hearings Official found the screening to the north adequate based, in part, on cedar trees that are on adjacent property. This is inadequate as that "screening" can be removed by the adjoining property owner. The screening on the northern boundary was also found adequate based on landscaping and planters, but those will be located in the dedicated right-of-way. Moreover, the screening requirement is not met when the

applicant pushes its impacts to the very edge of the property, requiring multiple adjustments to setback requirements for the wall to the west and the buildings on the other sides, while keeping open space in the center. This arrangement does not adequately “screen” the property, nor does it show that the development is “reasonably compatible and harmonious” with adjacent properties as required by EC 9.8320(13).

The Hearings Official also erred in deferring consideration of whether there will be adequate screening to a decision that will be made without public input or opportunity to comment. EC 9.83.20(3) requires the applicant to show that there will be adequate screening as part of the tentative plan. On page 14, the Hearings Official finds that “the applicant’s approach is insufficient” and later imposes condition of approval 15, but that condition defers the determination of what will be “adequate” to a later time.

The Hearings Official erred by relying on the following condition for a finding of consistency with EC 9.8320(3):

“Prior to final PUD approval, the applicant shall submit a report from a certified arborist confirming that the row of cedars on adjacent lands to the north can survive the construction impacts of the proposed development (and include any necessary protection measures to ensure survival). The final PUD plans shall show the location of Building 2 and any related protection measures (e.g. construction fencing for protected CRZ areas) consistent with the arborist’s recommendations.” Decision at 11.

First, as mentioned above, the finding relies on a row of cedars on adjacent lands to the north, which are not under control of the applicant. A finding that these trees can survive the construction impacts of the proposed development in no way ensures that the cedar trees will remain.

Second, for a condition to defer an analysis such as this, there must be the same opportunity at the time the analysis is presented for opponents to provide their own evidence and argument and testify at a hearing, which this condition does not provide.

## **EIGHTH ASSIGNMENT OF ERROR**

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(11): The PUD complies with all of the following:**

- (a) EC 9.2000 through 9.3915 regarding lot dimensions and density requirements for the subject zone.**

**SUBASSIGNMENT OF ERROR 8.A**

The Hearing Official erred in his calculation of the net density area pursuant to EC 9.2751.. For example, on page 35 of the decision, The Hearings Official excludes all easements from that calculation. The net density provisions are intended to determine the amount of land that is available to build; because buildings are not allowed within easements and areas dedicated for water, sewer, street and similar public services, those areas must be excluded from the calculation.

**SUBASSIGNMENT OF ERROR 8.B**

The Hearings Official erred in his understanding of the concept of “clustering” under EC 9.8300(1)(e). As the Hearings Official noted, the code specifically allows for clustering; however, even a cursory review of the site plan demonstrates that what is proposed is not “clustering” of buildings. The buildings and development have been pushed out to the edge of the property requiring modifications to the setbacks on three sides of the property. This is not clustering but imposing the negative impacts of the development onto the adjacent property. True clustering would reduce the need for modifications to setbacks.

**NINTH ASSIGNMENT OF ERROR**

The Decision erred by finding the application met the following approval criterion:

**EC 9.8320(11)**

- (k) All other applicable development standards for features explicitly included in the application except where the applicant has shown that a proposed noncompliance is consistent with the purposes set out in EC 9.8300 Purpose of Planned Unit Development.**

**9.2795 Solar Setback Standards**

The Hearings Official erred in his interpretation of the solar setbacks pursuant to EC 9.2795. Although the solar setbacks may be modified, the Hearings Official is required to understand the extent of the modification to determine if it is consistent with the purposes of the PUD ordinance. The error made by the Hearings Official was to measure the solar setback from the existing property line rather than the property line established by the required dedications.

## TENTH ASSIGNMENT OF ERROR

The Hearings Official made a decision that was not supported by substantial, probative and reliable evidence in the whole record; and the Decision improperly construed the applicable law.

The following identifies specific errors the Hearings Official made that contributed to the two assignments of error, above.

### SUBASSIGNMENT OF ERROR 10.A

The Hearings Official erred by not adequately considering the preponderance of evidence and analysis in the "Constitutional Findings for Exaction" produced by the Eugene Public Works Department (PWD). See Conte 10/9 pages 6 to 10 for a full discussion of the PWD analysis and conclusions.

In a similar fashion, the Hearings Official erred by not adequately considering the substantial evidence and analysis provided by PWD regarding the necessary improvements to Oakleigh Lane to "separate pedestrians from vehicles and provide a safe public walking surface for the residents of the proposed development." See Staff Report page 13:

*"Public Works staff indicates that the applicant's proposal is sufficient to accommodate the turnaround, but not the area necessary to extend the sidewalk along the south side of the turnaround, to separate pedestrians from vehicles and provide a safe public walking surface for the residents of the proposed development."*

In both cases, the Hearings Official unreasonably concluded that this evidence and analysis had no applicability to safety, convenience, comfort or capacity considerations for *any* part of Oakleigh Lane other than the short segment at the very end of this dead-end access lane, immediately adjacent to the development site.

The Hearings Official erroneously concluded that, because the PWD evidence and analysis was *used* only to justify exactions from the applicant, that the evidence and analysis had no relevance beyond the development site.

This is obviously an error. If the portion of Oakleigh Lane adjacent to the development must be widened and improved to ensure the safe, convenient and/or comfortable accommodation of vehicular, bicycle and pedestrian traffic on Oakleigh Lane after the development is built, then the long stretch of Oakleigh Lane between River Road and the development site would also have to be widened and improved in a corresponding manner to ensure the safe, convenient and/or comfortable accommodation of vehicular, bicycle and pedestrian traffic on Oakleigh Lane.

Whether or not this is “feasible,” how that might be accomplished, and what exactions can be required of the applicant are entirely separate issues from the engineering and safety issues. Either *all* of Oakleigh Lane needs comparable right-of-way width and improvements as those being exacted from the applicant alongside the development site, or it isn’t necessary to require the right-of-way and improvements adjacent to the site. There is nothing in the record that suggests there is something special about the short stretch alongside the development site that makes that section – and *only* that section – the only place widening and improvements are necessary to provide for safe, convenient and comfortable accommodation of all forms of traffic.

See Conte 10/16. Item #6, pages 5 to 9 for LUBA’s handling of this issue.

The specific places where the Hearings Official erred in this analysis include, but are not limited to, the following.

Decision at 24<sup>4</sup>

The Hearings Official reduces the EC 9.8320(5) requirement to “provide[] safe and adequate transportation” to just the dedication of right-of-way immediately adjacent to the development site. But, as explained above, that dedication is not sufficient to “provide[] safe and adequate transportation.” As LUBA covered in *Butte Conservancy v. City of Gresham* (Conte 10/16, page 5), adequate right-of-way and improvements must be feasible *and sufficient*, even if the applicant himself is not required to actually implement all the acquisition and construction that’s necessary.

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<sup>4</sup> “Based on the above interpretation of EC 9.8320(5)(a), the opponents arguments as set forth above are not relevant to whether the applicant has met the requirement to dedicate sufficient land to create a 45 foot right-of-way along Oakleigh Lane. Although eloquently argued, Mr. Conte’s substantial analysis of the Staff findings are well outside the scope of EC 9.8320(5)(a), EC 9.6805 and EC 9.6870. Oakleigh Lane need not have a dedicated 45 foot right-of-way and associated paved surface from River Road to the subject property in order to meet EC 9.8320(5)(a) because that provision is a standard for the “dedication” of land, not a “service” standard akin to level of service – LOS.”

Decision at 27<sup>5</sup>

Here again, the Hearings Official erroneously ignores the fact that – if additional right-of-way and improvements on the south side of the turnaround are necessary “to separate pedestrians from vehicles and provide a safe public walking surface for the residents” – then similar separation and walking surface would be necessary along the rest of Oakleigh Lane to ensure pedestrian safety and comfort. Whether that’s feasible, or how it might be achieved, does not alter the PWD conclusions for what is necessary for pedestrian safety and comfort.

**SUBASSIGNMENT OF ERROR 10.B**

The Hearings Official erroneously found that Oakleigh Lane was not an “access lane.”

“The Hearings Official considers Staff’s categorization [of Oakleigh Lane as a “Low Volume Residential Street] to be more accurate given the increase in ADT moves the lane into the 250-750 ADT range.” (Decision at 25)

The Hearings Official is using the *projected* traffic volume for his conclusion, as is made clear by the phrase “moves the lane into the 250-750 ADT range.”

The *current* classification is, however, as an access lane. The move from a lower- to a higher-volume category of street is evidence that the off-site impacts of traffic would not be “minimal” as the Hearings Official erroneously concluded for EC 9.8320(12).

See Conte 10/9 pages 4 to 5.

**SUBASSIGNMENT OF ERROR 10.C**

The Hearings Official used erroneous data for traffic counts in one or more places, including, but not limited to, the following.

“the Average Daily Traffic (ADT) would be greater than 500 trips per day” (Decision at 19)

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<sup>5</sup> “As to Mr. Conte’s assertion that the Staff’s own findings concede that pedestrian and bicycle traffic will not be assured safe use of Oakleigh Lane, the Hearings Official disagrees. PT-4. The statement Mr. Conte alights on is a finding related to explaining the justification for the dedication required under EC 9.8320(5)(a). Staff’s conclusions are properly understood to require the proposed PUD to dedicate sufficient right-of-way along the subject property’s frontage to allow Oakleigh Lane to be brought up to the low volume residential street standard along that frontage.”

This understates the estimated ADT of 712 for 29 dwellings, almost at the top of the Low Volume Residential Street range of 250-750 ADT.

“The construction of the new (structures will result in an increase of vehicular traffic onto Oakleigh Lane by approximately 164 new vehicular trips per day.” (Decision at 22)

The actual number is 169 new vehicular trips per day for 29 additional residential units.

“Even with the added trips attributable to the co-housing proposal, the ADT for Oakleigh will be closer to 400 ADT at most.” (Decision at 27)

The estimated ADT is 712 for 29 dwellings, almost at the top of the Low Volume Residential Street range of 250-750 ADT. The Hearings Official appears to have confused ITE-ADT (Average Daily Trips), which are *round trips* and City-ADT (Average Daily Traffic), which are *one-way* trips.

See Conte 10/9 pages 5 to 6 and Conte 10/16 pages 1 to 2 and 4.

#### **SUBASSIGNMENT OF ERROR 10.D**

The Hearings Official erroneously allowed the impermissible new and non-responsive evidence submitted by the applicant’s representatives on October 16, 2013 without providing an opportunity for opponents to respond, despite the timely, written request by Paul Conte.

The Planning Commission must exclude this evidence and must not rely upon it in their decision.

#### **CONCLUSION**

The multiple errors and misinterpretations made by the hearings official require the Planning Commission overturn this decision and deny this planned unit development (tentative) application must be denied.

Respectfully submitted this 22nd day of November, 2013.

**FOR APPELLANTS**




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Bryn Thoms  
**River Road Community Organization**

# Planning Receipt



Planning & Development  
Planning Division  
99 West 10th Avenue  
Eugene, OR 97401  
(541) 682-5377

Date: 11/22/13 Received From  
Address

Bryn Thoms  
135 Oakleigh Ln  
Eugene, OR 97404

Method of Payment:

- ~~Cash~~ Rgt  
 Check # 3094  
 Visa/MC

Amount Received Phone  
\$ 4,437.66 Project

( )  
Oakleigh PUD  
HO Appeal

Enter amount:

Annexation \$

Subdivision, Tentative \$

Appeal \$ 4,437.66

Subdivision, Final \$

Conditional Use Permit \$

Traffic Impact Analysis \$

Legal Lot Verification \$

Vacations (all) \$

Lot Validation \$

Willamette Greenway \$

Partition, Tentative \$

Zone Change \$

Partition, Final \$

Other \$

Property Line Adjustment \$

Fire Review Fee \$

PUD Tentative \$

Subtotal \$

PUD Final \$

Administrative Fee (except appeals) \$

Site Review \$

**TOTAL \$ 4,437.66**

Staff Initials RGT

Updated: Oct 2013

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CITY OF EUGENE  
BUILDING & PERMIT SERVICE  
99 WEST 10TH AVE 682-5086  
REG-RECEIPT:3-0010471 Nov 22 2013  
CASHIER: RMW  
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=====  
OTHER Planning Applicatio \$4,437.66  
Hearings Offcl Decision on PDT13-1  
Admin Fee-Auto Calc \$399.39  
Admin Fee-Manual Calc \$-399.39  
negating 9% admin fee  
=====

TOTAL DUE: \$4,437.66

RECEIVED FROM:  
BRYN THOMS

Check: \$4,437.66

Total tendered: \$4,437.66

Change due: \$0.00

PC Agenda Page 99

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[www.surveymonkey.com/s/COEPermitSurvey](http://www.surveymonkey.com/s/COEPermitSurvey)  
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**DECISION OF THE HEARINGS OFFICIAL  
FOR THE CITY OF EUGENE, OREGON**

**Planned Unit Development and Willamette Greenway Request**

**Application File Name (Numbers):**

Oakleigh Meadows Co-Housing PDT 13-1, WG 13-1

**Applicant's Request:**

Tentative Planned Unit Development and Willamette Greenway Permit approval for a 29-unit cohousing development.

**Subject Property/Location:**

Tax Lot 5500 of Assessor's Map 17-04-24-24 and Tax Lot 400 of Assessor's Map 17-04-24-13; Located at the east terminus of Oakleigh Lane.

**Relevant Dates:**

Applications submitted on June 18, 2013; supplemental application materials submitted on August 12, 2013; application deemed complete on August 12, 2013; public hearing held on October 2, 2013, record closed on October 23, 2013.

**Applicant's Representatives:**

Will Dixon, AIA  
Zack Mittge, Attorney

**Lead City Staff:**

Becky Taylor, Associate Planner, Eugene Planning Division, Phone: (541) 682-5437

**Summary of the Public Hearings and Open Record**

The Hearings Official held a public hearing on this application on October 2, 2013. At the hearing the Hearings Official stated he had no conflicts of interest or *ex parte* communications to disclose, and made all the required statements under ORS 197.763. No person objected to the Hearings Official conducting the hearing. The following is a summary of testimony and evidence submitted at the hearing and subsequent open record period and is not intended to be a complete list of evidence in the record.

**October 2, 2013 Public Hearing**

At the October 2, 2013, public hearing staff provided an overview of the staff report and highlighted certain aspects of the application.

Mr. Will Dixon testified on behalf of the applicant. He agreed with the findings of the staff report and to the recommended conditions of approval. He noted that the subject property is located in the Willamette River Greenway, but not within the protected buffer immediately adjacent to the river. He stated that the location of the proposed wall along the west boundary of the property could be perfected at the time of final PUD approval. He identified a September 27, 2013 letter from the applicant's traffic consultant that showed peak hour vehicle trips estimated between 15-29 trips, which did not warrant a traffic impact study.

Numerous persons testified in support of the application. Many in support are "members" of the co-housing project and expressed their aspirations for the quality of life they desired from the co-housing development. At least one proponent stated that the flexibility of design provided by the PUD provisions was well suited to the co-housing design. Another proponent suggested that the proposal met the density and design goals set forth in the Metro Plan and Envision Eugene.

Numerous neighbors testified in opposition to the application. Attorney Lauren Regan spoke on behalf of many of those neighbors. She stated that the residents of 21 homes on Oakleigh Lane were opposed to the application. The wall proposed for the western boundary was identified as particularly offensive to neighbors. She stated that the Metro Plan requires density such as that proposed to be located closer to River Road, not at a dead end of a small lane.

She asserted that the Willamette Greenway (statewide planning goal) was not met, and the proposal would also violate Goal 5. She also testified that the proposal did not provide sufficient screening from neighboring properties or the Willamette Greenway and associated bike path.

Other neighbors testified that the density and size of the proposed buildings were simply too large for a lane predominated by single family residences. Many neighbors were alarmed that a significant amount of fill would be needed to bring the eastern portion of the property above the floodplain level in order to allow development. Fears were expressed that the filled area would adversely impact the underlying sewer and would shunt stormwater onto the open space area between the subject property and the bike path.

Several neighbors suggested that a TIA should be required because even by the applicant's calculation of 168 new daily vehicles trips, the increase represents a 145% increase in traffic over existing levels. Opponents also asserted that the safety of pedestrians, children and bicyclists would be threatened by the increased number of cars. At least one opponent asserted that a traffic analysis should also look at impacts on the commercial zoned lands along River Road near the intersection with Oakleigh.

Several neighbors objected to the decreased setbacks proposed for several buildings. They felt that such setbacks are so much smaller than what is typical in the neighborhood that they would be incompatible with the look and feel of the existing lane. Similarly, the neighbors felt

that visual screening along every boundary line was insufficient. This view was particularly strong for the eastern boundary line. Other neighbors were worried about the proposed right-of-way dedication and thought that the dedication might be imposed from the subject property all the way to River Road.

Rick Rubin argued that the site is only 10 feet above the groundwater level which varies with the level of the Willamette River. He stated that this would make stormwater management difficult – causing the stormwater to be discharged on the adjacent City owned open space.

Several neighbors argued that the co-housing proposal would be incompatible with the surrounding lands because it would invite strangers into the neighborhood and be disruptive to wildlife.

The applicant's team made several observations during their rebuttal. First was that the proposed density for the co-housing project was lower than what the Low Density Residential zoning would ordinarily allow. They also noted that the project would not be visible from the bike path along the river because large numbers of trees already screened the river from the subject property.

Attorney Zack Mittge identified several rules, goals and plans which were identified by the opponents which he stated did not apply to the application. These included:

- Statewide Planning Goals generally, and specifically Goals 5 and 15,
- Metro Plan goals and objectives,
- Lane County code provisions argued by opponents,
- Lower River Road Concept Plan – which he argued had not been adopted

He stated that no additional on-street parking would result from the project, and that Oakleigh Lane is designed for up to 750 vehicle trips per day. On the topic of stormwater, he distinguished between "treatment" which would occur on site, and "discharge" of treated water which would be evenly spread along the eastern boundary of the site.

### **Open Record Period**

At the end of the October 2, 2013 hearing, the Hearings Official set an open record period at the request of several parties. The record was left open for: 1) argument and evidence on any topic by any party until October 9, 2013, 2) then until October 16, 2013 for responsive testimony and evidence to information submitted before October 9, 2013, and 3) the applicant's final comment was due October 23, 2013.

Numerous parties submitted written testimony and evidence prior to the October 9, 2013 deadline. Those documents are indexed as Exhibits PT-1 through PT-34. More comments were received by the October 16, 2013 deadline. Those documents are indexed as PT.R-01 through PT.R-13.

On October 16, 2013, Mr. Paul Conte submitted an objection to some documents submitted by the applicant. He asked that the record be reopened at that time. Exhibit PT.R-01. He made another request to have the record reopened on October 25, 2013. On November 5, 2013, the Hearings Official denied those requests in an order entitled "Order Denying Request to Reopen Evidentiary Record." While the Hearings Official declined to reopen the record, I made no decision on the question of whether to rely on the six documents that Mr. Conte objected to. That November 5, 2013 order is incorporated into this decision by this reference. Where the Hearings Official has relied on the disputed evidence, I have explained why the evidence is admissible under the rules set for the open record period.

After the November 5, 2013 Order was sent, Staff forwarded an October 31, 2013 letter from the applicant's attorney that apparently had just arrived in the Planning Staff's mail. The Hearings Official was unable to review that letter prior to issuing November 5, 2013 Order, and therefore, the order does not respond to the applicant's arguments.

On November 8, 2013, Mr. Conte attempted to submit a letter to the Hearings Official. The letter was forwarded via e-mail by Staff. Upon opening the e-mail and seeing it contained further argument about reopening the record, the Hearings Official made a determination not to read or consider the letter. That letter is excluded from this record.

### **Site Characteristics**

The subject property consists of 2.3 acres in two tax lots that are considered one development site under the current ownership. The property was recently annexed (see City File A 13-1) and is zoned R-1 Low-Density Residential. The east boundary of the subject property abuts undeveloped City parkland that contains Goal 5 Water Resources associated with the Willamette River, which borders the City property farther to the east. Otherwise, the surrounding properties primarily consist of single-family dwellings on individual lots or undeveloped lots that have potential for future residential development (i.e. at the north end of Oakleigh Lane and abutting the west boundary of the subject property.) Refer to Attachment A for a vicinity map.

Oakleigh Lane terminates near the midpoint of the northern boundary of the subject property, which will provide sole access to the development. Instead of extending the street along the entire length of the property, the applicant requests an exception to the street connectivity standards. To support the exception, the applicant has submitted a conceptual development plan for the undeveloped property to the north, to show how it could be further divided without necessitating an extension of Oakleigh Lane. Issues regarding Oakleigh Lane are addressed under approval criterion EC 9.8320(5).

Regarding the undeveloped property to the west, the applicant proposes a "green wall" as a buffer between the garages, recycling structure, vehicle use and parking areas abutting the west property boundary. EC 9.6420 requires vehicle uses areas to be setback seven feet from

property lines with a landscape buffer. EC 9.2750 requires structures to be setback five feet from interior property lines or ten feet between buildings. The applicant seeks modifications to these code standards through the PUD process. Staff notes that if the Hearings Official approves the applicant's request, EC 9.2751(7) still requires the applicant to obtain an easement from the abutting property owner. Staff's recommendations are provided under approval criterion EC 9.8320(11)(k), in the following evaluation.

### **Summary of Land Use Applications**

**Tentative PUD** – The applicant requests tentative Planned Unit Development (PUD) approval for the creation of a co-housing residential facility, with 28 dwelling units within seven buildings arranged around a community building. Staff found that the community building includes bedrooms and a kitchen; therefore, it is also considered a dwelling unit included in the residential density of the subject property. The applicant indicates that the dwelling units will be divided as condominiums for private ownership, whereas the land and community building will be commonly owned and managed by a homeowners association.

EC 9.2740 Residential Zone Land Use and Permit Requirements confirm that PUD approval is required for multiple-family (three or more dwellings on the same lot) development in the R-1 zone. The PUD process allows for a review of the specific location, design and intensity of a proposed multiple-family development in the R-1 zone to determine, among other things, whether the development is reasonably compatible with adjacent and nearby land uses. Multiple-family development is also required to meet specific development standards at EC 9.5500, which establish design regulations, such as building mass, orientation, and articulation.

At the same time, the PUD process allows for design flexibility, if the design meets the PUD purpose statements at EC 9.8300, which are intended to achieve flexibility in architectural design, clustering of buildings, and providing for economy of shared services and facilities. Accordingly, the applicant seeks several modifications to development code standards through the PUD process. The PUD approval criteria at EC 9.8030 are evaluated in the following staff analysis.

**Willamette Greenway Permit** – The property is within the City's adopted Willamette Greenway boundary, which requires Willamette Greenway (WG) permit approval prior to development. (Refer to Attachments A and B for a depiction of the adopted Willamette Greenway boundary – the area in which WG permit approval is required for intensification, change of use or development according to EC 9.8805.)

The Willamette River is located about 243 feet to the east of the subject property, according to the applicant's topographical survey prepared by Poage Engineering & Surveying, Inc. (See Attachment D-1.) The land between the river and the subject property is owned by the City, as an undeveloped natural resource area that contains /WR Water Resource (Goal 5) conservation areas. In this area (outside Willakenzie Area Refinement Plan which has an adopted WG setback distance from the river of 35 feet), and in accordance the WG permit approval criteria

EC 9.8815(4) and (5), there is no specific, pre-determined or adopted setback from the river under the City's implementing provisions of Goal 15 (Willamette Greenway).

The /WR conservation area at this location is greater than the typical 100-foot setback from top-of-bank along the Willamette River; here, the adopted riparian area boundary extends landward beyond the 100-foot setback from top of bank. Staff found that the /WR conservation area does not extend onto the subject property. As shown on Attachment A, the subject property is at least 53 feet from the boundary of the regulated resource area.

### **Documents Considered by the Hearings Official**

The Hearings Official has considered all the documents listed above and all the submissions into the record prior to and including the applicant's final comment dated October 23, 2013.

### **Rules not Considered by the Hearings Official**

Prior to discussing the applicable criteria under EC 9.8320 and 9.8800 the Hearings Official considers it important to identify various state and local rules that do not apply to this application.

The Statewide Planning Goals adopted by the Land Conservation and Development Commission do not apply directly to this application. The Metro Plan and the city's zoning and development provisions in Eugene Code, Chapter 9 have been acknowledged as complying with the Statewide Planning Goals under LCDC's rules, and therefore, those goals no longer apply directly.

The Lane County Code is a separate and discrete set of rules that do not apply within the City of Eugene. See PT-22.

The Metro Plan goals and objectives do not apply directly to this application. However, applicable Metro Plan "policies" are relevant and applicable through EC 9.8320(1) and EC 9.8815(3). Metro Plan goals and objectives may be used as context for understanding Metro Plan policies, but those goals and objectives did not apply directly.

Generally, the "purpose statements" set forth in EC 9.8300 are not approval criteria applicable to PUD Tentative Plans. Typically, purpose statements are not considered approval criteria. *Watts v. Clackamas County*, 51 Or LUBA 166, 172 (2006). The one exception is when an applicable approval criterion explicitly requires consistency with the purpose statement. That is the case with respect to EC 9.8320(11)(k).

The Lower River Road Concept Plan does not contain applicable approval criteria. Although the plan might be considered as context for understanding other related planning provisions, it is not intended to apply directly to individual land-use applications. EC 9.8010.

The "Needed Housing" provisions of EC 9.8325 do not apply to this application. The proposed co-housing buildings take a physical form similar to apartments or multifamily dwellings and will be

individually owned presumably in fee simple form – condominiums. This form meets both the EC definition of “multifamily dwelling” and the State definition of “needed housing.” ORS 197.303(1)(a). However, the provisions of EC 9.8325 only become applicable if the applicant elects to proceed under those provisions. EC 9.8325 allows an applicant to choose the general PUD criteria at EC 9.8320 which is the case for this application.

### **Issues Not Relevant to the Applicable Approval Criteria**

At both the October 2, 2013 public hearing and in written submissions, there was a significant amount of testimony that the Hearings Official cannot deem relevant, and therefore, cannot consider as part of this review. This evidence and argument includes:

- Generalized statements of support. See Exhibits HE-22 and 26 for examples.
- Generalized statements of opposition. See Exhibits HE-5 and 18 for examples.
- Comparison of the proposal to other co-housing developments elsewhere. PT-1.
- The relative cost of the proposed condominiums and assertions that the co-housing development will not be financially solvent.
- The results of meetings between the applicant and neighbors, and allegations that plans changed when out-of-state co-housing proponents became involved.
- Perceived fear of strangers visiting the neighborhood and asserted negative impacts.

### **Evaluation of Tentative PUD Request**

**EC 9.8320(1): The PUD is consistent with applicable adopted policies of the Metro Plan.**

#### ***Staff Findings:***

The applicant has addressed several Metro Plan policies (pages 12 through 22 of the applicant’s June 14, 2013 written statement), and to the extent that those additional findings and policies of the Metro Plan are also relevant here, staff generally concurs with the applicant’s statements. Staff also notes that the proposal for clustered dwellings, which will be divided into condominiums, is consistent with Metro Plan Residential Policies A.17 and A.20, which encourage a range of housing types and home ownership. With regard to Environmental Policies, the subject property is within the floodplain and Willamette Greenway. Policy C.31 calls for development regulations within the floodway fringe to minimize damage to life and property; accordingly, the City has adopted special flood hazard development standards, beginning at EC 9.6706, which will apply at the time of development and are further discussed at approval criterion EC 9.8030(10)(c). With regard to the Willamette Greenway, Policies D.2 and D.3 require land use regulations and limit new development to uses that are compatible with the natural, scenic, and environmental qualities. The applicant has applied for concurrent WG permit approval, which is evaluated below, following the PUD evaluation.

Staff also notes that the City's R-1, Low-Density Residential Zone implements, and is consistent with, the low-density residential land use designation for the subject property in the Metro Plan. The subject property is zoned R-1, and the proposed PUD is therefore subject to the applicable R-1 zoning provisions as discussed throughout the following approval criteria and related standards. To the extent that the PUD is found to be consistent with those applicable zoning provisions and the PUD approval criteria, as is the case here, it is also consistent with the more general policies of the Metro Plan and the approval criterion here at EC 9.8320(1).

### ***Opponents' Arguments***

Opponents argue that the applicant should have addressed two Metro Plan policies concerned with allocation of residential densities - A.12 and A.13. PT-4. Generally, many neighbors argued that the proposed co-housing is too dense compared to the existing individual single family homes on Oakleigh Lane. PT-2, PT-9.

### ***Hearings Official Conclusions***

The findings of the staff report are sufficient to show compliance with EC 9.8320(1) and the Hearings Official adopts them by this reference. The opponents assert that policies A.12 and A.13 apply, but do not effectively explain why that must be the case. The Hearings Official is unconvinced that Metro Plan policies A.12 and A.13 apply. The subject property is zoned Low Density Residential which is the same zone that the majority of the neighborhood is zoned. No increase in density is sought. The proposal does not implicate the "higher density residential development" identified in policy A.12 and the proposal does not represent an "increase" in residential density which is the focus of policy A.13. Even if the two policies do apply, the proposal is consistent with them because the density proposed is within the range allowed by the Low Density Residential zoning designation.<sup>1</sup>

**EC 9.8320(2): The PUD is consistent with applicable adopted refinement plan policies.**

### ***Staff Findings***

The River Road / Santa Clara Urban Facilities Plan (RR/SC UFP) serves as the applicable adopted refinement plan for the area included in this tentative PUD proposal. The property is designated Low-Density Residential on the Land Use Diagram in the refinement plan. Based on the prior findings at EC 9.8320(1), which are incorporated here by reference, the proposed development complies with the applicable plan designation as implemented through the R-1 zone. The applicant has also addressed several RR/SC UFP policies (pages 23 through 25 of the applicant's June 14, 2013 written statement). To the extent those policies are applicable or relevant to this request, staff generally concurs with the applicant's findings.

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<sup>1</sup> The opponents' arguments concerning the density calculations are discussed below.

Further, the Residential Land Use Element Policy 2.0 provides for a diversity of housing types; the related action suggested by the RR/SC UFP at 2.1 calls for innovative residential development, such as planned unit developments, for new residential development on larger parcels (page 2-14). Based on the above findings, the PUD is consistent with the applicable criterion here, at EC 9.8320(2).

### ***Hearings Official Conclusions***

The record does not appear to contain argument that the application does not comply with the applicable refinement plan. However, at both the October 2, 2103 public hearing and in some of the written submission, there does seem to be a misunderstanding that the Lower River Road Concept Plan is the applicable refinement plan. That is not the case, and as explained above, the Lower River Road Concept Plan does not contain approval criteria applicable to this application, nor is it implicated by EC 9.8320(2).

**EC 9.8320(3): The PUD will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height.**

### ***Staff Findings***

Surrounding properties are primarily developed with single-family dwellings on individual lots. The abutting lands to the west and north are vacant lots designated for low-density residential use. City parkland abuts the east property boundary, which is zoned with the /WR Water Resource overlay that establishes a conservation area abutting the Willamette River, farther to the east.

**West Property Line** – With regard to building locations and screening along the west property line, the applicant’s plans show a row of garages abutting the west property line, interrupted toward the midpoint of the property with a recycling building, and flanked to the north and south by gravel parking spaces. The residential development standards at EC 9.2750 require structures to be setback five feet from property lines and 10 feet between structures. The parking area standards at EC 9.6420 require vehicle parking spaces to be on a durable, dust-free surface, with a seven-foot wide landscape strip abutting the property line.

The applicant states that their proposed gravel parking spaces will be durable and dust-free because the gravel will be placed over drainage fabric, rather than dirt. Instead of a building setback and landscape strip, the applicant proposes a “green wall,” a continuous eight-foot tall concrete wall with espaliered trees every ten feet, along the west property line. Since the proposed wall is over six feet in height, it is also considered a structure that is subject to the setback requirement. The proposed design requires a modification to code standards, which is allowed by approval criterion EC 9.8320(11)(k) (“proposed non-compliance”); based on those subsequent findings and conditions, which are incorporated here by reference, the PUD will provide adequate screening along the west property boundary. Staff notes that, if the Hearings Official approves the modification, the applicant is still required by EC 9.2741(7) to obtain an

easement from the abutting property owners (Tax Lots 100 and 5700).

**North Property Line** – With regard to the north property line, the applicant’s landscape plan (Sheet L2) shows continuous landscaping, except for the driveway entrance, which is flanked by proposed landscape beds with new tree plantings. As shown on Sheet A1.1 of the applicant’s plans (see Attachment D-2), Oakleigh Lane abuts the western portion of the north property line with 20 feet of right-of-way width. South of the existing 20-foot right-of-way, along the north property line, the applicant’s plans show an additional 20 feet of special setback area to enable future right-of-way acquisition, should Oakleigh Lane need to be widened in the future.

The applicant’s plans show private landscaping and stormwater facilities within the special setback, which is typically not allowed. The proposed buildings are just south of the special setback, which means that those buildings would not have sufficient setbacks from the street if it is widened in the future. Public Works staff indicates that the special setback is not necessary, which resolves the above concerns presented by the applicant’s plans. Instead, Public Works staff recommends just enough right-of-way dedication to: (a) meet the minimum right-of-way width to enable future improvement of Oakleigh Lane, with an additional 22.5 feet of right-of-way along the north property line, between the west property line and the east margin of the proposed driveway (50 feet of lineal frontage); (b) provide right-of-way for a future hammerhead turnaround and sidewalk to enable further development of adjacent lands to the north (Tax Lot 200), for an area that is 13 feet wide and 199 feet in length, along the north property boundary; and (c) reserve an area for a future bicycle and pedestrian connection from the future hammerhead to the east property boundary, abutting the City parklands, for an area that is 13 feet wide and 24 feet long. (Refer to Attachment B.) The street right-of-way is evaluated in greater detail under approval criterion EC 9.8320(5).

Building 1, abutting the portion of Oakleigh Lane that is east of the proposed driveway, is setback by a minimum of 21 feet. (Refer to Attachment D-3 for a detail of the north line building setbacks.)

The northwest corner of Building 1 is setback 23 feet from the existing north property line, which is just outside the 22.5-foot right-of-way dedication being required. Following the 22.5-foot wide and 50-foot long right-of-way dedication at the northwest property corner, the abutting portion of Building 1 would have a front yard setback of about half a foot. The required front yard setback is 10 feet. The northeast corner of Building 1 is setback from the existing northern property line by 21 feet, which is outside the abutting area of right-of-way dedication being required. The right-of-way requirement along the northeast portion of Building 1 is 13 feet; hence, the building setback would be about eight feet, which is also less than the 10-foot front yard setback requirement. The applicant requests a modification to the front yard setback requirements, in accordance with the PUD purpose statements. This issue is evaluated later in this report, under approval criterion EC 9.8320(11)(k).

The easterly portion of the north property line is bordered by a row of existing large cedars, which are primarily located on the property to the north. Three attached dwelling units (Building 2) are proposed to be located south of these trees, with the closest part of the

building being setback 12 feet from the north property line. With the 13 feet of additional right-of-way being required along this portion of the north property line, the northwest corner of Building 2 would be within the right-of-way, which is not acceptable. As such, the following condition of approval is necessary:

- The final PUD plans shall show Building 2 located outside (moved south) of the required right-of-way dedication along the north property line.

The above condition protects the right-of-way. Following right-of-way dedication, the required setback would be 10 feet; however, the building would have no setback if it were just moved south of the right-of-way, as conditioned above. Again, the applicant requests a modification to the setback standards, which is evaluated under approval criterion EC 9.8320(11)(k).

Another consideration for the north property line is the row of cedar trees on the abutting lands to the north. Although the applicant's plans (Sheet L3) show preservation of the trees (refer to Attachment D-4), the critical root zone (CRZ) of the cedars projects into more than half of Building 2. It is unclear whether this is an acceptable level of disturbance. As such, the following condition of approval is necessary:

- Prior to final PUD approval, the applicant shall submit a report from a certified arborist confirming that the row of cedars on adjacent lands to the north can survive the construction impacts of the proposed development (and include any necessary protection measures to ensure survival). The final PUD plans shall show the location of Building 2 and any related protection measures (e.g. construction fencing for protected CRZ areas) consistent with the arborist's recommendations.

Based on the above findings, conditions, and the subsequent findings provided at EC 9.8320(11)(k), which are incorporated here by reference, the PUD will provide adequate screening along the north property line.

**East Property Line** – The east property line abuts City parkland, which is an undeveloped natural resource area bordered by the Willamette River farther to the east. The distance between the subject property and the ordinary high water line of the Willamette River ranges between 200 and 243 feet, according to the applicant's topographical survey. The applicant's topographical survey also shows the approximate boundaries of the special flood hazard area, notes that the base flood elevation is about 401 feet, and indicates that about 100 feet of the eastern portion of the property is below the base flood elevation. Between the 401-foot contour and the east property boundary, the applicant's survey shows a 26-inch diameter cedar, to the north, and a filbert cluster to the south.

The applicant's tree removal and preservation plan (Sheet L3, Attachment D-4) indicates that the 26-inch cedar will be removed to accommodate three dwelling units abutting the north property line. This building is approximately 10 feet from the east property line. Buildings to the south are located farther from the east property line, with the closest building being a bike

storage shed, which is about 20 feet from the east property line, near the southern property boundary. The applicant's tree removal and preservation plan shows that the filbert cluster, and a row of fruit trees along the southern property boundary, will be preserved. Based on these findings, the PUD will provide adequate screening along the east property line.

**South Property Line** – As noted above, a row of fruit trees along the eastern portion of the southern property line will be preserved. The applicant's removal and preservation plans indicate that a 24-inch fir and a 22-inch hemlock need to be removed to accommodate three dwelling units near the western portion of the south property line. Sheet A1.1 of the applicant's plans (see Attachment D-2) show Building 5 and 6 setback seven and five feet from the southern property line, respectively, with the exception of the southeast corner of Building 6, which appears to be within a foot of the property line. It is noted that the affected property owner to the south submitted a letter in support of the proposed development (Mr. Adee). Further, as recommended at EC 9.8320(11)(k), the applicant will be required to obtain an easement from the abutting property owner for the substandard building setback. Sheet L2 of the applicant's plans shows a 30-inch fence along the south property line, abutting Building 6. As such, staff assumes there is sufficient screening along the south property line abutting Buildings 5 and 6.

The southwest corner of the site has a paved vehicle use area and gravel parking areas. The applicant proposes landscape planter beds between the parking spaces and the southern property line and an eight-foot tall concrete wall on the southern property line, abutting the vehicle use area. As discussed previously, the concrete wall is a structure subject to interior yard setback requirements, which is five feet. With the wall located on the property line, the applicant will be required to obtain an easement from the affected property owner (Tax Lot 5600), as conditioned at EC 9.8320(11)(k). It is noted that the owner of Tax Lot 5600, Mr. Campbell, submitted a letter in support of the proposed development. Based on these findings, the PUD will provide adequate screening along the south property line.

With regard to the overall bulk and height of the proposed buildings, the largest building is the common house, which is located toward the center of the site. None of the buildings exceed the maximum building height of 30 feet, established by the R-1 zone at EC 9.2750. The building dimensions are also within the maximums of the multiple-family development standards at EC 9.5500. Based on these findings, building bulk and height does not appear to necessitate further screening mitigation.

Based on the available information and the above findings and conditions, the PUD will comply with approval criterion EC 9.8320(3).

### ***Opponents' Arguments***

The neighbors are generally dissatisfied with the proposed screening along all four property boundaries.

**West Boundary** – The neighbors argue that the proposed eight-foot wall is too tall, unsightly, out of scale with the surrounding neighborhood and violates the required 5 foot setback under EC 9.2750. PT-1, PT-2. The neighbors, including the adjacent property owner to the west, state that the applicant will not be granted an easement to allow the screening wall to be placed on or near the property line. HE-65, HE 66, PT-2.

**North Boundary** - The neighbors argue that insufficient screening is proposed along the north property boundary primarily because setback standards will not be met in that area. They are concerned about a row of mature cedar trees that could be adversely affected by the development. Neighbors argue that the setbacks along the north property line and the screening should be similar to that of residences along Oakleigh Lane - since the north property line fronts on the lane. PT-1, PT-2. The neighbors also argue that the development will not be sufficiently screened from the “public path/bike path” that traverses the north property line and leads to the Willamette River bike path further to the east.

**East Boundary** - The neighbors argue that the applicant has provided no screening along the eastern boundary which is adjacent to city owned open space. The neighbors argue that the row of trees between the Willamette River bike path and the subject property are not sufficient to screen the development from the intervening public open space. PT-1, PT-2.

**South Boundary** - The neighbors expressed the same concerns about the south property line as expressed toward the eastern property boundary. PT-1.

### ***Hearings Official Conclusions***

In a relatively recent decision, the Land Use Board of Appeals affirmed the former Hearings Official’s interpretation of the terms “adequate” and “screening” as used in EC 9.8320(3). *Northgreen Property LLC. V. City of Eugene*, \_\_ Or LUBA \_\_, (LUBA No. 2011-099, March 5, 2012). That interpretation concluded that EC 9.8320(3) does not require a development to be completely obscured from view, but that it be screened “to a reasonable extent” considering the proposed use. The Hearings Official adheres to that interpretation here.

**West Boundary** - The Hearings Official generally concurs with Staff’s findings for the screening along the western boundary and adopts those findings by this reference. In addition, the applicant's final comment responds to the argument that the proposed wall fails to provide adequate screening. The applicant notes that the definition of “screening” in EC 9.0500 includes “walls.” At the October 2, 2013 hearing the applicant testified that a “green wall” was being proposed - which would plant espaliered trees along the outside of the wall facing neighboring properties. The applicant also submitted an example site plan which shows that the overall design of the PUD can be maintained even if the neighboring property owner does not grant an easement allowing the wall to be located very close to the west property

boundary. PT 18.<sup>2</sup> Although the proposed wall is not the type of screening that the neighbors would prefer, it will have the quality of completely obscuring the adjacent parking area, and to some extent the buildings beyond. The example site plan shows that the development as proposed can accommodate a 5 foot setback for the wall even if the adjacent property owners do not grant an easement.

**Northern Boundary** - The Hearings Official generally concurs with Staff's findings for the screening along the northern boundary and adopts those findings by this reference. Based on the neighbors' arguments, it does not appear that they were aware of the applicant's landscape plan and intention to preserve the cedar trees along the northern boundary. Even with the reduced setbacks, those plans certainly meet the standard of screening adjacent properties to a reasonable extent.

**Eastern Boundary** – Both the Staff findings and the applicant rely on trees and intervening vegetation that already exists between the subject property and the Willamette River bike path to meet the requirements of EC 9.8320(3) for the eastern boundary. The Hearings Official agrees with the neighbors, that the applicant's approach is insufficient. The record is clear that the open space immediately adjacent to the eastern boundary is owned by the City and open for public access and use. Although the proposed development will be very unlikely to be visible from users of the bike path, the development will be completely unscreened from view from the perspective of users of the immediately adjacent public open space. Thus, the application does not comply with EC 9.8320(3) for the eastern boundary.

However, based on the submitted site plans, there appears to be sufficient space to accommodate landscaping or other screening elements near the eastern boundary of the proposal without causing the PUD to fall out of compliance with other applicable provisions. Therefore, the application can be approved with a condition requiring sufficient screening, or landscaping consistent with city standards for the eastern boundary. The Hearings Official has added a condition with such a requirement below.

**Southern Boundary** - Part of the southern boundary is screened by the adjacent filbert orchard, and the balance of the boundary is proposed to be screened by a 30 inch fence. Although the Hearings Officer generally agrees with the Staff findings for the southern boundary, in this instance a 30 inch high fence is unlikely to screen the development from property owners to the south to a reasonable extent. As part of the condition noted above, the Hearings Official will require the applicant to revise the landscape plan or provide a taller fence along the southern boundary.

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<sup>2</sup> The Hearings Official considers the example site plan in PT-18 to directly respond to comments made in PT-1 and PT-2 (submitted on October 9, 2013) and, therefore, it does not constitute new evidence being entered into the record.

**EC 9.8320(4): The PUD is designed and sited to minimize impacts to the natural environment by addressing the following:**

- (a) **Protection of Natural Features.**
1. **For areas not included on the City’s acknowledged Goal 5 inventory, the preservation of significant natural features to the greatest degree attainable or feasible, including:**
    - a. **Significant on-site vegetation, including rare plants (those that are proposed for listing or are listed under State or Federal law), and native plant communities.**
    - b. **All documented habitat for all rare animal species (those that are proposed for listing or are listed under State or Federal law).**
    - c. **Prominent topographic features, such as ridgelines and rock outcrops.**
    - d. **Wetlands, intermittent and perennial stream corridors, and riparian areas.**
    - e. **Natural resource areas designated in the Metro Plan diagram as “Natural Resource” and areas identified in any city-adopted natural resource inventory.**

### ***Staff Findings***

The subject property is within the Willamette Greenway boundary, and as noted previously, an adopted Goal 5 water resource conservation area is located east of the subject property, on the City parklands. (Refer to Attachment A.) There is no natural resource area designated in the Metro Plan or any other adopted natural resource inventory that includes protected resources on the subject property. The available information indicates that the subject property does not contain any rare plant or animal species, prominent topographical features, wetlands, streams, or riparian areas. With regard to significant natural features, the applicant states that the site is primarily a meadow, consisting of a cover crop of short grass with scattered fruit and fir trees. Tree preservation is evaluated below.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff’s findings for EC 9.8320(4)(a) and adopts those findings by this reference. The record does not appear to contain any argument that rare plant or animal species exist on the subject property. Mr. Mark Conley submitted several plant lists and letters which show a great deal of thought and time expenditure attempting to catalog the plant and animal species that are on the subject property. PT-5, PT-6, PT.R-11. However, the Hearings Official cannot find an argument that the species listed are rare plants or animal species which might trigger protection under EC 9.8320(4)(a).

- (b) **Tree Preservation. The proposed project shall be designed and sited to preserve significant trees to the greatest degree attainable or feasible, with trees having the following characteristics given the highest priority for preservation:**

1. **Healthy trees that have a reasonable chance of survival considering the base zone or special area zone designation and other applicable approval criteria;**
2. **Trees located within vegetated corridors and stands rather than individual isolated trees subject to windthrow;**
3. **Trees that fulfill a screening function, provide relief from glare, or shade expansive areas of pavement;**
4. **Trees that provide a buffer between potentially incompatible land uses;**
5. **Trees located along the perimeter of the lot(s) and within building setback areas;**
6. **Trees and stands of trees located along ridgelines and within view corridors;**
7. **Trees with significant habitat value;**
8. **Trees adjacent to public parks, open space and streets;**
9. **Trees located along a water feature;**
10. **Heritage trees.**

### ***Staff Findings***

The applicant states that there are approximately 135 existing trees on the subject property (see page 28 of the applicant's June 14, 2013 written statement). The applicant's tree removal and preservation plan is shown on sheet L3 (Attachment D-4). The applicant states that only four "significant" trees will be removed, according to the following definition:

EC 9.0500 Significant Tree: A living, standing tree having a trunk with a minimum cumulative diameter breast height of 8 inches, or, when there are multiple trunks, having a minimum cumulative diameter breast height of 8 inches, considering the 2 largest trunks measured at 4.5 feet above mean ground level at the base of the trunk or trunks.

The location, species, and size of the trees on the subject property are also shown in the applicant's topographical survey, which confirms that most of the trees are fruit and filbert trees that are less than eight-inches in diameter. Most of those trees are proposed for removal. The larger fruit trees along the southeast property line are proposed for preservation, which complies with the above approval criterion as these trees provide screening and buffering functions. The applicant also proposes to preserve a group of ash trees, west of Building 7, and a cluster of young cedar trees between Buildings 3 and 4. Preservation of these trees complies with the above criterion because they are stands of trees, rather than isolated individuals. The most significant tree being preserved on the subject property is a 14-inch fir located in the southwest portion of the property. The applicant's plans delineate the critical root zone (CRZ) of the tree to show that it can survive construction impacts, which are primarily the surrounding vehicle use areas, rather than buildings.

The applicant's plans also show the CRZ of three fir trees on the adjacent property to the west to show that the proposed parking garages and concrete wall will not require their removal. As

discussed previously at EC 9.8320(3), the applicant has not delineated the CRZ for the row of cedars abutting the north property line. Under the screening criterion at EC 9.8320(3), staff recommended a condition for the final PUD plans to show the CRZ of the row of cedars abutting the north property line, with either supporting documentation from a certified arborist that the trees could survive construction impacts or moving Building 2 farther to the south, outside the CRZ. Based on the condition established at EC 9.8320(3), which is incorporated by reference, approval criterion EC 9.8320(4) is also satisfied.

### ***Opponents Arguments***

At least one comment claims that the application does not meet this provision. PT-1. However, that argument is nearly incomprehensible. The opponent identifies several larger trees on the subject property, but the comment does not appear to respond to the applicant's tree preservation plan.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(4)(b) and adopts those findings by this reference. Certainly several significant trees will be removed. However, that is allowed under EC 9.8320(4)(b) as some significant trees can be removed with provided mitigation. There is no evidence showing that applicant is unwilling or unable to provide that mitigation. The applicant's information also shows that measures will be taken that are reasonably calculated to protect the root zone of the cedars to the north.

#### **(c) Restoration or Replacement.**

- 1. For areas not included on the city's acknowledged Goal 5 inventory, the proposal mitigates, to the greatest degree attainable or feasible, the loss of significant natural features described in criteria (a) and (b) above, through the restoration or replacement of natural features such as:
 
  - a. Planting of replacement trees within common areas; or**
  - b. Re-vegetation of slopes, ridgelines, and stream corridors; or**
  - c. Restoration of fish and wildlife habitat, native plant habitat, wetland areas, and riparian vegetation.****

**To the extent applicable, restoration or replacement shall be in compliance with the planting and replacement standards of EC 6.320.**

The Hearings Official concurs with Staff's finding that the area is not included on the City's acknowledged Goal 5 inventory. The applicant proposes to mitigate the removal of four trees by planting approximately 26 new trees within the common areas. Based on these findings, this criterion is met.

- #### **(d) Street Trees. If the proposal includes removal of any street tree(s), removal of those street tree(s) has been approved, or approved with conditions according to**

**the process at EC 6.305.**

Staff found that no street trees are proposed for removal. The Hearings Official finds this provision is not applicable.

**EC 9.8320(5): The PUD provides safe and adequate transportation systems through compliance with the following:**

- (a) **EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways (not subject to modifications set forth in subsection (11) below).**

***Staff Findings***

Oakleigh Lane abuts the west half of the north boundary of the subject property. The applicant's survey shows that the portion of Oakleigh Lane abutting the subject property has 20 feet of right-of-way width, with approximately 19 feet of pavement width that partially overlaps the north boundary of the subject property, outside the public right-of-way. Instead of dedicating additional right-of-way to widen the roadway, the applicant proposes a 20-foot special setback from the north property boundary (which coincides with the official right-of-way centerline).

East of the roadway is a row of cedar trees, which are primarily on adjacent lands to the north. Hence, extending Oakleigh Lane to the east would necessitate right-of-way dedication from the northerly property owner and, potentially removal of the cedar trees. Instead of extending Oakleigh Lane to the east, the applicant submitted a street connectivity study prepared by Access Engineering, LLC, which shows how the adjacent lands to the north could be further divided with flag lot access off the existing 20 feet of right-of-way, with just an additional five-foot right-of-way dedication (as multiple flag lots require 25 feet of street frontage). (Refer to Attachment D-5.)

Referral comments from Public Works confirm that the proposed street layout provides a safe and adequate transportation system, subject to additional findings and conditions for compliance with EC 9.6805 through EC 9.6875 Street Standards, as provided below. With regard to EC 9.6805 Dedication of Public Ways, Public Works staff recommends right-of-way dedication west of the development's driveway, so that the abutting street, Oakleigh Lane, will comply with EC 9.6870 Street Width. Public Works staff also recommends right-of-way dedication, east of the driveway, to enable the construction of a hammerhead turnaround, consistent with EC 9.6820 Cul-de-Sacs and Turnarounds. Public Works staff confirms that no additional right-of-way or special setback is required based on the acceptability of the applicant's street connectivity study; Public Works staff recommends the exception to EC 9.6815 Street Connectivity be approved. Details of these findings, with the recommended conditions of approval, are provided below.

Pursuant to EC 9.6850 Dedication of Public Ways, as a condition of any development, the City may require dedication of public ways for bicycle and/or pedestrian use as well as for streets and alleys, provided the City makes findings to demonstrate consistency with constitutional requirements. The public ways for streets to be dedicated to the public by the applicant shall conform to the adopted

right-of-way map and EC Table 9.6870. EC 9.6870 Street Width confirms that the required right-of-way width for Oakleigh Lane is 45 feet, based on the street functioning as a Low-Volume Residential Street. Public Works staff confirms that there are currently 25 residential tax lots along Oakleigh Lane, and with the addition of 29 dwelling units proposed by the subject development, the Average Daily Traffic (ADT) would be greater than 500 trips per day, which is within the expected 250-750 ADT range for low-volume streets.

The existing right-of-way width abutting the subject property is 20 feet, which was dedicated by properties to the north, per the Plat of Oakleigh in 1927. The southerly margin of this 1927 dedication is the official right-of-way centerline for Oakleigh Lane. Any additional dedications required of the subject development would be based on this centerline. Based on the right-of-way requirement of 45 feet for a low-volume street, and the existing 20 feet of right-of-way width located north of centerline, an additional 22.5 feet of right-of-way dedication (half of 45 feet) from the subject property is necessary, for the portion of the street being impacted by the subject development (i.e. from the site driveway to the west property boundary, which is about 50 lineal feet).

Oakleigh Lane currently terminates near the proposed driveway. As noted above, the right-of-way width needs to be expanded by an additional 22.5 feet in width for a length of 50 feet, between the northwest property corner, over the proposed site entrance, and five feet east of the proposed driveway to accommodate the approach apron and sidewalk. Beyond that point, Public Works staff confirms that right-of-way is needed to enable further development of adjacent lands to the north, and to provide a future hammerhead turnaround and sidewalk at the east end of the street. The acceptability of not extending the street, further to the east, is based on an exception to EC 9.6815 Street Connectivity. Public Works staff confirms that the applicant's alternative street plan, along with their narrative that addresses the intent statements at EC 9.6815(1), an exception is warranted pursuant to EC 9.6815(2)(g)(1).

The applicant's alternate street study (Figure 1, Attachment D-5) identifies the amount of right-of-way necessary to construct an emergency vehicle turnaround at the end of Oakleigh Lane, and to provide the necessary frontage for flag lot development of undeveloped adjacent lands to the north (Tax Lot 200). Public Works staff indicates that the applicant's proposal is sufficient to accommodate the turnaround, but not the area necessary to extend the sidewalk along the south side of the turnaround, to separate pedestrians from vehicles and provide a safe public walking surface for the residents of the proposed development. The amount of right-of-way necessary to allow for the construction of the proposed turnaround and adjacent sidewalk would be a strip that is 13 feet wide by 199 feet in length. These dimensions assume that the turnaround would be 21 feet wide and that the north edge of the turnaround would match the existing edge-of-pavement in Oakleigh Lane, which is shown on the tentative plans as being six feet south of the existing right-of-way. The addition of a six-inch curb, five-foot sidewalk, and six inches behind the sidewalk, as necessary for construction purposes, results in the need for a total of 33 feet of right-of-way (for the future hammerhead turnaround at the east end of Oakleigh Lane), 13 feet of which is within the bounds of the proposed development (with the balance coming from the northerly property, whenever that property decides to develop).

Construction of the hammerhead turnaround is not necessary or feasible at this time; the need will be based on further development of adjacent lands to the north. The right-of-way secured with this development will enable future development of that northerly property.

EC 9.6820 Cul-de-Sacs and Turnarounds require streets that are longer than 150 feet to terminate with a cul-de-sac bulb or an emergency vehicle turnaround (or hammerhead). The street connectivity exception also warrants an exception to the 400-foot maximum length of a dead-end street, pursuant to EC 9.6820(5)(b).

With regard to EC 9.6835 Public Accessways, Public Works staff notes that the nearest public accessway is located farther to the north, between the east terminus of East Hilliard Lane and the public bike path that runs along the west bank of the Willamette River. The Pedestrian and Bicycle Master Plan identifies a future connector from the east end of McClure Lane to the riverfront path, farther to the south of the subject property. The development proposes an internal sidewalk system that terminates at the southeast property corner, which would enable a future connection through the abutting City parkland to the McClure system to the south. (Refer to Attachment C.)

The segment of the internal sidewalk system that is located between the most easterly building (a bike barn) and the east property line is shown as having a graveled, rather than a paved, surface. This unimproved surface is appropriate because there are no plans or funding for construction of a public path on the City property at this location. Residents of the development will naturally want to walk across the City parkland toward the river. Parks staff state no objections or concerns. This proposed path at least delineates a more confined direction of travel, rather than random wandering through the City's resource area. This portion of the City property has been cultivated as a filbert orchard, which has been maintained by the former owner of the subject property, as discussed in the applicant's written statement. There appears to be an informal path between the orchard and the subject property that would direct travelers to the southerly McClure Lane right-of-way. Public Works staff confirms that the planned bicycle and pedestrian connection through the City's parkland is from McClure Lane toward the easterly West Bank Bike Path, which is a regional facility that borders the west bank of the Willamette River.

The applicant's plans also show an informal path, along the north property line, from the existing end of Oakleigh Lane to the riverfront path system. On page 31 of the written statement, the applicant indicates that the path "will be improved and maintained by Oakleigh Meadow, LLC." The applicant does not propose to improve the path with pavement, but rather to keep its current conditions open to the public. The right-of-way dedication being required for Oakleigh Lane covers most of this informal path. Between this right-of-way and the east property line (24 lineal feet), a 13-foot wide public access way is necessary to provide for a future bike path connection from the approved turnaround and sidewalk in the direction of the West Bank Bike Path.

In order to ensure compliance with the standards of EC 9.6835 Public Accessways, EC 9.6820 Cul-de-Sacs and Turnarounds, and to implement the applicant's alternative street study, as required for an exception to EC 9.6815 Street Connectivity, the following conditions of approval are necessary:

- Prior to final PUD approval, the applicant shall revise the final site plan to show the dedication of 22.5 feet of right-of-way along the northerly boundary of the development, between the westerly boundary of the proposed development and a line that is 50 feet east of the westerly boundary, and also to show the dedication of 13 feet of right-of-way extending from the aforementioned line (the east end of the required 22.5 feet of right-of-way dedication) to a line that is 117 feet beyond (east of) the existing the existing right-of-way (for a total length of 199 feet). Additionally, the revised site plan shall show the dedication of a 13-foot wide Public Accessway along the northerly boundary, which extends from the east end of the aforementioned right-of-way to the easterly property boundary (for a total distance of 24 lineal feet).
- Prior to final PUD approval, the applicant shall submit for review and approval by City staff and recording at Lane County Deeds and Records, a street deed which reflects the right-of-way as shown on the final site plan.

(Refer to Attachment B for a depiction of the required dedication areas.)

Constitutional Findings for Exaction:

It is in the public's interest to have Oakleigh Lane consist of 45 feet of right-of way through the development site's entry drive aisle and to consist of 33 feet beyond the drive aisle to the terminus of the street in order to ensure: safety for pedestrians, bicyclists and motorists traveling on Oakleigh Lane (a low-volume street); the efficient provision of emergency services; and that the proposed development and adjacent properties are accessible via Oakleigh Lane.

There is a nexus between the requirement to dedicate 22.5 feet of right-of-way west of the drive aisle and 13 feet east of the drive aisle and the public interest at issue. The 22.5 feet of right-of-way will result in one-half of the 45 feet of right-of-way which is necessary to construct Oakleigh Lane to the City's minimum street design standards which have been established for a low-volume street. The 13 feet of right-of-way will provide sufficient right-of-way on the south side of the centerline to construct emergency vehicle turnaround with adjacent sidewalks to City standards. Improving Oakleigh Lane to these standards will: allow for two-way vehicular and bicycle traffic; provide separation between vehicular traffic and pedestrians; and provide for emergency response and access to adjacent lots. Because 45 feet of right-of-way is the minimum amount of right-of-way necessary to construct Oakleigh Lane in this manner as a low-volume street, and because 33 feet of right-of-way is the minimum amount of right-of-way necessary to construct the turnaround at this location, the public interest in safe vehicular, pedestrian and bicycle travel and emergency response and access will be at risk if the 22.5 and 13 foot strips of right-of-way are not dedicated.

The requirement to dedicate 22.5 feet of right-of-way from the westerly boundary of the proposed development primary drive aisle and 13 feet from the drive aisle to a line that is 117 feet in length, as measured from east of the existing terminus of the right-of-way is roughly proportional to the impact that the proposed development will have on the City's transportation facilities. The proposed development will result in a 29 new residential units.

These residential units will be accessible only from Oakleigh Lane. Currently, 25 lots, consisting of a mix of residential, general office and commercial zoning have structures that take access onto Oakleigh Lane; thus, the additional 29 residential units will increase the number of structures that access this Oakleigh Lane by over 100 percent. The construction of the new (structures will result in an increase of vehicular traffic onto Oakleigh Lane by approximately 164 new vehicular trips per day. See Trip Generation Manual from the Institute of Transportation Engineers (ITE) for Residential Condo / Townhouses (Category 230).

Without the additional right-of-way, Oakleigh Lane cannot be improved to the City's minimum street design standards and the 164 new vehicle trips per day generated by the proposed development, along with the additional pedestrian and bicycle traffic generated by the proposed development, will not be assured of safe access via Oakleigh Lane. This is the last opportunity that the City will have to require the dedication of the right-of-way prior to the City needing the right-of-way for street construction.

It is also in the public interest to have a connected street and bike path system that allows pedestrians and bicyclists to safely and efficiently use the public system as a means of travelling throughout the City and to use alternative modes of transportation when traveling between the commercial, residential and recreational areas of the City.

There is a nexus between the requirement to dedicate a 13 foot public accessway and the public interest at issue. The dedication of a 13 foot public accessway will allow for the construction of a 12 foot wide bike path connecting Oakleigh Lane to the West Bank Bike Path. The 13 foot public access way will also allow for the south edge of the bike path to be aligned with the south edge of the future Oakleigh sidewalk and provide an additional six inches on each side of the bike path for constructability purposes. Because 13 feet is needed to construct a bike path connector in this manner as a standard 12 foot wide bike path, the public interest in safe pedestrian and bicycle travel between Oakleigh Lane and the West Bank Bike Path and throughout the City will be at risk if the 13 foot public access way is not dedicated.

Dedication of the 13 foot public access way is roughly proportional to the impact that the proposed development will have on the City's transportation facilities. The proposed development will result in 29 residential units. By creating new residential units, the proposed development will increase the number pedestrians and bicyclists using the bike path system. Using LCOG's Metro Trans Model "EMME 2" to determine vehicular and non-vehicular components for the street system, projections for bike/pedestrian trips generated by a proposed residential development of 29 units would generate five percent of the estimated 168 Average Daily Vehicular Trips from the development, or approximately eight bike/pedestrian trips per day. However, based on the applicant's written statement and because of the proximity of this development to the West Bank Bike Path, it is safe to assume that the number of daily bike/pedestrian trips from this proposed development would be significantly greater than the projected eight trips. Regarding the size of the dedication in comparison to the size of the proposed development site, the total area of the public access way is approximately 312 square feet, or approximately 0.3 percent of the total development site. This development

application is the last opportunity that the City will have to require the dedication of the public access way prior to the City needing the public access way for bike path construction.

The above findings and conditions demonstrate compliance with: EC 9.6805 Dedication of Public Ways; EC 9.6835 Public Accessways; EC 9.6870 Street Width; EC 9.6815 Street Connectivity; and EC 9.6820 Cul-de-Sacs and Turnarounds. Based on compliance with EC 9.6870, the street standards at EC 9.6850 Street Classification Map are also met. Public Works staff confirms that the following street standards do not apply: EC 9.6830 Intersections of Streets and Alleys, because no intersections are being created; EC 9.6810 Block Length, because no new local streets are proposed or required; EC 9.6840 Reserve Strips because, given the location of the required right-of-way, a reserve strip would not prevent access to adjacent properties, which would be the only purpose of a reserve strip in this case; EC 9.6845 Special Safety Requirements because the street is a dead-end and, therefore, discourages use by non-local motor vehicle traffic; EC 9.6855 Street Names, because no new streets are being created; EC 9.6860 Street Right-of-Way Map, because the proposal does not amend the adopted map; and EC 9.6875 Private Street Design Standards because the internal access is a driveway, rather than a private street.

Based on the above findings and conditions, the development will comply with the applicable street standards at EC 9.6800 through EC 9.6875.

### ***Opponent Arguments***

Numerous neighbors argued that the anticipated increase in vehicle trips would make Oakleigh lane unsafe. Many of these comments raised this concern in general terms raising the fear that the existing neighbors would be put in danger as they walked, biked, played and drove along the lane. These type comments are represented well by Exhibits PT-9 and HE-12. Others commented in more detail about alleged errors in the designation of Oakleigh Lane as a low volume residential street, and the associated right-of-way needs. The following is a summary of those more detailed comments:

- Oakleigh Lane is an “access lane” not a “low volume residential street” – and this misclassification caused the Staff to erroneously not require a traffic study. PT-1, PT-2, and PT-4.
- The Lower River Road Concept Plan states that conditions for pedestrians and bicyclists in the vicinity are worsening. PT-1 and PT-2.
- Treating the access lane designation as a standard, opponents argue that the aggregate of existing average daily trips (about 200) combined with the ADT produced by the co-housing proposal (164) would greatly exceed the 250 maximum daily trips for which access lanes are designed. PT-1 and PT-2.
- The increase of 164 ADT is a 145% increase in the number of current vehicle trips experienced by the neighborhood. That is deemed significant, and alleged to

inherently create unsafe conditions for children, bicyclists, pedestrians and drivers along Oakleigh Lane. PT-1 and PT-2.

- The existing right-of-way of Oakleigh Lane is insufficient for safe travel of the newly generated vehicle trips. PT-1.
- The Staff's conclusion that a dedication of land for the necessary right-of-way along the subject property's frontage on Oakleigh Lane is proof that the development will cause unsafe conditions for the length of Oakleigh Lane. PT-4.
- Safe conditions cannot be assured on Oakleigh Lane unless the right-of-way along the entire lane is increased to 45 feet and the paved surface increased. That cannot occur because the local residents have not agreed to it and structures might need to be removed in order to widen the street. PT-4 and PT.R-2.
- The Hearings Official cannot rely on Staff's conclusory opinion that the proposal will create no new adverse traffic safety conditions. PT.R-2.
- The applicant's street connectivity study is flawed and does not demonstrate that nearby properties can be developed to their maximum potential. PT-1 and PT-4.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(5) and adopts those findings by this reference – consistent with the findings below.

The opponents have raised numerous "safety" concerns and arguments that go well beyond the fundamental requirement of EC 9.8320(5). The very structure of EC 9.8320(5) does not require an applicant to prove that a proposed development will be safe from any and all asserted and or imagined traffic safety threats. The language of EC 9.8320(5) states: "[t]he PUD provides safe and adequate transportation systems through compliance with the following:" The underlined section demonstrates that the provision is limited by its own words to a requirement showing three things: a) that EC 9.6800 through 9.6875 can be met, b) that pedestrian, bicycle and transit circulation can be achieved, and c) that if necessary a Traffic Impact Analysis has been done and mitigation provided. In other words, the adopted provisions of EC 9.8320(5) assume that if those three criteria can be met, a "safe and adequate transportation system" will result.

EC 9.8320(5)(a) requires an applicant to demonstrate that it is possible, when necessary, for the applicant to "dedicate" sufficient land to accommodate public ways, including right-of-way for streets under EC 9.6800-8675. The purpose of those sections of the code are set forth in EC 9.6800 and states: "[s]ections 9.6800 through 9.6875 establish standards for the dedication, design and location of public ways to address the purpose of this land use code contained in EC 9.0020 Purpose." The pertinent sections of EC 9.6800 are EC 9.6805 and EC 9.6870. Importantly, EC 9.6805 allows the city to "require dedication of public ways for bicycle and/or pedestrian use as

well as for streets and alleys \* \* \*.” EC 9.6870 sets forth the “width” of the right-of-way and paved service to be “dedicated” in order to conform to the standards set forth in Table 9.6870.

The opponents arguments fundamentally misconstrue the requirement of EC 9.8320(5)(a) which is to ensure that a proposed development is capable of dedicating sufficient land along the property frontage to meet the right-of-way width requirements for that street designation. A “dedication” is a form of legal “taking” of property for public use that is intended to provide for public safety and offset impacts imposed by development. Because EC 9.8320(5)(a) is concerned with the dedication of land for a street, neither that provision nor EC 9.6800-9.6875 set forth standards that an existing street must meet in order to serve a proposed development. By its nature, a dedication only applies to the land that is subject to the given land-use application. Therefore, Staff have properly applied EC 9.8320(5)(a) by considering and requiring sufficient dedication of land to meet the right-of-way requirements for either an access lane or a low volume residential street - along the frontage of the subject property. Whether or not Staff have miscategorized Oakleigh Lane as a low volume residential street, and the Hearings Official does not agree that a mistake was made, is of no consequence because Table 9.6870 shows right-of-ways in the range of 40’ to 55’ for both access lanes and low volume residential streets. The Hearings Official considers Staff’s categorization to be more accurate given the increase in ADT moves the lane into the 250-750 ADT range. But, in any case, the record amply demonstrates that the applicant is both willing and able to dedicate land along the northwest corner of the subject property and adjacent to Oakleigh Lane for the purpose of providing sufficient right away and a public accessway. Nothing more is required by EC 9.8320(5)(a).

Based on the above interpretation of EC 9.8320(5)(a), the opponents arguments as set forth above are not relevant to whether the applicant has met the requirement to dedicate sufficient land to create a 45 foot right-of-way along Oakleigh Lane. Although eloquently argued, Mr. Conte’s substantial analysis of the Staff findings are well outside the scope of EC 9.8320(5)(a), EC 9.6805 and EC 9.6870. Oakleigh Lane need not have a dedicated 45 foot right-of-way and associated paved surface from River Road to the subject property in order to meet EC 9.8320(5)(a) because that provision is a standard for the “dedication” of land, not a “service” standard akin to level of service – LOS. Neither does EC 9.8320(5)(a) require the neighbors to now dedicate a portion of their property to the widening of the right-of-way or paved surface of Oakleigh Lane.

As to the applicant’s street connectivity study, the Hearings Official agrees with Staff’s analysis. The applicant’s August 6, 2013 connectivity study provides analysis required to comply with EC 9.6815(2)(g)(1)(b) which allows for alternative street designs if it can be shown that “undeveloped or partially developed properties within a quarter mile can be adequately served by alternative street layouts.” The opponents are incorrect that the standard for allowing the exemption is a showing that nearby properties can be developed to their maximum potential. The applicant’s study identifies only one property in the vicinity that remains undeveloped and adequately shows that it can be served by the alternative street lay out proposed. That is enough to qualify for the exemption.

- (b) Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. “Nearby” means uses within ¼ mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.**

### ***Staff Findings***

The applicant’s plans show pedestrian and bicycle circulation within the development via interconnected paths between the buildings and bicycle parking areas. The applicant notes that there is an existing worn path along the north property line, between the Oakleigh Lane roadway and the east property line, abutting the City parklands. The applicant proposes to keep this path open, but does not explicitly show any dedications to the public to enable continued access. The previous requirement for additional right-of-way dedication (13 feet wide and 24 feet long) will address this issue and satisfy the above criterion.

With regard to bicycles and pedestrians traveling westward on Oakleigh Lane toward transit services on River Road, referral comments from Public Works staff state that, for unimproved local streets in the River Road area (i.e., streets that lack sidewalks and have not been striped to identify dedicated travel lanes), the expectation is that pedestrians and bicyclists will share the paved surface with vehicles. Additionally, there is a tendency on dead end streets such as Oakleigh Lane, for motorists to travel at slower, more cautious speeds, because of the perceived narrowness of the street.

Public Works staff confirm that, until such time that property owners elect to improve Oakleigh Lane to full City standards (including sidewalks), the existing paved surface of Oakleigh Lane will continue to adequately provide for vehicle and pedestrian traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles. With regard to public comments received about vehicle parking occurring on the shoulders of the roadway, Public Works staff notes that, technically, such parking is not allowed. The street could be signed for no parking as part of improving the street, but not before, because the City does not maintain unimproved streets.

Public Works staff states that the existing paved surface provides safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles. As such, Public Works staff indicates that there is nothing to suggest that the impacts of the proposed development will result in unsafe conditions in Oakleigh Lane. Public Works staff confirms that it is appropriate to defer public improvements via an irrevocable petition.

Referral comments from Lane Transit District (LTD) staff also confirm that transit service is provided from River Road (i.e. *51 Santa Clara* and *52 Irving* routes), to the west. LTD staff states no objection to the proposed development.

### ***Opponent Arguments***

The Hearings Official views most of the arguments identified above in the findings for EC 9.8320(5)(a) to be equally directed at EC 9.8320(5)(b). Again, the strenuous assertion made by neighbors is that the increase in ADT will necessarily decrease the safety of pedestrians, children, and bicyclists traveling along Oakleigh Lane.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(5)(b) and adopts those findings by this reference.

The Hearings Official also concurs with the applicant's October 23, 2013 final argument that the queuing effect of having a single travel lane along Oakleigh Lane is likely to result in lower speeds and acceptably safe conditions for pedestrians. The applicant provided evidence in support of this position from the city's Arterial and Collector Street Plan. The neighbors submitted this very same information in Exhibit PT-1. The queuing effect is deemed effective for streets that have less than 750 ADT. Even with the added trips attributable to the co-housing proposal, the ADT for Oakleigh will be closer to 400 ADT at most. It is reasonable to expect that the queuing effect identified in the ACSP will work to calm speeds and provide reasonably safe passage pedestrians if the co-housing is approved. Once again, the Hearings Official has not been directed to evidence that shows that pedestrian safety will necessarily be decreased to unacceptable levels simply because 164 ADT are added to Oakleigh Lane.

As to Mr. Conte's assertion that the Staff's own findings concede that pedestrian and bicycle traffic will not be assured safe use of Oakleigh Lane, the Hearings Official disagrees. PT-4. The statement Mr. Conte alights on is a finding related to explaining the justification for the dedication required under EC 9.8320(5)(a). Staff's conclusions are properly understood to require the proposed PUD to dedicate sufficient right-of-way along the subject property's frontage to allow Oakleigh Lane to be brought up to the low volume residential street standard along that frontage. That is consistent with requiring the proposed PUD to meet current street design standards rather than allowing the development to access Oakleigh Lane in its current form. The Hearings Official agrees with the applicant's conclusion that there is no inconsistency in the Staff's findings.

- (c) The provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680 where applicable.**

### ***Staff Findings***

The proposed development does not meet any of the thresholds established in EC 9.8650 through 9.8680. The creation of 29 dwelling units is estimated to generate an additional 29 peak hour trips, which is well below the 100-trip threshold for requiring a Traffic Impact Analysis. Referral comments from Public Works staff indicate no concerns related to traffic

safety issues or poor service levels which will result from this development. Based on these findings, the above criterion does not apply.

### ***Opponent Arguments***

The neighbors strenuously argue that a TIA is needed because of the increase in ADT the proposed co-housing will produce. As noted above under the findings for EC 9.8320(5)(a), they argue that a 145% increase in the ADT should trigger a review, and that in any case the increase in traffic will bring safety risks that are unacceptable. Mr. Conte argues that in addition to the increase in ADT, an incredible increase of over 5,000 pass-by trips will be generated, and that should be sufficient reason to trigger a TIA. Mr. Conte also argues that the Staff's conclusion that there are no concerns with the safe operation of Oakleigh Lane has been rebutted by his analysis and cannot be viewed as sufficient substantial evidence of compliance. PT-4, PT.R-2.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(5)(c) and adopts those findings by this reference.

EC 9.8320(5)(c) invokes EC 9.8670 on the question of when a TIA may be required to support a PUD application. There are three primary circumstances in which a TIA may be required: 1) when the development will generate more than 100 peak hour vehicle trips, 2) when "the increased traffic resulting from the development will contribute to traffic problems in the area based on current accident rates, traffic volumes or speeds that warrant action, and 3) where approval of the development will result in level-of-service failures of the roadway system in the vicinity. If none of these conditions will result from approval of the PUD, then the code does not require a TIA and the City cannot force an applicant to provide one.

Although the Hearings Official understands the neighbors' concerns about increased numbers of vehicles using Oakleigh Lane, the strong assertion that an increase in ADT will result in traffic accidents or actual danger to pedestrians and bicyclists is not supported by evidence in the record. Assertion is not evidence, and neither is an explanation of inductive reasoning. Therefore, the Hearings Official cannot substitute the neighbors' very strongly held opinions that more cars will necessarily decrease traffic safety for actual evidence. Anecdotal instances of unsafe traffic conditions are also not enough to trigger a TIA.

Moreover, EC 9.8320(5)(c) and EC 9.8670 contemplate certain types of evidence concerning traffic conditions and makes implicit decisions about when mitigation measures might be needed. Those implicit assumptions are that under EC 9.8670(1), a proposal will not potentially create unsafe traffic conditions unless the development will increase peak vehicle trips by more than 100 trips. Under EC 9.8670(2), it is implied that a TIA and associated mitigation measures do not need to be considered unless there is evidence of "problems" caused by accident rates, traffic volumes or speeds. The third implied safety concern is that a TIA is needed if LOS is not sufficient in for the roads and intersections in the immediate vicinity.

This record contains uncontroverted evidence that the proposed development will come nowhere close to producing the 100 peak hour trips necessary to trigger a TIA. That standard does not discuss or contain a requirement to provide a TIA simply because ADT will rise by a certain percentage, or a certain number of pass-by trips will be generated. To interpret EC 9.8320(5)(c) and EC 9.8670(1) otherwise would be to add language and concepts to the provision that do not exist. That would violate ORS 174.010. The Hearings Official has not been directed to evidence in the record that shows accident rates for Oakleigh Lane or at the intersection with River Road are a problem. Nor have other documented “problems” with traffic volumes or speeds been submitted by any party. Contrary to Mr. Conte’s assertion, Staff’s position that there are no traffic safety concerns associated with the proposal or Oakleigh Lane is some evidence that a TIA under EC 9.8670(2) is not necessary. Public Works did a lengthy and thorough analysis of traffic conditions that is largely repeated in the Staff report. Neither Mr. Conte nor any other party submitted evidence to the contrary, and that is what is required in order for Staff or the Hearings Official to determine that EC 9.8670(2) might be implicated by this application. Finally, LOS at the intersection of Oakleigh Lane and River Road appears to be adequate and there is no evidence in the record showing that the proposal will reduce the LOS to an unacceptable or failing service level. Therefore, there is no evidentiary basis for requiring a TIA or assuming that the increase in ADT will necessarily lead to unsafe conditions along the lane.

**EC 9.8320(6): The PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response.**

### ***Staff Findings***

Regarding soil erosion and slope failure, the applicant’s geotechnical analysis confirms that the site is geologically stable and adequate for development. The analysis provides construction techniques consistent with industry standards, none of which indicate the existence of unsafe sub-surface conditions. Public Works staff confirms that the analysis indicates no soil conditions that would otherwise require extensive construction to mitigate any significant geological hazards or soil drainage issues. Due to the size of the development, an erosion prevention permit will be required prior to any ground-disturbing activities.

With regard to flood hazard, the subject property is within a special flood hazard area; as such, development of the subject property is subject to the special flood hazard area development standards at EC 9.6706 through EC 9.6709, which is addressed in greater detail at EC 9.8320(11) and is incorporated here by reference. The development itself will not result in unreasonable risk of flood, per the stormwater management evaluation at EC 9.8320(11)(j).

With respect to the provision of emergency vehicle response, the applicant states the proposed access on Oakleigh Lane and the hammerhead turnaround within the development site is sufficient for the proposed development. Referral comments from Public Works staff indicate

that this on-site turnaround must provide for emergency vehicle access by being within a temporary emergency access easement. The proposed turnaround area meets the dimension requirements for a hammerhead. Referral comments from the Fire Marshal state no concern with the turnaround. The permanent turnaround is anticipated at the end of Oakleigh Lane, when properties to the north further develop. As recommended previously at EC 9.8320(5)(a), the applicant is required to dedicate right-of-way for the portion of the future turnaround that would overlap the subject property. Based on these findings, the following condition of approval is necessary:

- Prior to final PUD approval, the applicant shall dedicate a temporary emergency vehicle access easement over the on-site hammerhead and the access drive from Oakleigh Lane, and show this easement on the final PUD plans.

Other public health concerns and necessary infrastructure improvements are otherwise addressed with respect to approval criteria at EC 9.8320(5)(b) and (11)(b). Given the available information, and based on the findings as set forth above, it is concluded that the proposed development will comply with this criterion.

### ***Opponent Arguments***

The neighbors raised concerns about stormwater quantity and quality both during the October 2, 2013 hearing and in written comments during the open record period. PT-15. While not expressly directed at compliance with EC 9.8320(6), some of the arguments could be construed to invoke that section. The primary concerns were that untreated stormwater might be discharged and that the quantity of stormwater likely to be generated could not be adequately managed on-site. Rick Rubin submitted information on precipitation and calculations on the size of a theoretical cistern that might be needed to accommodate that volume of water. PT-15.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(6) and adopts those findings by this reference.

The applicant submitted an October 15, 2013 letter from SSW Engineers which appears to be intended to respond to both public comment at the October 2, 2013 hearing, and Mr. Rubin's calculations. PT.R-6. Mr. Conte objects to this letter as new evidence. PT.R-1. The Hearings Officer finds that to the SSW Engineers letter appears to be calculated to respond to Mr. Rubin's October 9, 2013 letter and complies with the Hearings Official's open record schedule set at the October 2, 2013 hearing.

More importantly, the SSW Engineers letter does not add new information so much as explain the stormwater analysis that was already in the record on July 30, 2013, and which was attached to the letter. It does not appear that Mr. Rubin was aware of the prior stormwater

analysis in the record. There is no argument that the applicant's stormwater analysis is in error, or does not conform to the city's Stormwater Manual.

The applicant's stormwater analysis is substantial evidence showing that the anticipated amount of stormwater generated by the development can be adequately treated and discharged in compliance with EC 9.8320(6). Mr. Rubin's comments do not contradict or undermine the applicant's report sufficient to conclude that the applicant's information is unreliable. *Walmart Stores Inc. v. City of Bend*, 52 Or LUBA 261, 272 (2006).

**EC 9.8320(7): Adequate public facilities and services are available to the site, or if public services and facilities are not presently available, the applicant demonstrates that the services and facilities will be available prior to need. Demonstration of future availability requires evidence of at least one of the following:**

- (a) **Prior written commitment of public funds by the appropriate public agencies.**
- (b) **Prior acceptance by the appropriate public agency of a written commitment by the applicant or other party to provide private services and facilities.**
- (c) **A written commitment by the applicant or other party to provide for offsetting all added public costs or early commitment of public funds made necessary by development, submitted on a form acceptable to the city manager.**

Staff relied on the Public Works staff findings that adequate public utilities and services, including wastewater service, are presently available to the site as indicated on the applicant's plans. Further findings at EC 9.8320(11)(b) and (j), regarding public improvements and stormwater respectively, are incorporated herein by reference as further evidence that these services are available to or can be retained on-site. The provision of water and electric services and other utilities is subject to review by the Eugene Water and Electric Board (EWEB) or other utility providers. Referral comments from EWEB staff confirm that the water system needs to be upgraded within Oakleigh Lane and looped through the subject property for a connection with the system in McClure Lane. Approval conditions related to water service are included below, at EC 9.8320(11)(b). The applicant's written statement also confirms their commitment to provide funds necessary for development. The Hearings Official agrees with these findings and adopts them by this reference.

**EC 9.8320(8): Residents of the PUD will have sufficient usable recreation area and open space that is convenient and safely accessible.**

Staff concluded, and the Hearings Official agrees, that the applicant's site plan shows common open space provided at the center of the development that is convenient and safely accessible by all residents. Further, there is ample open space as part of the abutting City parkland, which abuts the east boundary of the subject property and includes regional bicycle facilities (i.e. the West Bank Bike Path). This criterion is met.

**EC 9.8320(9): Stormwater runoff from the PUD will not create significant negative impacts on natural drainage courses either on-site or downstream, including, but not limited to,**

**erosion, scouring, turbidity, or transport of sediment due to increased peak flows or velocity.**

### ***Staff Findings***

The site contours indicate that the subject property currently sheet drains to the east. The applicant proposes to maintain the existing drainage patterns by directing overflow from the proposed on-site stormwater management facilities toward the east property line, abutting the City parkland. The on-site stormwater management facilities consist of piped collection and conveyance systems that are interspersed with pollution-reduction facilities, which include filtration rain gardens abutting the dwellings and a vegetated swale in the common open space. The overflow to the parkland will be dispersed evenly toward the east property boundary with four outfalls that are designed to reduce flow volumes and velocities.

Referral comments from Public Works staff confirm that the overflow to the parkland is acceptable, provided the flow is not concentrated or otherwise cause damage to the City's property. The preliminary design information provided by SSW Engineers confirms that the development will meet this expectation, as well as the stormwater development standards at EC 9.6791 through EC 9.6797, which is addressed in detail at EC 9.8320(11)(j) and is incorporated here by reference.

Based on these findings, the development will comply with this criterion.

### ***Opponent Arguments***

As noted above, in the findings for EC 9.8320(6) the neighbors raised concerns about the quantity of stormwater and how it will be treated and discharged. Questions were raised about how the discharge onto the adjacent open space to the east would be modulated to mimic pre-development levels.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(9) and adopts those findings by this reference. The findings supporting EC 9.8320(6) are also incorporated here by this reference.

The application materials and Staff's findings explain that treated stormwater will be discharged onto the adjacent City open space to the east of the proposed PUD. The record shows that the city agreed to allow this discharge. There are no "natural drainage courses" in that area, and neither the record nor any evidence submitted by the neighbors indicates that erosion is anticipated to result from the discharge of treated stormwater.

**EC 9.8320(10): Lots proposed for development with one-family detached dwellings shall comply with EC 9.2790 Solar Lot Standards or as modified according to subsection (11) below.**

Staff found, and the Hearings Official agrees that this criterion does not apply because the development does not include one-family detached dwellings. Further, EC 9.2790 applies to the creation of lots in the R-1 zone, whereas the subject development is not creating any new lots. Nevertheless, the solar setback standards of EC 9.2795 apply to all structures on R-1 zoned lots, 4,000 square feet or greater, with a north-south dimension of at least 75 feet. The applicable solar setback standards are evaluated at EC 9.8320(11)(k).

**EC 9.8320(11): The PUD complies with all of the following:**

- (a) **EC 9.2000 through 9.3915 regarding lot dimensions and density requirements for the subject zone. Within the /WR Water Resources Conservation Overlay Zone or /WQ Water Quality Overlay Zone, no new lot may be created if more than 33% of the lot, as created, would be occupied by either:**
- 1. The combined area of the /WR conservation setback and any portion of the Goal 5 Water Resource Site that extends landward beyond the conservation setback; or**
  - 2. The /WQ Management Area.**

***Staff Findings***

The development is not creating residential lots; as such, EC 9.2760 Residential Zone Lot Standards do not apply. The subject property is not within a /WR or WQ area. With regard to density, based on the R-1 Low-Density Residential zoning and EC 9.2750 Residential Zone Development Standards, the subject property is permitted to have a maximum net density of 14 units per acre. EC 9.2751(1)(b) explains that net density is the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of residents in the development, such as common open space or recreational facilities. EC 9.2751(1)(c) states that, for calculating net density, the acreage of land considered part of the residential use shall exclude public and private streets and alleys, public parks, and other public facilities.

The subject property is 102,808 square feet (2.3 acres). The right-of-way dedications being required total 4,024 square feet:  $(22.5 \times 50) + (13 \times 199) + (13 \times 24)$ . Additionally, there is an existing public wastewater easement along the east property line that affects 3,230 square feet of the subject property (10 feet wide and 323 long). These areas  $(4,024 + 3,230)$  need to be subtracted from the gross density to establish the allowable density of 14 units per net acre  $(102,808 - 7,254)$ . With 95,554 square feet (2.19 acres) of net area, the allowable density is 30 units. The development includes 29 units (including the common house), which is within the allowed net density. The proposed 29 units on 2.19 net acres translate to a density of 13 units per acre.

EC 9.8310(4)(a) Tentative PUD General Application Requirements confirm that easements benefiting the residents of the PUD may be included in the residential density calculations. As such, the proposed driveway is not excluded from this calculation. It is further noted that the shared driveway is not a private street, which is typically necessary to provide frontage for the creation of lots; the development is not creating additional lots. The on-site turnaround is also

not a public facility in that it is not open to the general public (for those traveling on Oakleigh Lane), but only to provide emergency vehicle access to the development. Eugene Water and Electric Board (EWEB) staff has indicated that an off-site easement is needed to provide a looped water system prior to development of the subject property, but has not indicated that any easements are needed through the subject property.

Based on the above findings, the PUD complies with EC 9.8320(11).

### ***Opponent Arguments***

The neighbors make two fundamental arguments. First, that the common house contains four hotel type rooms and should be counted as four dwellings. PT-2. Second, that areas that will be encumbered by a utility easement must be removed from the calculation of net density. PT-1. The easements the neighbors say must be taken out of the calculations are:

- The 20 foot sanitary sewer easement on the east property line.
- The EWEB water line easement and an associated access road width.
- The fire and garbage turnaround.
- The right-of-way to be dedicated to the city along the north property line.
- Pending property line adjustment must be removed.
- The bike path right-of-way along the north property line.

Based on the exclusions asserted by the opponents, the proposed co-housing development is not entitled to 29 dwelling units.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(11)(a) and adopts those findings by this reference consistent with the findings set forth below.

EC 9.2751 sets forth the rules for calculating "net density." EC 9.2751(1)(b) explains what must be considered a "dwelling unit" for the purpose of those calculations:

For the purposes of this section "net density" is the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common space or recreation facilities.

The Hearings Official concurs with Staff's treatment of the common house as one dwelling unit. The common house appears to include kitchen facilities, bathroom and four rooms that can be utilized for guests. There is no indication in the record that the four rooms will be permanently occupied by residents or guests. The common house closely fits the definitions applicable to dwellings in EC 9.0500. The common house does not meet the definition of "hotel/motel" as

defined in EC 9.0500. The Hearings Official concludes that Staff's decision to count the common house as one dwelling is consistent with EC 9.2751.

EC 9.2751(1)(c) sets forth areas that must be excluded from the net density calculation. Those exclusions include, "public and private streets and alleys, public parks, and other public facilities." The neighbors assert that easements that might accommodate public facilities like water and sewer lines must be excluded. The applicant argues that easements are not the same as "public facilities" and are not required to be excluded.

The Hearings Official agrees with the applicant. EC 9.2751(1)(c)(1) uses the specific language "public facilities." The provision does not include the word "easements." If the provision was intended to exclude easements it would so state. Adding that concept to the provision would violate ORS 174.010. Public facilities are not defined in EC 9.0500. However, "public facility projects" are defined in the Metro Plan. Those definitions contemplate above ground physical structures such as water reservoirs, pump stations, and drainage or detention ponds. The Hearings Official has not been directed to information in the record that would necessitate removing the land area associated with easements where the infrastructure that utilizes the easement is below ground. Therefore, none of the easements identified by the opponents must be excluded from the net density calculation – including the sewer easement on the eastern boundary.

Similarly, the garbage and emergency turn around does not become a public facility simply because it might be used by public entities periodically. Those areas do not reasonably fall into the category of "public facilities."

As to the areas that the neighbors argue should be excluded due to pending property line adjustments, it appears that the area along the northern property line has already been excluded due to the required dedications. It is unclear whether the property line adjustment on the southeast corner was taken into account. However, even if that area is excluded (2706 square feet) with the addition back of the land Staff removed for the sewer line easement (3230 square feet) the proposed density of 29 units still meets the density restrictions for the low density residential zone.

**(b) EC 9.6500 through EC 9.6505 Public Improvement Standards.**

**EC 9.6500 Easements**

The Staff report found, and the Hearings Official agrees that this section authorizes the City to require dedication of easements for wastewater sewers and other public utilities and access under certain circumstances. This section also prohibits obstructions within public easements. The applicant's survey and engineering plans indicate that there are no existing or proposed easements, other than the 20-foot wide public sewer easement that overlaps the east boundary of the subject property and an underground 72-inch wastewater trunk line. The

applicant's plans show no encroachments within this public easement, other than the paths along the north and south property boundaries for bicycles and pedestrians.

Public Works staff notes that the applicant's title report identifies the following three easements, which are not shown on the tentative plans: (1) an easement recorded on August 6, 1947 at Book 353, Page 146 in favor of the United States for power lines and appurtenances; (2) an easement reserved in a deed recorded March 6, 1942 at Book 229, Page 60 from Nellie McClure, a single person, to H.H. Harris and Gladys M. Harris for a roadway; and (3) an easement recorded October 11, 1949 at Book 403, Page 285 in favor of the United States of America. The applicant's surveyor has confirmed that all these easements are shown on the survey map and do not impact the applicant's proposed development.

In regards to additional public easements, Public Works staff only identify the need for a temporary emergency vehicle access easement; see the prior findings and condition at EC 9.8320(5)(a), which are incorporated here by reference. Referral comments from the Eugene Water and Electric Board (EWEB) also indicate the potential need for additional easements, which will be more precisely determined when the service design is approved by EWEB; refer the findings and condition at EC 9.8320(11)(b) and the referenced water standards at EC 9.6505(1), which are incorporated by reference.

Based on the above findings, the proposed development will comply with EC 9.6500.

### **EC 9.6505 Improvements–Specifications**

This section requires all public improvements to be designed and constructed in accordance with adopted plans and policies, the procedures specified in EC Chapter 7, and standards and specifications adopted pursuant to EC Chapter 7. Additionally, all developments are required to be served by and implement infrastructure improvements including water, sewage, streets, street trees, street lights, sidewalks, access ways, and stormwater drainage.

#### **EC 9.6505(1) Water Supply**

Staff found, and the Hearings Official agrees, that water service for the proposed development must be provided in accordance with Eugene Water and Electric Board (EWEB) policies and procedures. Referral comments from EWEB staff are as follows:

The existing water infrastructure in Oakleigh Lane and McClure Lane is inadequate to serve any additional development or provide the necessary fire flows along Oakleigh Lane. Therefore, prior to any development of the site, significant upgrades of the water facilities in Oakleigh Lane and McClure Lane along with a loop connection between these streets through the project site will be required to serve the property. Easements will be required across private property to make the loop connection to McClure Lane to the south. The developer will need to fill out EWEB's standard design agreement prior to EWEB proceeding with design of the upgrades.

To ensure compliance with the water supply standards of EC 9.6505(1), the following conditions of approval are also necessary:

- Prior to final PUD approval, the applicant shall provide documentation from EWEB, confirming that water facilities are available for the proposed development.

As conditioned above, the PUD will comply with EC 9.6505(1).

### **EC 9.6505(2) Sewage**

Staff found, and the Hearings Official agrees that this standard requires all developments to be served by wastewater sewage systems of the City, in compliance with the provisions of EC Chapter 6. The applicant proposes to connect to the existing eight-inch public wastewater system within Oakleigh Lane, abutting the northwest property boundary. Public Works staff confirms that an eight-inch lateral was stubbed (under City Contract File No. 1992-0011) to the subject property from the manhole (structure number 49033) to the subject property. Public Works staff notes that there is a pending assessment for this wastewater infrastructure, which will become due at the time of development. Based on these findings, the applicant's proposed wastewater system conceptually complies with applicable sewage specifications, subject to a more detailed review during the subsequent site development and building permit processes.

### **EC 9.6505(3) Streets and Alleys and (4) Sidewalks**

#### ***Staff Findings***

EC 9.6505(3)(b) requires the developer to pave streets adjacent to the development site to the width specified in EC 9.6870 Street Width with provision for drainage and construction of curbs and gutters, sidewalks, street trees and street lights adjacent to the development site according to the Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways and Accessways and standards and specifications adopted pursuant to EC Chapter 7 and other adopted plans and policies.

Public Works staff confirms that Oakleigh Lane is not improved to City standards because it lacks curbs and gutters, storm drainage, sidewalks, and street trees. The street does have existing street lights and the 19-foot wide pavement width provides safe passage for two-way traffic. As such, Public Works staff indicates that it is appropriate to defer public improvements via an irrevocable petition, with the following condition of approval:

- The applicant shall submit an Irrevocable Petition for public improvements in Oakleigh Lane to include paving, curbs and gutters, storm drainage, sidewalks, and street trees.

Irrevocable petitions enable the City to initiate a local improvement process and obligate the property owners to pay their proportional share of the street construction costs in the future. The City could construct the street when the majority of benefitting property owners agrees to pay for the improvements. Based on the above findings and condition, the development will comply with the applicable street improvement standards.

### ***Opponent Arguments***

As discussed above, the neighbors raised numerous arguments related to the right-of-way requirements for Oakleigh Lane and asserted that the categories of “access lane” and “low volume residential street” constitute design standards that Oakleigh Lane must be brought up to in order to support the proposed PUD. It is unclear to the Hearings Official whether those arguments are also directed at compliance with EC 9.6505(3 & 4).

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff’s findings for EC 9.6505(3 & 4) and adopts those findings by this reference. The Hearings Official also incorporates the findings above for EC 9.8320(5) by this reference.

EC 9.6505(3) requires that any streets adjacent to the proposed development be paved by the developer consistent with applicable street width standards. The evidence discussed in the findings for EC 9.8320(5) demonstrates that the applicant will be able to accommodate the necessary right-of-way, street width, and sidewalks if necessary along the portion of Oakleigh Lane adjacent to the subject property.

### **EC 9.6505(5) Bicycle Paths and Accessways.**

Public right-of-way dedication is being required along the north property line, overlapping an existing worn path between the terminus of Oakleigh Lane and the easterly City parklands, to enable a future bicycle and pedestrian access way. Refer to the previous findings and condition at EC 9.8320(5), which are incorporated by reference.

### **(c) EC 9.6706 Development in Flood Plains through EC 9.6709 Special Flood Hazard Areas – Standards.**

### ***Staff Findings***

The subject property is within a Special Flood Hazard Area (SFHA), per the Federal Emergency Management Agency’s (FEMA) Flood Insurance Rate Map (FIRM) 41039C-1128-F, dated June 2, 1999. The applicant’s topographical survey prepared by Poage Engineering and Surveying, Inc. delineates the SFHA boundaries and notes that the Base Flood Elevation (BFE) is 401.2 feet.

Development is allowed to occur within the SFHA, subject to review and approval for compliance with applicable development standards during the building permit process. These standards generally require structures to be located at least one foot above the BFE, among other requirements. At the time of development, these standards may be addressed through several alternatives, including elevated building foundations or, typically, placing fill on the building site. Specific measures for compliance with SFHA standards will be subject to further City review and approval at the time of building permits.

Public Works staff does not concur with the applicant's floodplain delineation, but finds that it is relatively accurate. Buildings 1, 2, 4, the northernmost garage, the northernmost bike shed, and the bike barn are located entirely within the SFHA, whereas Buildings 3 and 7 are located partially within the SFHA. Staff notes that the highest BFE shall be used for the entire development site, unless each structure (including the bike barn) has a specific BFE determination that has been approved by City staff. To ensure compliance with the applicable SFHA standards, the following condition of approval is necessary:

- The final site plan shall delineate the Special Flood Hazard Area, identify Base Flood Elevation (for the entire site or for each building), and note that development of the site will be required to comply with the standards at EC 9.6707 through EC 9.6709.

As conditioned, the development will comply with the applicable SFHA standards.

### ***Opponent Arguments***

The neighbors raised concerns about the amount of fill that will need to be placed on the subject property – they estimate 2500 cubic yards. They argue that perhaps part of the eastern sewer easement will be at least partially covered with fill. They wonder if retaining walls will be necessary to bring the BFE up to required height. They also wonder who will be responsible for repairs to Oakleigh Lane if the dump trucks that will presumably be needed to haul that fill onto the site damage the road. PT-1.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.6706 and EC 9.6709 and adopts those findings by this reference.

While the neighbors' concerns are understandable, they do not raise issues that are relevant under EC 9.6706 and EC 9.6709. Those provisions are concerned with how the elevated areas and structures will be constructed. Fill in the SFHA is allowed subject to a development permit under EC 9.6707. The same is true of structures in the SFHA under EC 9.6709. There is no evidence in the record which demonstrates those standards cannot be met.

**(d) EC 9.6710 Geological and Geotechnical Analysis.**

Staff found, and the Hearings Official agrees that the geotechnical analyses requirements beginning at EC 9.6710 apply because the proposed development is a PUD that has slopes in excess of five percent. The applicant submitted a geotechnical analysis prepared by Foundation Engineering, Inc. Public Works staff confirms that the applicant's analysis meets the Level Three Analysis requirements of EC 9.6710(4)(c) and Administrative Order AO-58-02-25-F. The analysis includes the results of sub-surface investigation and testing, to establish soil types and distribution, and the characteristics of the site and soils, in relation to the proposed development. The analysis includes design recommendations for construction and inspection.

Public Works staff confirms that the analysis confirms the suitability of the site for the proposed development and notes that the geotechnical recommendations are industry standards. Nevertheless, to ensure compliance as proposed, the following condition of approval is necessary:

- The final PUD site plans shall note that construction permits shall conform to the applicant's geotechnical analysis.

Based on the above findings and condition, the geotechnical standards at EC 9.6710 will be met.

**(e) EC 9.6730 Pedestrian Circulation On-Site.**

Staff found and the Hearings Official agrees, that the development meets these standards by providing pedestrian connections between the dwelling units and common facilities. The findings for EC 9.8320(5)(b) are also incorporated here by this reference.

**(f) EC 9.6735 Public Access Required.**

Staff found, and the Hearings Official agrees, that the development will have access onto a public street, Oakleigh Lane, consistent with this standard. Referral comments from Public Works staff confirm that the other requirements of this standard are also met.

**(g) EC 9.6750 Special Setback Standards.**

Staff found, and the Hearings Official agrees, that the applicant's plans show a 20-foot special setback from the north property line for future right-of-way for Oakleigh Lane. Public Works staff confirms that a special setback is not needed, based on the right-of-way needs being exacted as a condition of development. The required dedication to provide needed right of way obviates the need for a special setback along the northern property line. The findings and conditions at EC 9.8320(5)(a) are incorporated here by this reference.

**(h) EC 9.6775 Underground Utilities.**

To ensure compliance with this standard, the following condition of approval is necessary:

- The final PUD plans shall note that all on-site utilities will be placed underground consistent with EC 9.6775.

As conditioned, the development will comply with this standard.

**(i) EC 9.6780 Vision Clearance Area.**

This standard does not apply because the subject property is not located at a street intersection.

**(j) EC 9.6791 through 9.6797 regarding stormwater destination, pollution reduction, flow control for headwaters area, oil control, source control, easements, and operation and maintenance.**

***Staff Findings***

In regards to EC 9.6791 Stormwater Destination, Public Works staff confirms that on-site management of stormwater runoff from the development is required because there is no public stormwater system available to serve the property. At the same time, the applicant's geotechnical analysis concludes that the site is not suitable for infiltration. Therefore, the applicant proposes to direct stormwater runoff from the proposed development to the abutting City parkland to the east. The site topography indicates that this is the natural drainage pattern. The applicant's on-site stormwater management system will include treatment facilities that also provide for some detention. The overflow toward the east property line will be released at pre-development levels, with rip-rap pads to disperse the flows at the discharge points. The applicant also indicates that level spreaders, consistent with the requirements of the City's Stormwater Management Manual, could be utilized, if required.

Public Works staff notes that many of the proposed rip-rap outfalls are located within the public wastewater easement along the east property line. As conditioned previously at EC 9.8320(11)(b), regarding prohibited uses in public easements, the stormwater infrastructure needs to be located outside the public easement. With regard to the acceptability of overflow onto City parklands, Neil Bjorklund, City of Eugene Parks and Open Space Planning Manager, confirms that this would be acceptable, provided the runoff is discharged evenly and not concentrated at one or more points along the shared property line. To meet this requirement, the following condition of approval is necessary:

- The final PUD plans shall note the requirement that, at the time of development, all stormwater discharge points directed toward the City's property shall be designed as level spreaders, consistent with the City's 2008 Stormwater Management Manual. All stormwater facilities shall be located outside the public wastewater easement along the east property line.

In regards to EC 9.6792 Stormwater Pollution Reduction, runoff from the proposed impervious surface areas will primarily be treated in planters (about 15 scattered throughout the development site). To ensure that the treated runoff will be discharged at pre-development levels, the rain gardens (planters) were sized using the City's Stormwater Surface Filtration/Infiltration Facility Sizing Spreadsheet. Runoff from the garage, driveway, and common house will be treated in a vegetated swale (approximately 10 feet wide and 58 feet long) located east of the common house. A proposed berm at the end of the swale will act as a weir to reduce flows to pre-development levels. As noted in the applicant's written statement, the swale was sized using the City's presumptive method.

Public Works staff confirms that the proposed facilities are adequately sized to provide both pollution reduction and destination from the development site. The actual facility sizes and design will be more precisely determined during the building permit process and may be smaller or larger, based on actual impervious surface area and any impervious surface reduction techniques or in-kind facilities that may be provided at the time of development, provided they are consistent with the City's 2008 Stormwater Management Manual, and are not materially inconsistent with the approved final site plan.

EC 9.6793 Stormwater Flow Control is not applicable because the subject property is below 500 feet in elevation and does not discharge to a headwaters stream. However, as discussed above, post-development flows will be limited to pre-development levels, in order to mimic existing drainage conditions. EC 9.6794 Stormwater Oil Control is not applicable because the proposed development will not generate high concentrations of oil and grease. EC 9.6796 Dedication of Stormwater Easements does not apply because the proposed stormwater facilities are to be privately operated and maintained.

EC 9.6797 Stormwater Operation and Maintenance applies to all facilities designed and constructed in accordance with the stormwater development standards. This section also specifies when, and under what conditions, the public will accept function maintenance. Consistent with these standards, the applicant proposes private operation and maintenance of the on-site stormwater management facilities. To ensure compliance with EC 9.6797(3)(c), as proposed, the following condition of approval is necessary:

- The final site plan shall note: "On-site stormwater management facilities will be privately owned and operated. An operation and maintenance plan will be developed consistent with the City's Stormwater Management Manual, and notice of this plan will be recorded, during the building permit process."

With the findings, conditions, and future permit requirements noted above, staff finds that this criterion will be met.

Based on these findings, the development will comply with this criterion.

### ***Opponent Arguments***

As noted in the findings for EC 9.8320(6 & 9) the neighbors raised concerns about discharging the treated stormwater on to the adjacent city open space.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(11)(j) and EC 9.6791-9.6797 and adopts those findings by this reference.

The opponents do not provide any persuasive evidence that the proposed stormwater treatment and discharge methods will be inadequate to properly manage the stormwater anticipated to be generated by the proposed PUD. There is no evidence that the proposed rain gardens, vegetated swales and permeable pavement to be used in the parking area will not work sufficient to comply with the standards discussed above. Again, the neighbors raise questions and made assertions about stormwater but those assertions or arguments of disbelief, particularly with regard to the permeable parking area do not constitute evidence upon which the Hearings Officer can rely.

**(k) All other applicable development standards for features explicitly included in the application except where the applicant has shown that a proposed noncompliance is consistent with the purposes set out in EC 9.8300 Purpose of Planned Unit Development.**

Staff took the following approach to reviewing the applicant's various "proposed non-compliance" with certain development standards. The applicable development standards for features explicitly included in the application, which have not already been addressed by other PUD approval criteria and related standards, are as follows: EC 9.2750 Residential Zone Development Standards; EC 9.2795 Solar Setback Standards; EC 9.5500 Multiple-Family Standards; EC 9.6105 Bicycle Parking Space Standards; and EC 9.6410 Motor Vehicle Parking Standards. Staff notes that EC 9.6205 Landscape Standards, EC 9.6730 On-site Pedestrian Circulation, and EC 9.6740 Recycling and Garbage Screening standards are referenced within the multiple-family development standards at EC 9.5500. The development complies with many of these standards, as noted below. Where the development does not comply with these standards, as described in greater detail below, the applicant requests a modification ("proposed non-compliance"), which is allowed through the PUD process, if the following PUD purpose statements are met.

**EC 9.8300 Purpose of Planned Unit Development. The planned unit development (PUD) provisions are designed to provide a high degree of flexibility in the design of the site and the mix of land uses, potential environmental impacts, and are intended to:**

- (1) Create a sustainable environment that includes:**
  - (a) Shared use of services and facilities.**
  - (b) A compatible mix of land uses that encourage alternatives to the use**

- of the automobile.
- (c) **A variety of dwelling types that help meet the needs of all income groups in the community.**
- (d) **Preservation of existing natural resources and the opportunity to enhance habitat areas.**
- (e) **Clustering of residential dwellings to achieve energy and resource conservation while also achieving the planned density for the site.**
- (2) **Create comprehensive site plans for geographic areas of sufficient size to provide developments at least equal in quality to those that are achieved through the traditional lot by lot development and that are reasonably compatible with the surrounding area.**

### ***Staff Findings***

With regard to EC Table 9.2750 Residential Zone Development Standards, the development complies with the following: density (below 14 units per net acre); building height (below 30 feet); interior yard setback (from the east property line only); and the maximum 50 percent lot coverage. The development does not comply with the front yard setback or the interior yard setback (along the south and west property lines).

The substandard front yard setbacks are due to the right-of-way dedications being required; refer to the findings and conditions at EC 9.8320(5), which are incorporated by reference. Following right-of-way dedication, Buildings 1 and 2 will be below the minimum 10-foot front yard setback requirement, being about a half of a foot and eight feet away, respectively. The applicant requests a modification to this setback, stating that "...the dwellings abutting Oakleigh Lane do not exceed massing widths or heights inconsistent with the neighborhood single-family proportions. Along Oakleigh Lane, at the southern side of the street, townhouses address the residential street with covered porches as found in this and other neighborhoods of the River Road area. Internally, the site plan is pedestrian oriented with many places for children to play and residents to sit outside. By clustering the units keeping all the parking to one side of the site, more usable open space, free from vehicle traffic, was able to be conserved with open views to the river and bike path." (See page 26 of the applicant's June 14, 2013 written statement.)

The substandard interior yard setbacks are as follows: the concrete wall, garages and carports abutting the west property line and Tax Lots 10100 and 5700, respectively to the northwest and southwest; the concrete wall at the southwest property corner, abutting Tax Lot 5600; and Building 6, abutting Tax Lot 500. There is no explanation in the applicant's materials for the substandard building setback along the south property line; however, staff notes that the affected property owners (Mr. Adee of Tax Lot 500 and Mr. Campbell of Tax Lot 5600) submitted letters in support of the proposed development.

With regard to the west property line, the applicant explains that the garages and carports are located near the property line because it makes for a better site layout. The applicant claims

that, if there were a setback, it would collect weeds and trash because it would be an unused portion of the site that serves no one. Staff understands that the design attempts to load most of the development on the western portion of the site because the eastern portion is in the floodplain and abuts a natural resource area. Staff's main concern is the potential impacts on the adjacent lands to the west.

In addition to aesthetics (i.e. screening and softening of the bulk and scale of the development along the property boundaries), the setback is intended to provide adequate separation between structures to meet fire code regulations. The setback regulation is five feet from property lines and ten feet between structures, which means that the abutting property would need to setback future structures ten feet from the common property line. The applicant proposes an eight-foot tall concrete wall along the west property line, not only to fulfill the screening function of the setback, but to fire-rate the wall as well, to meet fire code requirements. Staff notes that the appropriate fire rating cannot be determined at this time because the abutting property owners are not proposing to build abutting structures; rating depends on materials and the regulations change over time. Because the wall exceeds six feet, it too is considered a structure subject to setback requirements.

Staff believes the final determination as to acceptability of the concrete wall must include the participation of the affected property owners (Tax Lots 5700, 10100, and 5600). Even if the setback modification is granted, EC 9.2751(7) requires the developer to obtain an easement from the abutting property owners. Staff recommends the easement as a condition of PUD approval, which will ultimately determine whether the wall is acceptable to the abutting property owners. If the applicant is unable to obtain the off-site easements, then staff recommends an alternative condition that the final PUD plans show the structures setback five feet from the west property line. These conditions also apply to Building 6 and Tax Lot 500. The recommended condition of approval is as follows:

- Prior to final PUD approval, the applicant shall obtain from the property owners of Tax Lots 500, 5600, 5700, and 10100, an easement abutting the proposed structures on the subject property that are located less than five feet from the interior property lines (i.e. the garages, carports, and wall along the west property line, and the portion of the wall and Building 6 abutting the south property line). The easement shall establish a 10-foot no-build zone, for fire code purposes, and, for at least the first five feet abutting the common property line, rights for the development to access and maintain the backside of their buildings. Alternatively, if the applicant is unable to obtain these off-site private easements from the adjacent property owners, then the final PUD plans shall show all structures setback at least five feet from the property lines.

Staff notes that a five-foot shift of the development plans to the east should not significantly affect other site features, as there is sufficient area within the common areas and along the east property line to accommodate the adjustment. With regard to the PUD purpose statements, the overall development achieves those; in regards to these specific setback issues, the PUD purpose statements are met, to the degree the proposed design is critical to the

overall success of the development. Here, staff believes that the alternative of requiring compliance with the setback standards is both feasible and would not jeopardize compliance with any other approval criteria or applicable standards.

### ***Opponent Arguments***

As described in prior findings, the neighbors object to the proposed wall on the western boundary for many reasons. Also, the adjacent property owners have submitted statements indicating they will not grant an easement to allow the applicant to avoid the required five foot setback. The neighbors also state that the reduced setback on the south boundary line cannot be justified merely because the adjacent property owner does not oppose the development. The Hearings Official also assumes that opponents' argument relating to proper screening are also pertinent with respect to the applicant's requests to reduce various applicable setbacks.

### ***Hearings Officer Conclusions***

The applicant's final comment addresses the opponents' setback arguments in two ways. First, the applicant notes that the reason that setbacks are proposed to be reduced in several locations is to accommodate clustering of the buildings. Second, the applicant provided an example site plan that shows that the five foot required setback along the western boundary is not needed by shifting the buildings slightly to the east.

As to the proposed wall, the Hearings Officer agrees that the example site plan is sufficient evidence to show that "non-compliance" with the five foot setback will not be necessary. The Hearings Officer incorporates the findings for EC 9.8320(3) for a full discussion of the wall along the western property line.

As to the other reduced setbacks, the primary purpose of the PUD provisions generally is to "provide a high degree of flexibility in the design of the site." Clustering of residential dwellings is anticipated and encouraged under EC 9.8300(1)(e). The applicant testified both orally and in writing that the site design was specifically intended to cluster the residential building to achieve this goal. As to the setback reductions requested for the south and east boundaries, the Hearings Official finds that the proposed non-compliance facilitates clustering of the residential buildings. It is also relevant that the Hearings Official previously found that the applicant needs to provide sufficient screening along those boundaries under EC 9.8320(3). The site plan shows sufficient space to accommodate that screening. In part for those reasons, the Hearings Official concludes that the reduced setbacks do meet the purposes of EC 9.8300.

### ***Staff Findings***

With regard to 9.2795 Solar Setback Standards, EC 9.2795(3) grants an exception to these standards because the buildings abutting the north property line (Buildings 1 and 2) would shade a non-developable area, namely right-of-way for Oakleigh Lane and the bicycle/pedestrian access way required along the north property line. For comparative

purposes, absent the right-of-way, the required solar setback would be 20 feet from the north property line. Both buildings are setback at least 20 feet from the north property line. As such, it does not appear that a formal modification through the PUD process is required; however, one could be supported for the same reasons a modified front line setback, as discussed previously, would be granted.

### ***Opponent Arguments***

The neighbors dispute the applicant's setback calculation submitted on September 17, 2013 and provide alternative calculations attempting to show that the setback for buildings 1 and 2 cannot be met. PT-1.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.2795 and adopts those findings by this reference.

It does not appear that the neighbors were aware of the exemption identified by Staff. The Hearings Officer is not directed to any evidence that indicates the exemption at EC 9.2795(3)(c)(1) does not apply in this instance. A large portion of the northern property line will subject to dedication for widening of the right-of-way and Oakleigh Lane and will not be developable with structures. In addition, the applicant provided testimony at the October 2, 2013 hearing and presents a schematic showing how the shade point from the relevant buildings would avoid casting shade on each other or adjacent areas. The Hearings Official finds this evidence sufficient to demonstrate compliance with the city's solar setback standards.

### ***Staff Findings***

With regard to EC 9.5500 Multiple-Family Standards, the development complies with all of the applicable standards, as follows:

- Street Frontage: 60 percent of the street frontage, which is 82 linear feet, is occupied by a building;
- Building Orientation and Entrance: only applies to Building 1, abutting the street, which has primary entrances facing the street;
- Building Mass and Façade: only applies to Building 1, abutting the street, which is less than 100 feet in length
- Articulation: the buildings have porches, windows, and offsets;
- Landscaping: the development exceeds the minimum requirement of 4,007 square feet;
- Open Space: the development has more than double the required open space, with 54,727 square feet instead of 20,037 square feet;
- Site Access and Internal Circulation: the proposed driveway is 22 feet wide, which is within the 20-foot minimum and 28-foot maximum;
- Vehicle Parking: is not abutting street frontage;

- On-site Pedestrian Circulation: provided between buildings and shared facilities, consistent with EC 9.6730;
- Recycling and Garbage Areas: not located in the front yard setback and has perimeter screening, consistent with EC 9.6740.

Based on the above findings, the development complies with the applicable multiple-family development standards at EC 9.5500. With regard to EC 9.6105 Bicycle Parking Space Standards, the development appears to exceed these requirements, subject to stall dimensions and security details being determined during the building permit process. EC 9.6105 requires one long-term bicycle parking space per dwelling unit. With 28 units plus the common house, 29 long-term bicycle parking spaces are required. Short-term bicycle parking is not required of residential development.

The applicant indicates that 52 spaces are proposed; the plans show four sheds scattered across the site and a “bike barn” near the southeast property corner. The plans do not provide enough specificity to determine whether the long-term space security requirements are met, but those can be addressed in greater detail during the building permit process. The PUD plans show ample room on the development site to accommodate the required bicycle parking. Additional bicycle parking (more than the 29 long-term spaces required) does not have to meet code standards, with regard to dimensions and security specifications. Based on these findings, the bicycle parking space standards of EC 9.6105 will be met.

### ***Hearing Official Conclusions***

The Hearings Official is not aware of opposition arguments directed at this criterion. The neighbors did testify generally that the size, height and number of buildings was simply too large for the neighborhood. Those concerns are discussed in the findings for EC 9.8320(12) and 13).

### ***Staff Findings***

With regard to EC 9.6410 Motor Vehicle Parking Standards, the applicant’s plans show 16 covered spaces, as garages and carports along the west property line. The applicant’s plans note that there are 31 additional open/surface parking spaces. The plans show approximately 29 gravel parking spaces abutting the paved driveway. The minimum number of vehicle parking spaces required is one per dwelling unit (or 29 in this case). It appears that the minimum requirement is met; there is no limitation on the maximum number of vehicle parking spaces for residential development. The actual number of spaces is difficult to determine because the applicant does not propose to stripe the spaces in accordance with the stall dimension standards of EC 9.6410; however, the scaled plans show sufficient areas to accommodate the required parking. Public Works staff notes that, due to the 22-foot wide drive aisle, all of the parking spaces are considered compact.

The applicant seeks a modification to the striping, surfacing, and landscaping requirements for the vehicle parking spaces. EC 9.6410 requires a durable a dust-free surface, whereas the applicant proposes gravel parking spaces. The applicant proposes filter fabric below the gravel surface to meet the durable and dust-free standard. The applicant also explains that the driveway will be paved, where durability and dust would be of greater concern associated with vehicle movements. To keep gravel in the parking stalls and off the driveway, the applicant states that the planned community can maintain this area and suggests keeping a broom nearby. The abutting concrete wall proposed along the west property line serves as mitigation to additional noise and dust associated with gravel.

The concrete wall is also proposed in lieu of a seven-foot wide landscape bed between the parking stalls and the west property line, which would be required by EC 9.6410, unless modified through the PUD process. The concrete wall appears to meet the intent and function of the high-screen landscaping requirement, as it is eight feet tall with living plant material (espaliered trees). As such, staff recommends approval of the landscape modification. This design also meets the PUD purpose statements, with regard to clustering the development away from the easterly portion of the site.

As discussed previously, the wall is considered a structure subject to setback requirements. As conditioned previously, if the applicant is unable to obtain easements from the abutting property owners, the structures (wall included) will need to be moved five feet from the property line. Either with or without the five-foot setback, the wall meets the intent of the landscaping requirement for vehicle use areas adjacent to interior property lines.

Based on the available information and the findings and condition recommended above, staff believes the requested modifications could be approved as being consistent with the PUD purpose statements. Otherwise, the applicable development standards appear to be met. No signs or exterior lighting is shown on the plans, but staff notes that those features would be subject to the development standards at EC 9.6650 and EC 9.6725 at the time of development. Land Use Management staff recommends the following condition of approval:

- The final site plans shall note that compliance with the following development standards will be determined more precisely at the time of building permit review:
  - Landscape Standards beginning in EC 9.6200
  - Garbage Screening contained in EC 9.6740
  - Bicycle Parking Standards contained in EC 9.6105
  - Outdoor Lighting Standards contained in EC 9.6725

Based on the above findings, approval of the requested modifications and the condition for a more detailed review for compliance at the time of building permit, the PUD will comply with the above approval criterion at EC 9.8320(11)(k).

### ***Hearing Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.6410 and adopts those findings by this reference – consistent with the findings set forth below.

Although the neighbors raised concerns with dust generated from the gravel parking area, there was no evidence submitted that the proposed gravel with filter fabric approach proposed by the applicant would result in obnoxious levels of dust. The Hearings Official cannot locate the requirement in EC 9.6410 identified by Staff that parking surfaces be “dust free.” The applicant's approach appears to be calculated to minimize dust impacts. The gravel over fabric filter is more than just dumping gravel over bare ground, and it is reasonable to conclude that it will both filter water through the gravel and keep the underlying dirt from rising up through the fabric to create unacceptable levels of dust.

**EC 9.8320(12): The proposed development shall have minimal off-site impacts, including impacts such as traffic, noise, stormwater runoff and environmental quality.**

### ***Staff Findings***

Traffic – Public Works staff confirm that the development will have minimal off-site traffic impacts, as only 29 additional peak hour trips will be generated by the development. Public Works staff state that Oakleigh Lane currently provides for safe passage of two-way and emergency vehicles. No street improvements are required of the development, although right-of-way dedication and an Irrevocable Petition are being required to enable future public improvements. Pedestrian safety is further addressed at EC 9.8320(5)(b); those findings are incorporated by reference. With regard to public comments about the accident at the intersection of Oakleigh Lane and River Road, this intersection is not on the City's inventory of intersections with high crash ratings that would otherwise warrant analysis to determine patterns that could be mitigated by infrastructure improvements. As such, nothing further is required of the development.

Noise – It is not expected the development would generate noise other than from a typical residential area. The common open space is located at the center of the development. An eight-foot tall concrete wall is proposed along the west property boundary. The design of this development should have minimal off-site impacts in regards to noise.

Stormwater – Off-site impacts of stormwater runoff is addressed as part of the applicant's proposed stormwater collection, conveyance, and treatment system, as discussed previously at criterion (11)(j) and incorporated herein by reference.

Environmental Quality – The subject property is not on any acknowledged Goal 5 natural resource inventory, but it is within the Willamette Greenway boundary. The applicant has submitted a concurrent Willamette Greenway permit application, which is evaluated later in this report; based on those findings, the proposed development is compatible with the

Willamette River, which is located more than 200 feet east of the subject property. As discussed at EC 9.8320(4), the PUD is designed and sited to minimize impacts to the natural environment and includes tree preservation and additional tree planting; those findings are incorporated by reference.

Based on these findings, the proposed PUD will comply with the applicable criterion.

### ***Opponent Arguments***

The neighbors mostly blended arguments under this criterion with compatibility arguments under EC 9.8320(13). However, the following arguments seem to be directed at EC 9.8320(12):

- The proposed PUD more than doubles the amount of traffic on Oakleigh Lane. PT-1, PT-2 and PT-4.
- Up to 47 cars will be leaving the PUD every morning making noise and shining headlights into neighboring homes. PT-2
- Visitors coming to the PUD will bring traffic impacts.
- More than 100 new residents will be living in the PUD. PT-2.
- At the October 2, 2013 hearing some neighbors stated that building the development would reduce wildlife habitat.

In addition, Mr. Conte argues that the word “minimal” is nearly meaningless as a standard and urges the term “insignificant” be used as the standard instead. PT-32.

### ***Hearing Official Conclusions***

The Hearings Official generally concurs with Staff’s findings for EC 9.8320(12) and adopts those findings by this reference – consistent with the findings set forth below.

As an initial matter, the Hearings Official rejects Mr. Conte’s invitation to substitute the term “insignificant” for the term “minimal” in EC 9.8320(12). I agree with the applicant, that if the City Council had intended to impose a different standard it could have done so. ORS 174.010. The Hearings Official agrees that requiring a PUD to have minimal impacts is a very subjective standard that is difficult to implement, but EC 9.8320(12) says what it says.

As to stormwater impacts, the application has already been found to comply with EC 9.8320(6 & 9) which regulate the treatment and discharge of stormwater from the subject property. The findings for those sections is adopted here by this reference. The record shows that the infiltration and treatment of stormwater will allow the applicant to mimic pre-development levels after the PUD is built, which means no net increase in stormwater impacts should be reasonably anticipated for the City open space to the east. That constitutes a minimal impact.

As to noise, although fears were voiced about noise coming from the PUD residents and their cars, no real evidence was submitted that these impacts will be of such volume as to be

significantly different from the same activities occurring in the existing neighborhood. Without some evidence that the residents of the PUD will be violating some noise standard, it is not reasonable to assume they will bring any new, or louder noise impacts than the present residents of the neighborhood already experience.

At to environmental impacts, the PUD contains abundant open space with gardens and water available to urban wildlife. As noted by the applicant, there are no identified rare or threatened species present. The neighbors concerns about loss of habitat do not match the evidence in the record which indicates the off-site impacts on the environment will be minimal.

Traffic is a tougher issue to measure. On the one hand, the record shows that both peak hour vehicle trips and ADT will increase, and even the applicant does not dispute that the increase appears to double ADT over current levels. On the other hand, the applicant argues that the proposal does not seek the highest density possible, and that the low density residential zone anticipates 14 units per acre with the associated traffic impacts.

In attempting to understand what “minimal off-site impacts” means, the Hearings Official is required to seek out the intent of the City Council in adopting those terms. *PGE v. BOLI*, 317 Or 606, 610-612 (1993). I find that the concept of minimal impacts is inherently ambiguous. It is clear that the City Council could have set a higher standard of “no off-site impacts” but chose not to do so. However, the term minimal could be argued to mean that only the minimum density could be sought in the applicable zone through a proposed PUD. That conflicts with the purposes of the residential zones as set forth in both the Metro Plan and the EC, both of which seek to increase residential density in residential areas within the urban area.

The Hearings Official concludes that it is appropriate to look to the context of EC 9.8320(12) to help understand its intent as to traffic. The context for EC 9.8320(12) are the provisions in EC 9.8320(5) and the related standards in EC 9.8650 – 9.8680 which state when a TIA is required. Those standards are discussed above and the findings are incorporated here by reference. As discussed above, EC 9.8670 sets forth three relevant circumstances in which a TIA is needed: 1) the traffic anticipated from the proposed PUD exceeds 100 peak hour trips, 2) accident rates or other “problems” warrant a study, and 3) LOS on the servicing road or nearby intersections is below standard. The City Council appears to have decided that any one of these conditions presents potential traffic system impacts that could warrant mitigation.

In interpreting related statutes or local code provisions, an interpretation must be sought that harmonizes those provisions and does not leave one provision as redundant or meaningless. Reading EC 9.8320(12), as the neighbors do, to impose a different standard for traffic impacts than EC 9.8320(5) and reading the term “minimal” to mean almost no impacts at all, would render EC 9.8320(5) and EC 9.8670 redundant if not completely meaningless. In other words, it makes no sense that the City Council would ask an applicant to go through the analysis in EC 9.8320(5) and potentially complete a TIA if the proposed PUD could be denied for having “some” impacts on the transportation system.

Instead, harmonizing EC 9.8320(12) with EC 9.8320(6) is helpful in understanding when a project might have more than “minimal off-site impacts.” While it is not prudent to theorize too much about whether a project that requires a TIA necessarily has more than minimal off-site impacts, it is certainly reasonable to assume that if any of the three conditions identified in EC 9.8670 are evident in the record, EC 9.8320(12) might be implicated. However, when none of the conditions exist that would trigger a TIA under EC 9.8670, it is reasonable to question whether EC 9.8320(12) is implicated as to traffic.

That is the case for this application and this record. There are no conditions identified in the record which come anywhere close to triggering a TIA. The peak vehicle trip estimates are less than a third of that required to trigger a TIA, and no “problems” or LOS deficiencies are identified. The neighbors’ fear that there will be more cars on Oakleigh Lane than before is not enough to view those new cars as more than a minimal impact, let alone a negative off-site impact. As such, the Hearings Official concludes that the increase in peak vehicle trips from the proposed PUD will result in minimal off-site impacts.

**EC 9.8320(13): The proposed development shall be reasonably compatible and harmonious with adjacent and nearby land uses.**

### ***Staff Findings***

The proposed development is a low-density residential land use, within a low-density residential area. Given the similar residential uses, there do not appear to be any inherent conflicts that would keep the developments from being at least reasonably compatible and harmonious. The development complies with the low-density (R-1) residential development standards, with regard to density and building height. Although the development proposes attached single-family dwellings, rather than the detached nature of the surrounding neighborhood, the density is dispersed across the development site, with groupings of three to four dwelling units per building.

Further the east boundary of the development site abuts a swath of undeveloped City parkland, which contains Goal 5 riparian area associated with the Willamette River. The applicant’s plans show the development clustered away from the resource area with open space adjacent to the east property line. As such, the development is reasonably compatible and harmonious with the adjacent parkland and nearby Willamette River.

The compatibility and harmony of the development is challenged most along the west property line, where the applicant proposes vehicle use areas and garages. The applicant proposes a concrete wall along the west property line to mitigate these impacts and to provide screening to adjacent lands. As discussed previously, staff recommends the applicant obtain an easement from the affected property owners, which will ultimately test whether the wall is acceptable mitigation. If the applicant is unable to obtain the easements, staff recommends the final PUD plans show the wall setback five feet from the property line. The applicant’s plans show the wall with espaliered vegetation. These findings and conditions are detailed at EC 9.8320(11)(k),

which are incorporated here by reference.

Staff notes that the northwest corner of the development site is the gateway to the neighborhood. The wall proposed along the west property line stops short of the north property line, to enable a landscaped bed with a tree and shrubs, which will help soften the entrance to the development. As noted at EC 9.8320(5)(c) in regards to traffic, EC 9.8320(9) in regards to stormwater runoff, and EC 9.8320(4) in regards to protection of natural features, which are also incorporated here by reference, the proposed development will have minimal off-site impacts related to traffic, noise, stormwater runoff and natural resources. Based on the above findings, the development is reasonably compatible with the nearby land uses.

### ***Opponents Arguments***

The neighbors argue strenuously that the proposed PUD is not compatible or harmonious with the existing neighborhood. In addition to the reasons discussed above in EC 9.8320(12), the neighbors argue that the proposed PUD is simply too big, and that fewer buildings of a more demure size would be more harmonious with the existing neighborhood. PT-1 and PT-2.

### ***Hearing Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8320(13) and adopts those findings by this reference – consistent with the findings set forth below.

In the *Northgreen Property LLC. V. City of Eugene* discussed above, LUBA also affirmed the prior Hearings Official's approach to EC 9.8320(13).

Although the findings quoted above could be clearer, we understand the hearings officer to have concluded that the proposed tower is reasonably compatible and harmonious with the neighborhood where it meets the objective standards set out in the EC for telecommunications towers, and where the tower will be screened from view while still allowing the tower to function as intended. We cannot say that those findings are inadequate or represent an erroneous interpretation and application of EC 9.8320(13). We also do not think that the evidence cited by petitioner in support of its argument that the tower is not compatible with the neighborhood is so overwhelming that a reasonable person could not find that the tower is compatible, particularly given the inherently subjective nature of the criterion. *Olson v. City of Springfield*, 56 Or LUBA 229, 237 (2008).

The Hearings Official adheres to this approach. Here, a finding that the proposed PUD is incompatible and unharmonious despite having complied with all the applicable provisions of EC 9.8320 would, at least in this case, be logically and legally indefensible.

The Hearings Official is also persuaded that the proposed co-house will be compatible and harmonious for the following reasons: 1) the development will be at the end of the street where comparatively fewer property owners along Oakleigh Lane will be affected visually, 2) the scale of the buildings, as the applicant points out, are within the range of typical single family homes. The applicant states that the common house is similar in size to a large home and the other buildings are similar to smaller single family homes, 3) the proposed density is less than the maximum and the proposed height is less than the maximum height allowed, and 4) the proposed use is residential (as opposed to some conditional use allowed in the zone).

As to arguments about traffic impacts, the Hearing Official adopts the findings for EC 9.8320(12) here by this reference. Evidence of a modest increase in total vehicle trips, where there is no evidence of associated traffic problems, is sufficient to demonstrate that the proposed PUD will be compatible with adjacent and nearby uses.

**EC 9.8320(14): If the tentative PUD application proposes a land division, nothing in the approval of the tentative application exempts future land divisions from compliance with state or local surveying requirements.**

This criterion does not apply because the development does not include a future land division.

**EC 9.8320(15): If the proposed PUD is located within a special area zone, the applicant shall demonstrate that the proposal is consistent with the purpose(s) of the special area zone.**

The subject property is not located within a special area zone. As such, this criterion is not applicable.

### **Willamette Greenway Evaluation**

As required by the Type III land use application procedures beginning at EC 9.7300, the Hearings Official must review any WG permit application and consider pertinent evidence and testimony as to whether the proposal is consistent with the criteria required for approval at EC 9.8815 (shown below in **bold** typeface). In this case, the proposal is being reviewed concurrently with the tentative PUD in accordance with EC 9.8005(2).

**EC 9.8815(1): To the greatest degree possible, the intensification, change of use, or development will provide the maximum possible landscaped area, open space, or vegetation between the activity and the river.**

### ***Staff Findings***

As previously noted, the Willamette River is located more than 200 to the east of the subject property. The land between the river and the subject property is owned by the City, as an undeveloped natural resource area that contains /WR Water Resource (Goal 5) conservation areas. In this area, there is no specific, pre-determined or adopted setback from the river

under the City's implementing provisions of Goal 15 (Willamette Greenway).

While not the focus of the applicable WG permit approval criteria, staff notes that the applicable setbacks along the river in this area are based on the City's Goal 5 Adopted Riparian inventory, which is regulated with the /WR overlay zone (see EC 9.4920). The /WR conservation area at this location is greater than the typical 100-foot setback from top-of-bank along the Willamette River; here, the adopted riparian area boundary extends landward beyond the 100-foot setback from top of bank. For clarity, staff notes that the /WR conservation area does not extend onto the subject property. As shown on Attachment A, the subject property is at least 53 feet from the boundary of the regulated resource area.

Vegetation on the eastern portion of the subject property nearest the river consists of a cover crop of non-native short grasses, weedy forbs, and scattered and isolated fruit and fir trees. The location, species, and size of existing trees are shown on the applicant's topographical survey (see Attachment D-4). The eastern portion of the site, closest to the riparian area to the east, has few trees. The trees closest to the east property line include a row of fruit and filbert trees along the south property boundary, which the applicant proposes to preserve, and a row of cedars along the north property boundary.

Most of the northerly cedars are on adjacent lands to the north; the applicant proposes to preserve these trees, which is further conditioned in the PUD evaluation at EC 9.8320(3) and incorporated by reference. A 26-inch diameter cedar on the subject property, near the north property line, however, is proposed for removal to accommodate the location of Building 1. (The applicant's tree removal and preservation plan is provided on Sheet L3.) The cedar to be removed is about 50 feet from the east property line.

As for proposed landscaping between the development and the river, the applicant's landscape plan (Sheet L2) shows the eastern portion of the site as being planted with drought-tolerant native meadow grasses. The eastern portion of the site will primarily be open space, with the closest building being about 20 feet from the east property line (i.e. Building 2, abutting the north property line). Buildings to the south (i.e. Buildings 4 and 7) have greater setbacks from the east property line, by approximate 30 and 60 feet, respectively. As such, the development will provide the maximum possible open space and vegetation between the activity and the river. Additional landscaping along the east property boundary does not appear to be warranted, given the existing site conditions as an open meadow.

Based on the available information and the preceding findings, the above criterion is met.

### ***Opponent Arguments***

The neighbors argue that the configuration of the proposed PUD does not leave the maximum possible landscaped area between the development and the Willamette River. PT-2, PT-1.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8815(1) and adopts those findings by this reference – consistent with the findings set forth below.

For the purposes of EC 9.8815(1), the Hearings Official agrees with the opponents that the proposed PUD is a change in use and an intensification in use. Those facts make EC 9.8815(1) applicable and raises the question of just how much landscaped area must be provided to comply with the greenway protections. It is relevant that the subject property is over 50 feet from the regulated resource area, and that a large stand of trees exist between the river and the subject property. Nevertheless, those factors do not necessitate denying the proposal or requiring a complete reconfiguration, as opponents suggest, simply because the parking area is proposed for the western portion of the property.

For the most part, the site plan shows the bulk of the interior open space on the east side of the development. That alone is consistent with EC 9.8815(1). The distance to the river, and the fact that persons travelling along the river corridor (mostly on the bike path) will not be able to see the development also militate toward approving the PUD as proposed. That being said, the Hearings Official found under EC 9.8320(3) that additional landscaping and screening is required along the eastern boundary – at least enough to adequately screen Building 2. That condition will also support compliance with EC 9.8815(1). With the condition imposed under EC 9.8320(3), the PUD will provide the maximum possible landscaped area between the development and the river.

**EC 9.8815(2): To the greatest possible degree, necessary and adequate public access will be provided to and along the river by appropriate legal means.**

### ***Staff Findings***

The applicant's plans show pedestrian and bicycle circulation within the development via interconnected paths between the buildings and bicycle parking areas. The applicant notes that there is an existing worn path along the north property line, between the Oakleigh Lane roadway and the east property line, abutting the City parklands. The applicant proposes to keep this path open, but does not explicitly show any dedications to the public to enable continued access. Right-of-way dedication is required over this area, to enable continued public access, pursuant to the concurrent PUD approval criterion EC 9.8320(5), the findings and conditions of which are incorporated by reference.

The applicant also proposes to stub a soft path to the southeast corner of the site. The segment of the internal sidewalk system that is located between the most easterly building (a bike barn) and the east property line is shown as having a graveled, rather than a paved, surface. This unimproved surface is appropriate because there are no plans or funding for construction of a public path on the City property at this location. Residents of the development will naturally want to walk across the City parkland toward the river. Parks staff state no objections or concerns. This proposed path

at least delineates a more confined direction of travel, rather than random wandering through the City's resource area.

This portion of the City property has been cultivated as a filbert orchard, which has been maintained by the former owner of the subject property, as discussed in the applicant's written statement. There appears to be an informal path between the orchard and the subject property that would direct travelers to the southerly McClure Lane right-of-way. Public Works staff confirms that the planned bicycle and pedestrian connection through the City's parkland is from McClure Lane toward the easterly West Bank Bike Path, which is a regional facility that borders the west bank of the Willamette River.

Based on the above findings, and the condition at EC 9.8320(5), public access will be provided to the river by appropriate legal means. Refer to Attachment B and C for visual representations of these findings.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8815(2) and adopts those findings by this reference. The opponents are incorrect in their statement that no right-of-way has been provided for access to the bike path through Oakleigh Lane to the north.

**EC 9.8815(3): The intensification, change of use, or development will conform with applicable Willamette Greenway policies as set forth in the Metro Plan.**

### ***Staff Findings***

Pages III-D-4 and 5 of the Metro Plan contain the Willamette Greenway policies. Of these, several policies provide direction to local governments regarding legislative decision-making and other long range planning efforts, and do not constitute mandatory approval criteria for the application. The following Metro Plan policy is potentially relevant to the proposed development, and is therefore addressed below.

*Policy D.5: New development that locates along river corridors and waterways shall be limited to uses that are compatible with the natural, scenic, and environmental qualities of those water features.*

The proposed use is appropriate in this location, as the Metro Plan designates the subject property for residential uses. The proposed development is an allowed use that requires PUD approval; staff has determined previously in this report that the proposed development is consistent with the PUD approval criteria. To the extent the above policy is applicable, the development is setback more than 200 feet from the river, with City parkland and riparian areas located between the subject property and the river which will not be impacted by the proposed development. Further, the development proposes open space along the eastern portion of the site, abutting the parkland, and has setback buildings by at least 20 feet from the east property

line. As such, the proposed residential use is compatible with the natural, scenic, and environmental qualities of the river corridor.

Based on the above findings, the proposed development is consistent with the applicable Willamette Greenway policies set out in the Metro Plan. The above criterion is met.

### ***Opponent Arguments***

Neighbors argue that a number of Metro Plan goals and objectives are not met by the proposal. The neighbors also argue that Metro Plan policies D.5 and D.8 are not met. PT-2.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8815(3) and adopts those findings by this reference. Staff's analysis of policy D.5 is sufficient to respond to the neighbors' argument concerning policy D.5. As to policy D.8, the language applies to "Willamette River Greenway plans" not to individual development proposals.

**EC 9.8815(4): In areas subject to the Willakenzie Area Plan, the intensification, change of use, or development will conform with that plan's use management considerations.**

This criterion does not apply because the area of request is not within the boundaries of the Willakenzie Area Plan.

**EC 9.8815(5): In areas not covered by subsection (4) of this section, the intensification, change of use, or development shall conform with the following applicable standards:**

- (a) **Establishment of adequate setback lines to keep structures separated from the Willamette River to protect, maintain, preserve, and enhance the natural, scenic, historic, and recreational qualities of the Willamette Greenway. Setback lines need not apply to water related or water dependent activities as defined in the Oregon Statewide Planning Goals and Guidelines (OAR 660-15-000 et seq.).**

### ***Staff Findings***

Outside the Willakenzie Area Refinement Plan (WAP) and the Goal 5 Water Resource (/WR) riparian conservation area (neither of which affect the subject property), there is no regulatory setback from the Willamette River. For context, the WAP establishes a 35-foot setback and the /WR establishes a 100-foot setback from the top of the bank of the Willamette River. In this location, the /WR conservation area exceeds 100 feet from the riverbank, yet is still more than 50 feet from the subject property (see Attachment A).

The existing setback, of more than 200 feet from the ordinary high water line of the Willamette River, afforded by the intervening public park, is adequate to protect and maintain the natural and scenic qualities of the Willamette Greenway. The development plan preserves the natural and scenic qualities of the site by maintaining the existing open prairie conditions along the eastern portion of the site, by setting the buildings back from the east property line by at least 20 feet and by creating common open space that will be vegetated with native grasses.

### ***Opponent Arguments***

The neighbors argue that there are no setback lines between the river corridor and the proposed PUD. PT-2.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8815(5)(a) and adopts those findings by this reference.

- (b) Protection of significant fish and wildlife habitats as identified in the Metropolitan Plan Natural Assets and Constraints Working Paper. Sites subsequently determined to be significant by the Oregon Department of Fish and Wildlife shall also be protected.**

### ***Staff Findings***

The Metropolitan Plan Natural Assets and Constraints Working Paper does not identify any significant fish and wildlife sites on the subject property. Although the Willamette River Corridor is an Anadromous Fish River that is designated as an essential Salmon Habitat by the Oregon Department of Fish and Wildlife (ODFW), the subject property is located more than 200 feet west of the ordinary high water line. No habitat protection measures appear to be required of the proposed development.

### ***Hearings Official Conclusions***

The Hearings Official generally concurs with Staff's findings for EC 9.8815(5)(b) and adopts those findings by this reference.

- (c) Protection and enhancement of the natural vegetative fringe along the Willamette River to the maximum extent practicable.**

### ***Staff Findings***

The proposal does not affect the vegetated fringe along the Willamette River, which is located more than 200 feet to the east. The regulated riparian resource conservation area is shown on

Attachment A. The existing vegetation closest to the river will be maintained as an open prairie with native grasses in common open space.

### ***Opponent Arguments***

The neighbors argue that the lack of landscaping along the eastern boundary violates this provision. PT-2.

### ***Hearings Official Conclusions***

The term “fringe” must be given some meaning in applying this provision. The neighbors interpret fringe to mean the entire greenway area. As Staff notes in the findings for EC 9.8815(1), the subject property is over 50 feet from the regulated resource area. That places the subject property well beyond the “fringe” of the Willamette River. Staff’s conclusions are correct.

**(d) Preservation of scenic qualities and viewpoints as identified in the Metropolitan Plan Natural Assets and Constraints Working Paper.**

The subject property is not identified as having scenic qualities or viewpoints on the Metropolitan Plan Natural Assets and Constraints Working Paper.

**(e) Maintenance of public safety and protection of public and private property, especially from vandalism and trespass in both rural and urban areas to the maximum extent practicable.**

Staff found, and the Hearings Official agrees, that the applicant indicates that there is an existing dirt path along the north property line, between Oakleigh Lane and the City parkland. This indicates potential public trespass on private property. The applicant proposes to keep this path open, but does not explicitly show any dedications to the public to enable continued access. Right-of-way dedication is being required over this area, to enable continued public access, pursuant to the concurrent PUD approval criterion EC 9. 8320(5), the findings and conditions of which are incorporated here by reference. Overall, development of the subject property with dwelling units would increase public safety by providing more eyes on the City parkland.

**(f) Compatibility of aggregate extraction with the purposes of the Willamette River Greenway and when economically feasible, applicable sections of state law pertaining to Reclamation of Mining Lands (ORS Chapter 517) and Removal of Material; Filling (ORS Chapter 541) designed to minimize adverse effects to water quality, fish and wildlife, vegetation, bank stabilization, stream flow, visual quality, noise, safety, and to guarantee necessary reclamation.**

This standard does not apply because the proposal does not include aggregate extraction.

- (g) **Compatibility with recreational lands currently devoted to metropolitan recreational needs, used for parks or open space and owned and controlled by a general purpose government and regulation of such lands so that their use will not interfere with adjacent uses.**

### ***Staff Findings***

Referral comments from Public Works staff indicate no concern with the proposed development's compatibility with the City's adjacent public open space.

### ***Opponent Arguments***

The neighbors argue that the lack of landscaping along the eastern boundary violates this provision. The neighbors also argue that the size of the buildings will interfere with the public's use of the adjacent City owned open space.

### ***Hearings Official Conclusions***

The findings for EC 9.8320(3) discuss screening and landscaping along the property boundaries adjacent to the City open space. Those findings are incorporated here by reference. The additional landscaping and screening required will also address this criterion. The Hearings Official also finds it to be nearly absurd to suggest that low density residential use is incompatible with recreation along the greenway. The maps of the area in the record and presented at the hearing show that the majority of nearby lands along the greenway and the bike path are residential – and that residential uses is typically much closer to the river. I find no persuasive evidence to suggest that persons currently using the adjacent City open space will not continue to be able to use it for recreation as it is now currently used.

**EC 9.8815(6): When site review approval is required, the proposed development will be consistent with the applicable site review criteria.**

This criterion does not apply because the subject property is not zoned with the /SR Site Review Overlay, nor does the subject development require Site Review approval.

**EC 9.8815(7): The proposal complies with all applicable standards explicitly addressed in the application. An approved adjustment to a standard pursuant to provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard.**

The concurrent PUD application has been evaluated against all applicable development standards. Based on the findings and conditions provided at EC 9.8320(11)(k), which are incorporated by reference, the above criterion will be met.

## Decision

Based upon the available evidence and preceding findings, the Hearings Official APPROVES the applicant's request for a Planned Unit Development, Tentative Plan approval and Willamette Greenway Permit subject to the following conditions:

1. The final PUD plans shall show Building 2 located outside (moved south) of the required right-of-way dedication along the north property line.
2. Prior to final PUD approval, the applicant shall submit a report from a certified arborist confirming that the row of cedars on adjacent lands to the north can survive the construction impacts of the proposed development (and include any necessary protection measures to ensure survival). The final PUD plans shall show the location of Building 2 and any related protection measures (e.g. construction fencing for protected CRZ areas) consistent with the arborist's recommendations.
3. Prior to final PUD approval, the applicant shall revise the final site plan to show the dedication of 22.5 feet of right-of-way along the northerly boundary of the development, between the westerly boundary of the proposed development and a line that is 50 feet east of the westerly boundary, and also to show the dedication of 13 feet of right-of-way extending from the aforementioned line (the east end of the required 22.5 feet of right-of-way dedication) to a line that is 117 feet beyond (east of) the existing the existing right-of-way (for a total length of 199 feet). Additionally, the revised site plan shall show the dedication of a 13-foot wide Public Accessway along the northerly boundary, which extends from the east end of the aforementioned right-of-way to the easterly property boundary (for a total distance of 24 lineal feet).
4. Prior to final PUD approval, the applicant shall submit for review and approval by City staff and recording at Lane County Deeds and Records, a street deed which reflects the right-of-way as shown on the final site plan.
5. Prior to final PUD approval, the applicant shall dedicate a temporary emergency vehicle access easement over the on-site hammerhead and the access drive from Oakleigh Lane, and show this easement on the final PUD plans.
6. Prior to final PUD approval, the applicant shall provide documentation from EWEB, confirming that water facilities are available for the proposed development.
7. The applicant shall submit an Irrevocable Petition for public improvements in Oakleigh Lane to include paving, curbs and gutters, storm drainage, sidewalks, and street trees.
8. The final site plan shall delineate the Special Flood Hazard Area, identify Base Flood Elevation (for the entire site or for each building), and note that development of the site will be required to comply with the standards at EC 9.6707 through EC 9.6709.

9. The final PUD site plans shall note that construction permits shall conform to the applicant's geotechnical analysis.
10. The final PUD plans shall note that all on-site utilities will be placed underground consistent with EC 9.6775.
11. The final PUD plans shall note the requirement that, at the time of development, all stormwater discharge points directed toward the City's property shall be designed as level spreaders, consistent with the City's 2008 Stormwater Management Manual. All stormwater facilities shall be located outside the public wastewater easement along the east property line.
12. The final site plan shall note: "On-site stormwater management facilities will be privately owned and operated. An operation and maintenance plan will be developed consistent with the City's Stormwater Management Manual, and notice of this plan will be recorded, during the building permit process."
13. Prior to final PUD approval, the applicant shall obtain from the property owners of Tax Lots 500, 5600, 5700, and 10100, an easement abutting the proposed structures on the subject property that are located less than five feet from the interior property lines (i.e. the garages, carports, and wall along the west property line, and the portion of the wall and Building 6 abutting the south property line). The easement shall establish a 10-foot no-build zone, for fire code purposes, and, for at least the first five feet abutting the common property line, rights for the development to access and maintain the backside of their buildings. Alternatively, if the applicant is unable to obtain these off-site private easements from the adjacent property owners, then the final PUD plans shall show all structures setback at least five feet from the property lines.
14. The final site plans shall note that compliance with the following development standards will be determined more precisely at the time of building permit review:
  - a. Landscape Standards beginning in EC 9.6200
  - b. Garbage Screening contained in EC 9.6740
  - c. Bicycle Parking Standards contained in EC 9.6105
  - d. Outdoor Lighting Standards contained in EC 9.6725
15. Prior to final PUD approval, the applicant shall revise the final site plan and landscaping plan compliant with EC 9.6200 to provide landscape screening along the eastern property boundary, and a combination of landscape screening and fencing along the southern property line, to screen the buildings from view from adjacent properties.

Dated this 12<sup>th</sup> day of November, 2013.

Mailed this 12<sup>th</sup> day of November 2013.

A handwritten signature in black ink that reads "Kenneth D. Helm". The signature is written in a cursive style and is contained within a light gray rectangular box.

Kenneth D. Helm  
Hearings Official

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SEE NOTICE OF HEARINGS OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS



**FINAL ORDER OF THE EUGENE PLANNING COMMISSION ON APPEAL:  
OAKLEIGH MEADOWS COHOUSING PUD (PDT 13-1)**

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**I. INTRODUCTION**

The Eugene Hearings Official (HO) held the initial public hearing on this request on October 2, 2013. Following the hearing and open record period for additional testimony, he approved the applicant's tentative planned unit development (PUD) with 15 conditions of approval on November 12, 2013. The applicant's concurrent request for a Willamette Greenway Permit was also approved but is not challenged by the opponents as part this appeal.

On November 22, 2013, an appeal was filed by the River Road Community Organization. The co-appellant is Bryn Thoms, the owner of adjacent lands to the north. The appeal statement identifies ten primary assignments of error in the Hearings Official's findings and decision with respect to applicable Eugene Code (EC) approval criteria at EC 9.8320.

On November 25, 2013, in accordance with EC 9.7655(1), the City mailed written notice of the appeal hearing to the applicant, the appellant, the River Road Community Organization, all persons who submitted written comments in regard to the original applications, and all persons who requested notice. The written notice included the required elements set forth in EC 9.7655(2).

The Planning Commission (PC) held a public hearing on the appeal on December 5, 2013. At the public hearing, Will Dixon and Zack Mittge provided oral testimony on behalf of the applicant. Lynn Dixon, Otto Poticha, Joan Connolly, and Antonia Lewis spoke in favor of the application. Bryn Thoms and Paul Conte provided oral testimony on behalf of the appellant. Anne Love, Richard Dambrov, and Paul Heintz spoke in opposition to the application. The applicant's legal counsel, Zack Mittge, followed with rebuttal testimony. Written testimony was also provided by the parties and other individuals at the hearing which is included in the record and considered by the Planning Commission in its final decision.

The PC closed the public hearing and the record on December 5, 2013. The PC deliberated on the appeal issues at its meetings on December 9<sup>th</sup> and 16<sup>th</sup>, and reached its final decision on December 16, 2013. The appeal is based on the record and limited to the assignments of error contained in the appeal statement submitted. As described below, the PC affirms the HO's decision to approve the subject applications, with additional findings and modifications to approval conditions in some instances. Those additional findings and modifications are detailed below with respect to each related assignment of error.

**II. RECORD BEFORE THE PLANNING COMMISSION**

The record before the PC consists of the Eugene Planning Commission Agenda Item Summaries and related attachments for Appeal of Hearings Official Decision: Oakleigh Meadow (PDT 13-1) dated December 9, 2013; the written and oral testimony presented by appellants, applicant, and other

parties to the Planning Commission; the decision of the Eugene Hearings Official dated November 12, 2013; and all record materials (including written and oral testimony, City staff reports and application materials) presented to and not rejected by the HO. The entire City Planning & Development Department file was physically before the PC prior to its final decision.

EC 9.7655(2) limits the nature of evidence that the PC can consider on appeal as follows: “The record from the proceeding of the Hearings Official or Historic Review Board shall be forwarded to the appeal review authority. No new evidence pertaining to the appeal issues shall be accepted.” Pursuant to this section, the PC cannot accept any new evidence, and none was accepted as part of the appeal.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the applicable law and all argument and evidence in the record, the PC finds that the subject application meet all applicable PUD approval criteria from EC 9.8320, with additional findings and modified conditions of approval described below. In the event of any conflict between the Hearings Official’s decision and this Final Order, this Final Order shall prevail.

To further support the PC’s conclusion, the PC incorporates the City Attorney’s memorandum from Anne Davies dated December 11, 2013, which is included as Attachment A. The HO’s decision is also adopted by reference and included as Attachment B.

As noted above, the appeal is comprised of ten assignments of error. Each assignment of error is set forth below, followed by the PC’s findings of fact and conclusions of law as to each one.

**First Assignment of Error: The Decision erred by finding that the application met EC 9.8320(1) “The PUD is consistent with applicable adopted policies of the Metro Plan.”**

**A. Sub-assignment of Error 1.A: the Decision failed to address the following policy at all:**

**TransPlan Transportation System Improvements (TSP) Pedestrian Policy #1: Pedestrian Environment (Metro Plan Policy F.26)**

***Provide for a pedestrian environment that is well integrated with adjacent land uses and is designed to enhance the safety, comfort, and convenience of walking (Metro Plan III-F-9)***

**B. Sub-assignment of Error 1.B: the Decision failed to address the following policy at all:**

**TransPlan Finance Policy #4: New Development (Metro Plan Policy F.36)**

***Require that new development pay for its capacity impact on the transportation system. (Metro Plan III-F-13)***

The appellant asserts that the HO failed to consider these policies, and to include adequate conditions of approval for sufficient right-of-way, sidewalks, and other improvements to ensure consistency. The PC finds that the HO did not explicitly address Policies F.26 and F.36 of the Metro Plan, but agrees with the applicant’s reasoning that these policies are not mandatory approval criteria for the application. The policies provide broad direction to the local government in legislative matters but are not intended

to be used as PUD approval criteria. Unlike the policies the case cited by the appellant (*Bothman v. City of Eugene*), where the policies actually sought to discourage the exact planning action that was being proposed, the text and context of these policies do not appear to require any additional consideration for the proposed PUD. Even though consideration of the policies is not required, the PC finds that approval of the PUD is nonetheless consistent with those policies based on the proportional requirements made for right-of-way dedication, future street and public accessway improvements, and further, through the City's System Development Charges (SDC's) which are collected at the time of development.

**Second Assignment of Error: The Decision erred by finding the application met EC 9.8320(5) "The PUD provides safe and adequate transportation systems through compliance with the following..."**

**A. Sub-assignment of Error 2.A: the Decision erred by finding the application met the following criterion:**

***EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways (not subject to modifications set forth in (11) below).***

**B. Sub-assignment of Error 2.B: the Decision erred by finding the application met the following criterion:**

***Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. "Nearby" means uses within ¼ mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.***

**C. Sub-assignment of Error 2.C: the Decision erred by finding the application met the following criterion:**

***The provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.6880 where applicable.***

The HO completed a detailed analysis of this issue on page 24 of his decision. The PC finds that the HO was correct in his application of EC 9.8320(5), as being limited in scope to compliance with the following: a) that EC 9.6800 through 9.6875 can be met, b) that pedestrian, bicycle and transit circulation can be achieved, and c) that if necessary a Traffic Impact Analysis (TIA) has been done and mitigation provided. To the extent the HO's decision concludes that EC 9.8320(5)(a) relates only to the dedication of land, the PC disagrees. EC 9.6800 through 9.6875 establish standards for dedication, design and location of public ways, generally. EC 9.6800. That said, the PC agrees that neither EC 9.8320(5)(a) nor EC 9.6800 through 9.6875 require that an existing street must meet certain standards in order to serve a proposed development. EC 9.6870 only provides the required paving widths for certain types of streets when and if those streets are ever fully improved to City standards.

With regard to EC 9.6800 through 9.6875, the PC finds that the HO was correct in granting exceptions to the street connectivity standards and cul-de-sac length standards. The PC concludes that the street connectivity exception at EC 9.6815(2)(g)(1) is met by the applicant's alternative street connection study, along with their narrative that addresses the intent statements at EC 9.6815(1). The PC finds that the alternative street connection study is not required to evaluate full build-out potential of the entire area. The PC also finds that no right-of-way is being exacted of Tax Lot 200.

The PC concludes that the HO did not err by granting an exception to the 400-foot maximum cul-de-sac length. The PC finds that there is existing development to the south and natural resources to the east that warrant an exception to the cul-de-sac length, pursuant to EC 9.6820(5). The PC affirms that the cul-de-sac standards at EC 9.6820(1) and EC 9.6820(4) are met because the HO conditioned approval upon right-of-way dedication for a future hammerhead turnaround and an access way beyond the turnaround. To the extent that there is any conflict between the street connectivity exception and the standards for maximum cul-de-sac length, the PC resolves this conflict in favor of granting the exception.

The PC finds that the constitutional findings in the Public Works referral comments are limited to justification for a proportional right-of-way exaction along the frontage of the subject property that would accommodate future public street improvements. The constitutional findings address a future need for street improvements abutting the property, rather than any immediate need, based on safety issues or otherwise, associated with the proposed PUD. The PC concludes that no additional right-of-way dedication or street improvements are necessary to meet the approval criteria. Based on these findings, the pedestrian, bicycle and transit circulation requirements of EC 9.8320(5)(b) are met.

With regard to TIA requirements, the PC finds that the HO did not err in his conclusion that none of the TIA applicability provisions required a TIA. Based on the previous findings that the Public Works referral comments are limited in scope, the PC concludes that there is nothing in the record to require a TIA.

Based on these findings, PC finds that the HO was correct in determining compliance with EC 9.8320(5). The HO findings on page 18-29 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error. To provide clarity on the basis for the cul-de-sac length exception, the PC modifies the HO decision to include the additional findings provided above.

**Third Assignment of Error: The Decision erred by finding the application met EC 9.8320(6) "The PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater and flood hazard, or an impediment to emergency response."**

- A. Sub-assignment of Error 3.A: the Decision erroneously found that the PUD would not be a significant risk to public safety.**
- B. Sub-assignment of Error 3.B: the Hearings Official provided no evaluation of PWD's own analysis that Oakleigh Lane would be an impediment to emergency response unless the**

***right-of-way was widened and the road improved.***

Based on the previous determination under the second assignment of error about the limited scope of the PW constitutional findings for right-of-way exaction, the PC finds no basis in the record to require additional right-of-way dedication or street improvements. The PC concludes that the HO's conditions for right-of-way dedications and irrevocable petitions address a future need for street improvements, rather than any immediate need associated with the proposed PUD. The PC also concludes that the HO's conditions for a temporary turnaround easement within the development site adequately address the emergency response provision of EC 9.8320(6). The HO findings on page 29-31 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

**Fourth Assignment of Error: The Decision erred by finding the application met EC 9.8320(11)(b) "The PUD complies with all of the following...EC 9.6505 Improvement-Specifications (3)(b) Streets and Alleys, (4) Sidewalks, and (5) Bicycle Paths and Accessways**

- A. Sub-assignment of Error 4.A: the Decision erroneously found that Oakleigh Lane, which is not only adjacent to, but also serves as the only vehicular access to and from the development site, would be paved to the specifications in EC 9.6870 (or exempt).***
- B. Sub-assignment of Error 4.B: the Decision erroneously found that Oakleigh Lane, which is not only adjacent to, but also is and will be used by pedestrians to and from River road and to and from the public bike/ped path along the river, would provide sufficient sidewalks that are located, designed and constructed according to the specifications in Eugene Code and referenced standards.***
- C. Sub-assignment of Error 4.C: the Decision erroneously found that Oakleigh Lane, which is not only adjacent to, but also is and will be used by bicyclists to and from River Road and to and from the public bike/ped path along the river, would provide sufficient bike accessways that are located, designed and constructed according to the specifications in Eugene Code and referenced standards.***

The PC finds that the HO did not err in finding compliance with EC 9.8320(11)(b). As confirmed under the second assignment of error, the PC determines that the PW referral comments are not evidence of a safety concern under existing or proposed conditions. The PC concludes that the conditions of approval imposed by the HO for right-of-way dedication and irrevocable petitions sufficiently ensure that the improvement standards at EC 9.6505 will be met. With regard to the local improvement process associated with the irrevocable petitions, the PC finds that this is not an undue burden on the abutting property owners. The PC further affirms that the development's traffic impacts are acceptable under the PUD approval criteria. The HO findings on pages 33-50 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

**Fifth Assignment of Error: The Decision erred by finding the application met EC 9.8320(12) "The proposed development shall have minimal off-site impacts, including impacts such as traffic, noise, stormwater runoff and environmental quality."**

The PC finds that the HO properly interpreted the meaning of “minimal off-site impacts” and did not err with regard to traffic impacts. The PC has previously determined, under the second assignment of error, that the constitutional findings in the PW referral comments are limited to justification for a proportional right-of-way exaction along the frontage of the subject property that would accommodate future public street improvements. As such, the PC disagrees with appellant; these findings cannot be taken out of context as asserted, to mean that traffic impacts would be so substantial as to violate the requirements of EC 9.8320(12).

The PC finds that the HO was correct in adopting the staff findings to address the traffic component of EC 9.8320(12), in which Public Works staff confirmed the following: the development will have minimal off-site traffic impacts; that Oakleigh Lane currently provides for safe passage of two-way and emergency vehicles; and, no street improvements are required of the development at this time, although right-of-way dedication and an Irrevocable Petition are being required to enable future public improvements. Public comments about the accident at the intersection of Oakleigh Lane and River Road are not on the City’s inventory of intersections with high crash ratings that would otherwise warrant analysis to determine patterns that could be mitigated by infrastructure improvements. (HO Decision, Page 50). The HO findings on pages 50-53 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

With regard to the design of the development, however, the PC finds that the allowance for reduced setbacks along the north and west property lines does not have a “minimal off-site impact”. The PC addresses these concerns in the sixth assignment of error, below, which is incorporated by reference. With those findings and conditions that modify the HO’s decision, the PUD will comply with EC 9.8320(12).

**Sixth Assignment of Error: The Decision erred by finding the application met EC 9.8320(13) “The proposed development shall be reasonably compatible and harmonious with adjacent and nearby land uses.”**

The PC generally agrees with the HO’s findings of compliance under EC 9.8320(13), as addressed on pages 54-55 of his decision. The PC finds that the HO did not ignore or misinterpret the evidence regarding an accident on River Road at the intersection of Oakleigh Lane, and did not misinterpret the requirements of EC 9.8320(12) regarding “minimal off-site impacts” related to traffic. As also discussed under the second and third assignments of error, the PC concludes that the HO did not err, based on the available evidence that the traffic generated by the proposed PUD is acceptable under the approval criteria and does not warrant additional right-of-way or street improvements beyond what has already been required. The Hearings Official was correct in adopting the related findings under EC 9.8320(12), with regard to arguments about traffic impact also made under EC 9.8320(13). As such, the PC concludes that traffic generated from the PUD will be reasonably compatible and harmonious with adjacent and nearby land uses as required by EC 9.8320(13). The HO findings on pages 53-55 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

The PC finds, however, that the allowance for a substandard setback along the north property line should be modified in order to ensure the development will be reasonably compatible and harmonious with adjacent and nearby land uses. The PC also finds that additional screening is necessary between

the development and surrounding properties. To address these concerns, the PC modifies the HO's approval to add the following condition:

- The final PUD plans shall show a building setback of 5 feet from the front property line along the newly dedicated right-of-way boundary for Oakleigh Lane. A 10 foot setback shall be shown along the remainder of the north property line, along the newly dedicated right-of-way for a bike/pedestrian path. (See related Condition #3.)

The PC finds that the applicant's proposed landscape plan (Sheet L2 of Exhibit PH-69) cannot be accomplished with the required right-of-way dedication, as there is no future guarantee that it would not be removed upon future street improvements. The HO did not specifically address this conflict in finding that the screening along the north property line would be sufficient to meet the approval criteria. Further, the right-of-way dedications along the north line result in the abutting buildings being too close to the future street, hammerhead, and access way improvements. For compatibility and safety purposes, the PC finds that adequate screening should be provided within the expanded setback areas along the north property line, therefore ensuring the continued existence of the required screening regardless of the timing for future street improvements.

With the additional setbacks afforded by the added condition of approval above, PC finds that adequate landscape screening can be accomplished with some relatively minor, additional changes to the applicant's site plans. Specifically, the applicant's proposal for screening vegetation and trees along the western portion of the north property line is acceptable if moved south, outside of the dedicated right-of-way, essentially implementing a modified version of the City's standard L-2 landscaping requirements at EC 9.6210(2). The applicant's proposal for 4 trees in this area, including one on either side of the entrance, with a low screen (hedge) to mitigate the impact of traffic and headlights and create separation between the building and right-of-way, will provide adequate screening and therefore ensure compatibility if implemented on the development site within the expanded 5-foot setback along the newly dedicated right-of-way for Oakleigh Lane. In addition, the requirement for landscaping should extend along the remainder of the north property line, rather than reliance only on the existing row of trees which are not on the development site, nor under the applicant's control. To address this concern, the PC modifies the HO's approval to add the following condition of approval:

- The final PUD plans shall show landscaping along the north property line consistent with the applicant's proposed landscape plan (Sheet L2 of Exhibit PH-69), but moved south within the required 5-foot setback outside of the newly dedicated right-of-way for Oakleigh Lane. The applicant shall also revise the site plans to show landscaping that meets the City's L-2 standard at EC 9.6210, within the required 10-foot setback along the remainder of the north property line, but without the requirement for additional canopy trees. As part of the final PUD application, the applicant's arborist shall assess whether this landscaping would jeopardize the health of the cedar trees to the north. If so, no landscaping shall be required.

The appellant also challenges the HO's condition of approval (see Condition #15 on page 64 of the HO decision) regarding additional screening requirements along the south and east property lines, and whether it needs more specificity to ensure compliance at the time of final PUD review. The PC agrees that the HO should have included more specificity, beyond his requirement for a combination of

landscaping and fencing that would screen the buildings from view from adjacent properties.

Here, responding to arguments about the uncertainty and adequacy of the public process, and deferring a determination of compliance to a later stage of review, the PC finds that the condition of approval should be modified to specifically require the City's High Screen Landscape Standard (L-3) at EC 9.6210(3), along a portion of the south boundary which abuts other single-family residential uses. This modified requirement will provide for clarity and objectivity upon review at the final PUD stage, while recognizing that the City's Type II application process for final PUD approval affords adequate public notice and opportunity for appeal.

Along the eastern boundary, however, the PC finds that the applicant's original proposal to maintain open space in this area for views and connectivity toward the adjacent park property and natural areas along the river is preferable, being more compatible and harmonious with the adjacent open space. As such, the HO's additionally required landscaping is not necessary along the east boundary to provide adequate screening or otherwise meet the PUD approval criteria. Based on these findings, the PC modifies and replaces the HO's Condition #15 with the following:

- The final PUD plans shall show landscaping along the southern property boundary except along the length of the proposed wall (see related Condition #13) and the easternmost property line segment (123.48 feet) where existing trees are shown on the applicant's plans. The required landscaping shall meet the High Screen Landscape Standard (L-3) at EC 9.6210(3). Additional landscape screening is not required along the eastern property boundary.

The PC also finds that there needs to be a condition to ensure that the concrete wall along the west boundary includes vegetation, as proposed. Specifically, the applicant's proposal to plant "espaliered" trees along the outside face of the wall as a feature to help soften the appearance is acceptable, but should be required as a condition of approval. In addition, while the HO allowed the applicant's request for a reduced setback for the proposed wall to be located on the property line if the necessary maintenance access easement is obtained from the adjoining owner (see Condition #13), the applicant indicated at the appeal hearing that a five-foot setback would be provided and the PC concludes that the setback is necessary to ensure compatibility. To address these concerns, the PC modifies the HO's decision to replace Condition #13, with the following:

- The final PUD plans shall show the applicant's proposal for "espaliered" trees along the outside face of the proposed concrete wall as a requirement. The required landscaping shall be the responsibility of the owner(s) and maintained as a requirement of the PUD approval. Those portions of the wall adjacent to unenclosed parking areas shall also be limited to 6 feet in height. Plans shall also be revised to show a minimum 5-foot setback for the wall along the west and south boundaries of the site. A reduced setback may be allowed for Building 6, so long as the applicant obtains the necessary maintenance access easement from the adjoining owner, in compliance with EC 9.2751(7), and all other conditions of approval are met.

With these additional findings and conditions of approval, the PC concludes that the approval criteria at EC 9.8320(13) will be met. These requirements also address compliance with EC 9.8320(3) regarding adequate screening, EC 9.8320(12) regarding minimal off-site impacts, and related modifications to applicable standards allowed by the HO under EC 9.8320(11)(k).

**Seventh Assignment of Error: The Decision erred by finding the application met EC 9.8320(3) "The PUD will provide adequate screening from surrounding properties including, but not limited to anticipated locations, bulk, and height."**

The PC confirms that the PUD cannot rely on the cedar trees on adjacent lands to the north as screening for the development because those trees are not within the development's control. As addressed previously, under the sixth assignment of error, the PC has modified the HO decision to establish conditions of approval to ensure adequate screening along all property lines; those findings and conditions are incorporated by reference to address this seventh assignment of error and EC 9.8320(3).

The PC further finds that the proposed "clustering" of dwellings includes a form of attached single-family units in dispersed buildings, which minimizes the overall impact of the allowed R-1 density which might occur in other multi-family designs (i.e. an apartment complex). Based on the available evidence, the PC concludes that this is acceptable, as long as the proposed design otherwise meets the PUD approval criteria. In this case, the proposal for "clustering" increases the size of each individual building, but not in a way that offends the requirements for compatibility, screening, or overall character of the area. The PC concludes that added conditions of approval noted above will provide enough clarity to ensure adequate screening which will be implemented during the final PUD process, involving adequate opportunity for public review and comment, as well as appeal provisions.

Except as modified above, the HO findings on pages 9-14 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

**Eighth Assignment of Error: The Decision erred by finding the application met EC 9.8320(11)(a) "The PUD complies with EC 9.2000 through EC 9.3915 regarding lot dimensions and density requirements for the subject zone."**

- A. Sub-assignment of Error 8.A: the Hearings Official erred in his calculation of the net density area pursuant to EC 9.2751...***
- B. Sub-assignment of Error 8.B: the Hearings Official erred in his understanding of the concept of "clustering" under EC 9.8300(1)(e).***

The PC finds that the HO did not err in his calculation of net density by not subtracting public easement areas, as asserted by the appellant. Even if these additional areas are subtracted from the net density calculation, staff's analysis shows and PC affirms that the PUD complies with the net density allowance in R-1 zoning for 14 units per acre.

The PC finds that the HO did not err in his understanding of the concept of clustering under EC 9.8300(1); however, as discussed previously under the sixth assignment of error, the PC finds that there appears to be sufficient open space within the development site to accommodate the changes required by the PC, which will result in more clustering of the dwellings within the development site. As discussed under the sixth assignment of error, the PC is modifying the HO's decision to require

additional setbacks and landscaping to ensure compliance. Here, as modified, those requirements further the PUD purposes with regard to clustering of dwellings, and are therefore incorporated by reference. Except as modified above, the HO findings on pages 33-35 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

**Ninth Assignment of Error: The Decision erred by finding the application met EC 9.8320(11)(k) "All other applicable development standards for features explicitly included in the application except where the applicant has shown that a proposed noncompliance is consistent with the purposes set out in EC 9.8300 Purpose of Planned Unit Development: EC 9.2795 Solar Setback Standards."**

The PC finds that the HO did not err in his interpretation of the solar setback standard and that he was correct in granting an exception pursuant to EC 9.2795(3)(c)(1) Exemptions to Solar Setback Requirements, based on the right-of-way being required along the entire north property line. The HO findings on pages 43-50 are hereby incorporated by reference as further evidence of compliance with the applicable criteria appealed under this assignment of error.

**Tenth Assignment of Error: The Hearings Official made a decision that was not supported by substantial, probative and reliable evidence in the whole record; and the Decision improperly construed the applicable law."**

- A. Sub-assignment of Error 10.A: The HO erred by not adequately considering the preponderance of evidence and analysis in the "Constitutional findings for Exaction" produced by the Eugene Public Works Department (PWD).***
- B. Sub-assignment of Error 10.B: the Hearings Official erroneously found that Oakleigh Lane was not an "access lane."***
- C. Sub-assignment of Error 10.C: The Hearings Official used erroneous data for traffic counts in on or more places..."***
- D. Sub-assignment of Error 10.D: The Hearings Official erroneously allowed the impermissible new and non-responsive evidence submitted by the applicant's representatives on October 16, 2013, without providing an opportunity for opponents to respond, despite the timely, written request by Paul Conte.***

As addressed previously, the PC finds that the constitutional findings included in the staff report and PW referral comments (Pages 2-4 of Exhibit PH-30) were adopted to justify exaction from the applicant for that a portion of the subject property abutting the street. Those findings do not demonstrate that Oakleigh Lane will be unsafe unless developed now. In fact, other evidence in the record specifically supports a conclusion that the street will be safe as currently improved, even with the anticipated increase in traffic generated from the proposed PUD. Accordingly, the PC finds that immediate improvements are not required of the development, either abutting the development site, or on any part of Oakleigh Lane, based on the findings and conclusions provided previously under the second assignment of error, which are incorporated here by reference.

The PC affirms the HO's decision that Oakleigh Lane is a low-volume residential street under existing and proposed conditions, as the street has not yet been designed and built to urban City standards and the projected ADT is within the 250 to 750 range. The conditions imposed by the HO for right-of-way dedication and irrevocable petition from the developer will ensure that the PUD contributes its proportional share of the future local improvement. The PC finds the traffic generation to be consistent with the proposed residential use, which is within the permissible density range. As such, the PC agrees with the HO that the traffic generated by the development is not "significant" within the context of EC 9.8320(12).

The PC finds that the various trip generation estimates provided in the record do not change the determination that Oakleigh Lane is a low-volume residential street. The PC finds that the HO did not err in his conclusions that relied on ADT estimates, and the relevance of this alleged error is unclear in the appeal statement as it does not identify any related approval criteria to which the argument applies. The HO findings on pages 18-29 are hereby incorporated by reference as further evidence of compliance under the approval criterion appealed under this assignment of error.

The PC finds that the HO was correct in allowing the applicant's October 16, 2013 submittals into the record, as they were responsive to evidence and argument submitted up to October 9, 2013, as explained in the HO's decision. The PC also affirms the HO's Order Denying Reopening the Evidentiary Record. The HO findings on pages 3-4 are hereby incorporated by reference as further evidence of the open record appealed under this assignment of error.

#### **IV. CONCLUSION**

The Eugene Planning Commission has reviewed the record and the assignments of error in the appeal, and has voted to modify and affirm the decision of the Hearings Official to conditionally approve the tentative PUD for Oakleigh Meadows Co-housing (PDT 13-1). Additional findings and modified conditions of approval are provided in Section III of this Final Order; the modified conditions of approval are also included below for reference. All other conditions imposed by the Hearings Official remain applicable as set out in the Hearings Official's decision, which is adopted here by reference and included as Attachment B.

#### **Added Conditions of Approval:**

- The final PUD plans shall show a building setback of 5 feet from the front property line along the newly dedicated right-of-way boundary for Oakleigh Lane. A 10 foot setback shall be shown along the remainder of the north property line, along the newly dedicated right-of-way for a bike/pedestrian path. (See related Condition #3.)
- The final PUD plans shall show landscaping along the north property line consistent with the applicant's proposed landscape plan (Sheet L2 of Exhibit PH-69), but moved south within the required 5-foot setback outside of the newly dedicated right-of-way for Oakleigh Lane. The applicant shall also revise the site plans to show landscaping that meets the City's L-2 standard at EC 9.6210, within the required 10-foot setback along the remainder of the north property line, but without the requirement for additional canopy trees. As part of the final PUD application, the applicant's arborist shall assess whether this landscaping would jeopardize the

health of the cedar trees to the north. If so, no landscaping shall be required.

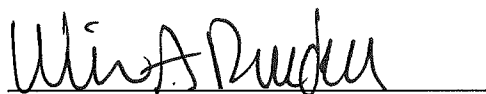
**Condition of Approval #13 (as modified/replaced):**

- The final PUD plans shall show the applicant's proposal for "espaliered" trees along the outside face of the proposed concrete wall as a requirement. The required landscaping shall be the responsibility of the owner(s) and maintained as a requirement of the PUD approval. Those portions of the wall adjacent to unenclosed parking areas shall also be limited to 6 feet in height. Plans shall also be revised to show a minimum 5-foot setback for the wall along the west and south boundaries of the site. A reduced setback may be allowed for Building 6, so long as the applicant obtains the necessary maintenance access easement from the adjoining owner, in compliance with EC 9.2751(7), and all other conditions of approval are met.

**Condition of Approval #15 (as modified/replaced):**

- The final PUD plans shall show landscaping along the southern property boundary except along the length of the proposed wall (see related Condition #13) and the easternmost property line segment (123.48 feet) where existing trees are shown on the applicant's plans. The required landscaping shall meet the High Screen Landscape Standard (L-3) at EC 9.6210(3). Additional landscape screening is not required along the eastern property boundary.

Accordingly, PUD approval is hereby affirmed. The foregoing findings and conclusions are adopted as the Final Order of the Eugene Planning Commission for Oakleigh Meadows Co-Housing PUD (PDT 13-1) this 16<sup>th</sup> day of December, 2013.



William Randall, Chair  
Eugene Planning Commission

Attachment A: December 11, 2013 City Attorney Memo from Anne Davies

Attachment B: Hearings Official's Decision, dated November 12, 2013

BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

OAKLEIGH-MCCLURE NEIGHBORS,  
BRYN THOMS, SANDY THOMS, TAMMY CRAFTON,  
KAREN FLEENER-GOULD, SCOTT FLEENER-GOULD,  
CECELIA BAXTER-HEINTZ and PAUL BAXTER-HEINTZ,  
*Petitioners,*

and

PAUL CONTE,  
*Intervenor-Petitioner,*

vs.

CITY OF EUGENE,  
*Respondent,*

and

OAKLEIGH MEADOWS CO-HOUSING, LLC,  
*Intervenor-Respondent.*

LUBA No. 2014-001

FINAL OPINION  
AND ORDER

Appeal from City of Eugene.

Lauren C. Regan, Eugene, filed a petition for review and argued on behalf of petitioners. With her on the brief was Justice Law Group.

Paul Conte, Eugene, filed a petition for review and argued on his own behalf.

Anne C. Davies, Assistant City Attorney, Eugene, filed the response brief and argued on behalf of respondent.

1 Zack P. Mittge, Eugene, filed response briefs and argued on behalf of  
2 intervenor-respondent. With him on the briefs were Hutchinson, Cox, Coon,  
3 Orr & Sherlock PC.

4  
5 RYAN, Board Chair; BASSHAM, Board Member, participated in the  
6 decision.

7  
8 HOLSTUN, Board Member, did not participate in the decision.

9  
10 REMANDED 08/21/2014

11  
12 You are entitled to judicial review of this Order. Judicial review is  
13 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision approving a tentative planned unit  
4 development application.

5 **MOTION TO INTERVENE**

6 In an order dated May 1, 2014, we previously granted intervenor-  
7 respondent Oakleigh Meadows' (Meadows) motion to intervene on the side of  
8 the city, intervenor-petitioner Paul Conte's (Conte's) motion to intervene on  
9 the side of petitioners Oakleigh-McClure Neighbors *et al* (Neighbors), and  
10 intervenor-petitioner Simon Trautman's (Trautman's) motion to intervene on  
11 the side of Neighbors. *Oakleigh-McClure Neighbors v. City of Eugene*, \_\_ Or  
12 LUBA \_\_ (LUBA No. 2014-001, Order, May 1, 2014). In its response brief,  
13 Meadows renews its previous objection to Trautman's motion to intervene,  
14 arguing that Trautman's motion to intervene was not timely filed under ORS  
15 197.830(7), which requires that "[w]ithin 21 days after a notice of intent to  
16 appeal [NITA] has been filed with [LUBA]" a person who appeared before the  
17 local government may file a motion to intervene in the appeal. ORS  
18 197.830(7)(c) provides that failure to file a motion to intervene with LUBA  
19 within 21 days after the NITA is filed "shall result in denial of the motion to  
20 intervene."

21 Neighbors filed their NITA on January 3, 2014. Under ORS 197.830(7),  
22 the deadline for intervention in the appeal expired on January 24, 2014.  
23 Trautman filed his motion to intervene on March 11, 2014, 68 days after the  
24 NITA was filed. As we explained in our May 1 order, as required by OAR  
25 661-010-0015(2) and (3)(f)(D), on January 3, 2014, Neighbors served copies of  
26 the NITA on "[a]ny \* \* \* person to whom written notice of the land use

1 decision or limited land use decision was mailed as shown on the governing  
2 body's records."<sup>1</sup> However, after the NITA was filed, the city discovered that  
3 it had failed to mail notice of the decision to all persons who participated orally  
4 or in writing during the proceedings before the city, and on February 4, 2014,  
5 after the 21-day deadline for intervention had expired, the city subsequently  
6 provided a second mailed notice of the decision to the remaining persons  
7 entitled to notice of the decision. The city then presumably provided an  
8 updated list of "[a]ny \* \* \* person to whom written notice of the land use  
9 decision or limited land use decision was mailed as shown on the governing  
10 body's records" to Neighbors. Thereafter, on February 20, 2014, Neighbors  
11 provided a certificate of service to LUBA certifying that Neighbors served a  
12 copy of their NITA on additional persons whom the city identified as being  
13 mailed written notice of the decision on February 4, 2014, and who were thus  
14 entitled to be served with a copy of the NITA under OAR 661-010-0015(2) and  
15 (3)(f)(D). One of those additional persons was Trautman. On March 11, 2014,  
16 68 days after the notice of intent to appeal was filed, and 20 days after being  
17 served with a copy of the NITA, Trautman moved to intervene on the side of  
18 Neighbors in the appeal.

19 Trautman's late filing of his motion to intervene undoubtedly occurred  
20 because the city failed to initially mail notice of the decision to all persons who

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<sup>1</sup> ORS 197.830(9) requires the petitioner to serve copies of the NITA on the "the applicant of record, if any, in the \* \* \* proceeding." The requirement to serve copies of the NITA on "[a]ny \* \* \* person to whom written notice of the land use decision or limited land use decision was mailed as shown on the governing body's records" is entirely a requirement of LUBA's rules of procedure and has no counterpart in the statutes governing LUBA's review procedures.

1 participated orally or in writing during the proceedings, and thus provided  
2 inaccurate and incomplete information to Neighbors about who should be  
3 served with a copy of the NITA under OAR 661-010-0015(3)(f)(D).

4 In our May 1, 2014 order, we relied on our order in *Mountain West*  
5 *Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000), to  
6 conclude that we would not deny Trautman’s motion to intervene where the  
7 delay in filing the motion to intervene was attributable to the city’s failure to  
8 provide required notice of the decision to all parties entitled to notice and its  
9 corresponding failure to provide Neighbors with complete information for  
10 purposes of satisfying their service obligations under OAR 661-010-0015(2)  
11 and (3)(f)(D). In *Mountain West Investment*, the petitioner failed to serve a  
12 copy of the NITA on the applicant of record, as required by ORS 197.830(9)  
13 (and OAR 661-010-0015(2) and (3)(f)(C)). The applicant moved to intervene  
14 as soon as it became aware that the NITA was filed, and in fact, prior to being  
15 served with a copy of the NITA. With little discussion, we concluded that “in  
16 [that] circumstance we do not believe ORS 197.830(7) requires that the motion  
17 to intervene be denied.” *Id.*

18 On reconsideration of Trautman’s motion to intervene and Meadows’  
19 arguments, we conclude that ORS 197.830(7)(c) requires us to deny  
20 Trautman’s late-filed motion to intervene. Trautman failed to file his motion to  
21 intervene within 21 days after the NITA was filed, and in that circumstance  
22 ORS 197.830(7)(c) provides that such failure “shall result in a denial of the  
23 motion to intervene.” Even in the circumstances presented here, where the late  
24 filing occurred as a result of the city’s recordkeeping and mailing errors and  
25 where denying a late-filed motion to intervene in that circumstance is arguably  
26 inequitable, LUBA must strictly adhere to deadlines imposed by statute. *Lange-*

1 *Luttig v. City of Beaverton*, 38 Or LUBA 909, 910 (2000). To the extent  
 2 *Mountain West Investment* recognizes an exception to the statutory deadline for  
 3 intervention for a party who is the applicant of record and is not served with a  
 4 copy of the NITA as required by ORS 197.830(9) and LUBA’s rules, and  
 5 consequently files its motion beyond the 21-day deadline in ORS  
 6 197.830(7)(c), *Mountain West Investment* provides no basis for us to grant  
 7 Trautman’s late-filed motion to intervene.

8 Trautman’s motion to intervene is denied.<sup>2</sup>

## 9 **STANDING**

10 Meadows argues that petitioners Tammy Crofton, Karen Fleener-Gould  
 11 and Scott Fleener-Gould lack standing to appeal the challenged decision to  
 12 LUBA, because they participated only during the proceedings before the  
 13 hearings officer, and failed to participate in the proceedings on the appeal of  
 14 the hearings officer’s decision before the planning commission. According to  
 15 Meadows, their failure to participate in the local appeal means that those  
 16 petitioners failed to “exhaust” their administrative remedies as required by  
 17 ORS 197.825(2).<sup>3</sup>

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<sup>2</sup> Because we deny Trautman’s motion to intervene, we do not consider his petition for review, Meadow’s response brief in response to his petition for review, the reply brief, or Meadows accompanying motion to take evidence and the response to it.

<sup>3</sup> ORS 197.825(2) provides in relevant part:

“(2) The jurisdiction of the board:

“(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]”

1 Neighbors does not respond to Meadows' challenge to the three named  
2 petitioners, which presents a novel and complex issue regarding the meaning of  
3 the ORS 197.825(2) requirement that a petitioner must exhaust available  
4 administrative remedies. However, we conclude that we need not resolve that  
5 challenge. The petitioners whom Meadows challenges filed the same NITA as  
6 Neighbors and multiple other petitioners, all of whom filed the same petition  
7 for review and are represented by the same attorney. There is no indication that  
8 the challenged petitioners are presenting issues that are different from any of  
9 the other petitioners joining in the NITA and the appeal. Accordingly,  
10 resolving the issue would lengthen an already lengthy opinion and would have  
11 no bearing on our jurisdiction over the appeal, or the merits of the appeal, since  
12 there is no question that the other petitioners appeared before the planning  
13 commission. For those reasons, we decline to dismiss petitioners Tammy  
14 Crofton, Karen Fleener-Gould and Scott Fleener-Gould.

#### 15 **REPLY BRIEFS**

16 Neighbors and Conte each move for permission to file a reply brief to  
17 respond to new matters raised in the response briefs. The reply briefs are  
18 allowed.

#### 19 **FACTS**

20 Meadows applied for tentative planned unit development (PUD)  
21 approval for a 29-unit residential development on 2.3 acres of land zoned low  
22 density residential (R-1). The only access to the subject property is via  
23 Oakleigh Lane, an east/west street that runs from its western intersection with  
24 River Road approximately 850 feet to the subject property. The subject

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1 property is located adjacent and to the south of Oakleigh Lane, and is adjacent  
2 to a city park on the east, and single family dwellings and vacant land zoned  
3 residential on its north, west, and south. Oakleigh Lane terminates at  
4 approximately the mid-point of the northern boundary of the subject property.  
5 Existing Oakleigh Lane has a 19-foot wide unstriped, paved surface and lacks  
6 curbs and gutters, storm drainage, and sidewalks.

7 The PUD proposes seven buildings containing between two and five  
8 one- and two-story dwellings, for a total of 28 dwellings, and a two-story  
9 common building that also contains bedrooms and a kitchen, located in the  
10 center of the seven residential dwelling buildings. Buildings 1 and 2 are  
11 proposed to be located along the northern property boundary, and Building 1 is  
12 adjacent to Oakleigh Lane, while Building 2 is adjacent to a future proposed  
13 hammerhead turnaround at the end of Oakleigh Lane. The PUD proposes to  
14 locate on-site parking (garages and carports) and trash facilities along the  
15 western property boundary, and to screen those parking and trash facilities and  
16 the buildings containing dwellings that are located in the western and southern  
17 portions of the property with an 8-foot-tall concrete wall bordered by  
18 espaliered trees. Record 1036. A garden area is proposed for the southeastern  
19 boundary of the property.

20 As we discuss in more detail later in this opinion, the city required  
21 Meadows to dedicate a 22.5 foot strip of land for right of way purposes along  
22 Oakleigh Lane, and a 13 foot strip of land from the point at which Oakleigh  
23 Lane terminates on the property boundary to the eastern property boundary, to  
24 accommodate (1) a future hammerhead turnaround to connect to the adjoining  
25 property to the north, in the event it further develops, and (2) a bike and  
26 pedestrian path to connect to the adjacent park to the east of the property.

1 However, the city approved a temporary emergency hammerhead turnaround  
2 that is located entirely on the western portion of the subject property until the  
3 property to the north of the subject property is developed and the hammerhead  
4 turnaround can be built.

5 The hearings officer held a hearing on the application and approved it  
6 with conditions. Petitioners and others appealed the hearings officer's decision  
7 to the planning commission, and the planning commission affirmed the  
8 hearings officer's decision. This appeal followed.

### 9 **NEIGHBORS' FIRST ASSIGNMENT OF ERROR**

10 EC 9.8320(11)(a)(2009) requires the PUD to comply with density  
11 requirements for the R-1 zone that are set out in EC Table 9.2750.<sup>4</sup> Table  
12 9.2750 specifies a maximum net density of 14 units per acre. EC 9.2751(1)(b)  
13 defines "net density" to mean "the number of dwelling units per acre of land in  
14 actual residential use and reserved for the exclusive use of the residents in the  
15 development, such as common open space or recreation facilities." EC  
16 9.2751(1)(c)(1) further provides that "[t]he acreage of land considered part of  
17 the residential use shall exclude public and private streets and alleys, public  
18 parks, and other public facilities."

19 In their first assignment of error, we understand Neighbors to argue that  
20 the city's finding that the density requirement in EC Table 9.2750 is met is not

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<sup>4</sup> Ordinance 20521, which took effect on March 1, 2014, renumbered EC 9.8320 sections (10) through (16) to sections (9) through (15). Therefore, the numbering scheme in the on-line version of EC 9.8320 is not the numbering scheme that applied at the time the decision was rendered. For example, EC 9.8320(11)(a)(2009) is now numbered EC 9.8230(10)(a)(2014). The two provisions are identical aside from the numbering.

1 supported by substantial evidence in the record and is inadequate. ORS  
2 197.835(9)(a)(C); ORS 227.173(3).

3 **A. Motion to Strike/Waiver**

4 Neighbors include in Appendices 2 and 3 to the petition for review a  
5 number of documents that are not included in the record. The petition for  
6 review relies on those extra-record documents to support Neighbors' argument  
7 that the planning commission's decision that the PUD meets the net density  
8 requirements is not supported by substantial evidence in the record.

9 The city moves to strike the portions of Appendices 2 and 3 that are not  
10 included in the record, and any argument that relies on those appendices. The  
11 city also argues that an issue that Neighbors raise in their first assignment of  
12 error that alleges that the total acreage of the subject property is less than 2.3  
13 acres was not raised in the appeal statement to the planning commission, as  
14 required by Eugene Code (EC) 9.7655(3), and therefore Neighbors are  
15 precluded from raising that issue for the first time at LUBA.<sup>5</sup>

16 Neighbors do not really dispute that the documents included in  
17 Appendices 2 and 3 are not included in the record but respond that the  
18 documents are "based upon the actual record (with references included) and

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<sup>5</sup> EC 9.7655(3) provides that for an appeal of a hearings officer's decision:

"The appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how and hearings official or historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The basis of the appeal is limited to the issues raised during the review of the original application."

1 were compiled to assist the decision-maker with regard to detailed  
2 measurements and data that are critical to determine the accurate net density.”  
3 Neighbors’ Reply Brief 1.

4 LUBA’s review is limited to the record filed by the local government.  
5 ORS 197.835(2). Portions of the two appendices are not included in the  
6 record, and based on Neighbors’ reply, they appear to be offered for their  
7 evidentiary value. The city’s motion to strike the portions of Appendices 2 and  
8 3 not included in the record is granted. With regard to striking the portions of  
9 the petition for review that the city contends relies on those appendices, LUBA  
10 disregards any allegations of material fact that are not supported by the record.  
11 However, a lack of evidentiary support for arguments and factual allegations in  
12 a response brief is not a basis for striking those portions of the brief. *Hammack*  
13 *& Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff’d* 89 Or App  
14 40, 747 P2d 373 (1987).

15 Where EC 9.7655(3) requires that the issues to be raised in a local appeal  
16 must be stated in the notice of local appeal, those issues must be identified in  
17 the local notice of appeal or the issues are not preserved for review. *Miles v.*  
18 *City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003) (a party may not  
19 raise an issue at LUBA if no party specified the issue as a basis for appeal  
20 before the local appeal body). Neighbors do not respond to the city’s  
21 exhaustion waiver argument. We agree with the city that absent any showing  
22 that Neighbors raised the issue of the accuracy of the city’s calculation of the  
23 total acreage included in the subject property in their appeal statement to the  
24 planning commission, that issue may not be raised for the first time at LUBA.

1           **B.     The City’s Decision**

2           We understand Neighbors to argue that the city improperly construed EC  
3 9.2751(1)(b) and EC 9.2751(1)(c)(1) by including acreage that is encumbered  
4 by easements for sewer and water lines in calculating the net density of the  
5 development.<sup>6</sup> ORS 197.835(9)(a)(D). According to Neighbors, the easements  
6 are “other public facilities” that EC 9.2751(1)(c)(1) requires be excluded from  
7 the acreage that is considered part of the residential use, and are also not  
8 “reserved for the exclusive use of the residents in the development” and for that  
9 reason should not be included in the acreage of land considered part of the  
10 residential use.

11           The staff report calculated the net density of the proposed PUD by taking  
12 the total square feet included in 2.3 acres (102,808), and subtracting (1) the  
13 square footage of the right of way dedications being required (4,024) and (2)  
14 the square footage of the area encumbered by the sewer easement along the east  
15 property line (3,230), to conclude that the property contains 95,554 square feet  
16 of net area and an allowable density of 30 units per acre. Record 1007-08.

17           The hearings officer disagreed with the staff’s exclusion of the sewer  
18 easement area from the acreage of land considered part of the residential use,  
19 and concluded that areas encumbered by easements are not “other public  
20 facilities” that must be excluded from the calculation of net density within the  
21 meaning of EC 9.2751(1)(c)(1):

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<sup>6</sup> As far as we can tell, Meadows agreed to grant an easement to the Eugene Water and Electric Board (EWEB) for construction of a water line on the property, but that easement had not been granted at the time the decision was rendered.

1 “EC 9.2751(1)(c) sets forth areas that must be excluded from the  
2 net density calculation. Those exclusions include ‘public and  
3 private streets and alleys, public parks and other public facilities.’  
4 The neighbors assert that easements that might accommodate  
5 public facilities like water and sewer lines must be excluded. The  
6 applicant argues that easements are not the same as ‘public  
7 facilities’ and are not required to be excluded.

8 “The Hearings Official agrees with the applicant. EC  
9 9.2751(1)(c)(1) uses the specific language ‘public facilities.’ The  
10 provision does not include the word ‘easements.’ If the provision  
11 was intended to exclude easements it would so state. Adding that  
12 concept to the provision would violate ORS 174.010. Public  
13 facilities are not defined in EC 9.0500. However, ‘public facility  
14 projects’ are defined in the Metro Plan. Those definitions  
15 contemplate above ground physical structures such as water  
16 reservoirs, pump stations, and drainage or detention ponds. The  
17 Hearings Official has not been directed to information in the  
18 record that would necessitate removing the land area associated  
19 with easements where the infrastructure that utilizes the easement  
20 is below ground. Therefore, none of the easements identified by  
21 the opponents must be excluded from the net density calculation –  
22 including the sewer easement on the eastern boundary.” Record  
23 381.

24 The planning commission affirmed the hearings officer’s conclusion that EC  
25 9.2751(1)(c)(1) does not require the area encumbered by the sewer easement to  
26 be excluded, but also pointed out that staff excluded the sewer easement area  
27 and found that even without the sewer easement area the PUD still complies  
28 with the net density requirement of 14 units per acre. Record 14.

29 We understand Neighbors to rely on the definition of “net density” in EC  
30 9.2751(1)(b) to argue that the city erred in failing to exclude areas of the  
31 property that are encumbered by the sewer easement, because those areas  
32 encumbered by easements are not “in actual residential use and reserved for the  
33 exclusive use of the residents in the development[.]” Neighbors’ Petition for

1 Review 15-16. The city and Meadows (together respondents) respond that the  
2 hearings officer's interpretation of the relevant EC provisions is correct, and  
3 nothing in EC 9.2751(1)(c) or EC 9.2751(1)(b) supports Neighbors'  
4 interpretation that areas subject to an easement must be excluded from the  
5 calculation of net density.

6 We review the planning commission's interpretation to determine  
7 whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323  
8 (1988). We agree with respondents that the planning commission's  
9 interpretation of EC 9.2751(1)(b) and (1)(c) is correct and gives effect to the  
10 entire provision and each of its parts. The planning commission's interpretation  
11 is consistent with the express language of EC 9.2751(1)(c)(1), which does not  
12 include "easements" in the list of areas to be excluded. Neighbors' proffered  
13 interpretation, on the contrary, reads the phrase "reserved for the exclusive use  
14 of the residents in the development" in isolation without harmonizing the entire  
15 provision.

16 Neighbors' first assignment of error is denied.

17 **NEIGHBORS' SECOND AND THIRD ASSIGNMENTS OF**  
18 **ERROR/CONTE'S SECOND AND THIRD ASSIGNMENTS OF ERROR**

19 Neighbors' second and third assignments of error and Conte's second  
20 and third assignments of error challenge the city's decision that the PUD  
21 complies with EC 9.8320(3), (4)(b), (11)(a), (12) and (13). Neighbors' second  
22 and third assignments of error include a number of overlapping and poorly  
23 developed or undeveloped arguments. We address each assignment of error  
24 and each argument in each assignment of error below to the extent the  
25 assignment of error sets out a cognizable argument.

1           **A.     Setbacks (EC 9.8320(11)(a))**

2           EC 9.8320(11)(a)(2009) requires the PUD to comply with various  
3 development standards, including setbacks. EC Table 9.2750 specifies a  
4 minimum front yard setback for buildings of 10 feet from the property line, and  
5 a minimum interior yard setback for buildings of 5 feet from the property line.

6           Under the EC, an applicant for a PUD can request relief from compliance  
7 with applicable development standards, where the applicant shows that  
8 proposed noncompliance is consistent with the purposes of the PUD provisions  
9 set out in EC 9.8300, Purpose of Planned Development Standards.<sup>7</sup> EC

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<sup>7</sup> EC 9.8300 provides:

“Purpose of Planned Unit Development. The planned unit development (PUD) provisions are designed to provide a high degree of flexibility in the design of the site and the mix of land uses, potential environmental impacts, and are intended to:

- “(1) Create a sustainable environment that includes:
  - “(a) Shared use of services and facilities.
  - “(b) A compatible mix of land uses that encourage alternatives to the use of the automobile.
  - “(c) A variety of dwelling types that help meet the needs of all income groups in the community.
  - “(d) Preservation of existing natural resources and the opportunity to enhance habitat areas.
  - “(e) Clustering of residential dwellings to achieve energy and resource conservation while also achieving the planned density for the site.
- “(2) Create comprehensive site plans for` geographic areas of sufficient size to provide developments at least equal in

1 9.8320(11)(k)(2009). In its application, Meadows proposed noncompliance  
2 with the setback standards for the north, south, and west property lines and  
3 argued that the proposed noncompliance was consistent with EC 9.8300(1)(e),  
4 which specifically provides that the Planned Development provisions are  
5 intended to provide flexibility in designing the PUD and are intended to, in  
6 relevant part “create a sustainable environment that includes \* \* \* clustering of  
7 residential dwellings to achieve energy and resource conservation while also  
8 achieving planned density for a site.” See n 5. Along the north property line,  
9 for Building 1, rather than the 10 foot front yard setback that would apply,  
10 Meadows proposed setbacks that varied from 6” to 8 feet after 22.5 feet of the  
11 property is dedicated as right of way for future improvement and widening of  
12 Oakleigh Lane for 50 feet along the northern property boundary, and 13 feet of  
13 the property for a length of 117 feet is dedicated as a future hammerhead  
14 turnaround and sidewalk to enable development of the property to the north of  
15 the subject property.

16 For Building 2, Meadows proposed a setback of 12 feet from the  
17 property line, which would place the northwest corner of Building 2 within the  
18 setback after 13 feet is dedicated for right of way purposes for the future  
19 hammerhead turnaround. On appeal of the hearings officer’s decision, the  
20 planning commission imposed a condition of approval that requires a building  
21 setback of 5 feet (less than the 10 foot minimum setback) from the newly  
22 dedicated right of way boundary for Oakleigh Lane for a distance of 199 feet,

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quality to those that are achieved through the traditional lot  
by lot development and that are reasonably compatible with  
the surrounding area.”

1 and a 10 foot building setback along the remainder of the right of way  
2 boundary for the newly dedicated right of way for a bike/pedestrian path for a  
3 distance of 24 feet. Record 12.

4 For the west and south property lines, rather than the 5 foot setback that  
5 would apply to the concrete walls, garages, carports along the western  
6 boundary line and Building 6 along the south property line, Meadows proposed  
7 noncompliance with a zero setback. However, during the proceedings before  
8 the hearings officer, Meadows agreed to shift the concrete wall and buildings  
9 along the western and southern property line 5 feet to the east and north,  
10 respectively, to satisfy the applicable setbacks.

11 To summarize, when the dust settled on the planning commission's  
12 decision, all buildings and the concrete wall met the required minimum  
13 setbacks from the future post-dedication property lines, except that the  
14 planning commission included a condition of approval that allows a 5-foot  
15 setback from Oakleigh Lane for Buildings 1 and 2, and allows Building 6 to  
16 have a zero setback if a maintenance access easement is obtained from the  
17 adjacent property owner to the south. We understand the planning commission  
18 to have concluded, under EC 9.8320(11)(k)(2009), that the proposed  
19 noncompliance of a 5-foot setback for Buildings 1 and 2 and a zero setback for  
20 Building 6 is consistent with the purpose of the Planned Development  
21 Standards at EC 9.8300(1)(e).

22 In their second assignment of error, we understand Neighbors to argue  
23 that the buildings on the north property line and the south property line do not  
24 meet the required setbacks and that the city's findings are inadequate to explain  
25 why the city concluded that the proposed PUD meets the required setbacks.  
26 Neighbors also challenge the city's reliance on the PUD's proposal for

1 clustering the residential development on the property to justify “proposed  
2 noncompliance” with setback requirements as allowed under EC 9.8320(11)(k).

3 With regard to the north property line setbacks, petitioners argue:

4 “[T]he proposed conditions and modifications appear to permit the  
5 developer to build a condo without any setback at all once right of  
6 way is designated and/or is in conflict with other conditions  
7 imposed. A condo directly adjacent to a ROW does not satisfy the  
8 code requirements and the findings do not address the grave  
9 detrimental impacts to adjacent land owners, nor does it address  
10 the incompatibility with proposed bike/ped path to city park land,  
11 and are in conflict with the public interest mandating 10 foot  
12 setbacks \* \* \*.” Neighbors’ Petition for Review 19-20.

13 With regard to the South property line setbacks, petitioners argue:

14 “The record does not contain substantial evidence and the findings  
15 are inadequate to demonstrate that the South property line  
16 development complies with the required setback standards. \* \* \*  
17 Buildings 5 and 6 are within inches from the south property line at  
18 worst, and within 7’ at best and thus fail to comply with the 10’  
19 setback standards as well as the screening requirements. The fact  
20 that one of the developers \* \* \* currently owns the adjacent south  
21 property does not negate the setback requirements because of  
22 course property ownership can change in the future. \* \* \*”  
23 Neighbors’ Petition for Review 21-22.

24 Neighbors’ arguments reflect a couple of points of misunderstanding of the  
25 planning commission’s decision. First, the planning commission’s decision  
26 requires compliance with all setbacks except that it conditionally allows  
27 proposed noncompliance with setbacks for Buildings 1 and 2, which have a 5  
28 foot setback, and Building 6, which can be built with a zero setback only if an  
29 easement is obtained. Second, EC 9.8320(11)(k) and EC 9.8300 specifically  
30 allow proposed noncompliance with an otherwise applicable setback if the  
31 PUD meets the purpose of the planned development standards, one of which is  
32 to promote clustering of residential development while achieving the required

1 density. The planning commission found that the PUD meets the purpose of  
2 the planned development standards with reduced setbacks. Record 14, 392.  
3 Accordingly, the planning commission did not err in relying on the clustering  
4 aspect of the development to conditionally allow proposed noncompliance for  
5 Buildings 1, 2 and 6.

6 In their second assignment of error, Neighbors additionally include an  
7 argument that “there is no substantial evidence in the record demonstrating that  
8 construction of Building 2 without setbacks can meet the proposed condition”  
9 that requires Meadows to provide a report from an arborist that certifies that the  
10 construction of Building 2 where it is approved will not destroy cedars located  
11 on the adjacent property to the north of the subject property. Neighbors’  
12 Petition for Review 20; Record 409. Meadows responds that Neighbors failed  
13 to raise the issue in its appeal statement and having failed to do so, may not  
14 raise the issue in an appeal to LUBA. Neighbors responds with citations to  
15 pages in the record that contain “significant references to cedar trees \* \* \*:  
16 206, 207 [.]” Neighbors’ Reply Brief 3. Record 206-207 are two pages of the  
17 appeal statement, but the issue that is raised on those pages asserts that reliance  
18 on the cedar trees to meet the “adequate screening” requirement at EC  
19 9.8320(3), discussed below, is improper because the trees are not under  
20 Meadows’ control.

21 We agree with Meadows that the issue presented in Neighbors’ second  
22 assignment of error that argues that the effect of construction of Building 2  
23 with an approved 5-foot setback rather than the required 10-foot setback is not  
24 preserved under the doctrine of exhaustion waiver. However, even if the issue  
25 was preserved, the condition of approval imposed by the hearings officer  
26 requires Meadows to demonstrate that the cedars can survive construction

1 impacts of the development and include any necessary protection measures to  
 2 ensure their survival. Record 409. Those protection measures could include  
 3 moving Building 2 farther back than the approved 5-foot setback.  
 4 Accordingly, Neighbors’ argument provides no basis for reversal or remand of  
 5 the decision. This portion of the second assignment of error is denied.

6 **B. Adequate Screening (EC 9.8320(3))**

7 EC 9.8320(3) requires the city to find that “[t]he PUD will provide  
 8 adequate screening from surrounding properties including, but not limited to,  
 9 anticipated building locations, bulk, and height.”

10 **1. Eastern Boundary**

11 In portions of their second and third assignments of error, Neighbors  
 12 argue that the city erred in concluding that the PUD will provide adequate  
 13 screening from the park located to the east of the proposed PUD.<sup>8</sup> In order to  
 14 satisfy EC 9.8320(3) along the eastern property boundary, Meadows proposed  
 15 open space along the northern portion of the eastern property line and proposed  
 16 to rely on an existing filbert cluster and fruit trees along the southern portion of  
 17 the eastern property line for screening. The hearings officer concluded that  
 18 Meadows’ proposed screening on the east property line that essentially  
 19 maintained open space on the eastern portion of the property did not comply  
 20 with EC 9.8320(3). Record 360. The hearings officer imposed a condition of  
 21 approval that required Meadows to revise the final site plan prior to final PUD  
 22 approval to provide landscaping along the eastern property line. Record 410.

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<sup>8</sup> As noted, the petition for review is not well organized with respect to Neighbors’ challenges to the city’s decision that the screening requirement is met.

1           However, the planning commission found that Meadows’ proposal to  
2 “maintain open space for views and connectivity towards adjacent park  
3 property and natural areas along the river [was] preferable” to the hearings  
4 officer’s condition of approval requiring landscape screening, and eliminated  
5 that condition of approval requiring landscaping along the east boundary.  
6 Record 13. The planning commission relied in part on Meadows’ proposal to  
7 cluster buildings and found that the clustering of the buildings minimizes the  
8 overall impact of the density because it creates more open space than would  
9 otherwise be available.<sup>9</sup>

10           One of Neighbors’ arguments included in the second assignment of error  
11 is directed at the city’s finding that the proposed PUD meets the screening  
12 requirements at EC 9.8320(3) on the eastern boundary of the property.  
13 Neighbors’ Petition for Review 21. Additionally, a portion of Neighbors’ third  
14 assignment of error challenges the city’s conclusion that EC 9.8320(3) is met  
15 on the eastern property boundary. Neighbors’ Petition for Review 25.  
16 According to Neighbors, the planning commission misconstrued EC 9.8320(3)  
17 in concluding that open space provides “adequate screening” of the PUD from  
18 the adjacent park, and should have required the PUD to be screened from the  
19 view of the park with landscape screening.

20           EC 9.8320(3) requires “adequate screening from surrounding  
21 properties.” EC 9.0500 defines the word “screening” as “[a] method of visually  
22 shielding or obscuring an area through the use of fencing, walls, berms, or

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<sup>9</sup> We do not understand Meadows to have “proposed noncompliance” under EC 9.8320(11)(k)(2009) with the screening requirements for the eastern property boundary, or the planning commission to have approved proposed noncompliance for that boundary under EC 9.8320(11)(k)(2009).

1 densely-planted vegetation.” Given that definition, we agree with Neighbors  
2 that the planning commission’s conclusion that open space along the eastern  
3 boundary provides “adequate screening from” the adjacent park fails to give  
4 meaning to the word “screening,” where it does not require the PUD to be  
5 visually shielded or obscured from the adjacent park through any of the means  
6 specified in the definition. The planning commission appears to have relied on  
7 its conclusion that the proposed PUD is “reasonably compatible and  
8 harmonious with” the adjacent park under EC 9.8320(13)(2009) to conclude  
9 that no screening of the proposed PUD from the park is required. However, as  
10 Neighbors point out, EC 9.8320(3) is concerned with screening the proposed  
11 PUD *from* adjacent lands; it is not concerned with the views the PUD will have  
12 *of* adjacent lands. While open space along the eastern boundary may be  
13 compatible and harmonious with the adjacent park, open space does not screen  
14 the PUD from view from the park. Accordingly, a portion of Neighbors’  
15 second and third assignments of error are sustained.

## 16 **2. Northern, Western, and Southern Boundaries**

17 In portions of their second and third assignments of error, Neighbors  
18 challenge the planning commission’s conclusion that the PUD will be  
19 adequately screened from the surrounding properties to the north, west, and  
20 south. The planning commission concluded that, with conditions of approval  
21 requiring (1) landscaping along the northern property line in accordance with  
22 Meadows’ landscaping plan and outside of required setbacks, (2) vegetation as  
23 proposed along the concrete wall on the western property line, and (3)  
24 landscaping that satisfies the city’s High Screen Landscaping Standard along  
25 the south property line, screening along the north, west and south property lines  
26 is adequate to satisfy EC 9.8320(3). Record 12-13. Neighbors do not

1 challenge these findings or conditions or otherwise explain why the planning  
2 commission erred in concluding that EC 9.8320(3) is met with respect to the  
3 northern, western, and southern boundaries. Accordingly, these portions of  
4 Neighbors' second and third assignments of error are denied.

### 5 **3. Building Location and Bulk**

6 In a portion of their third assignment of error, Neighbors argue that the  
7 city failed to adopt findings that consider "building location \* \* \* and bulk" in  
8 determining whether the PUD is adequately screened from view from  
9 surrounding properties. Meadows responds by pointing to the city's findings  
10 that address building location and bulk and conclude that the scale of the  
11 buildings is within the range of large and small single family homes, and the  
12 proposed height is less than the maximum allowed. Record 401. Absent any  
13 challenge to those findings or any attempt to explain how the proposed PUD  
14 does not satisfy EC 9.8320(3) with regard to building location and bulk,  
15 Neighbors' arguments provide no basis for reversal or remand.

16 This portion of Neighbors' third assignment of error is denied.

### 17 **C. Compatibility with Adjacent and Nearby Land Uses (EC** 18 **9.8320(13))**

19 EC 9.8320(13)(2009) requires the city to find that "[t]he proposed  
20 development shall be reasonably compatible and harmonious with adjacent and  
21 nearby land uses." In their third assignment of error, Neighbors argue that the  
22 city's findings that the PUD is reasonably compatible and harmonious with  
23 adjacent and nearby land uses are inadequate and are not supported by  
24 substantial evidence in the record. Neighbors first challenge a finding in the  
25 hearings officer's decision that observes that if the hearings officer determines  
26 that the proposed PUD complies with all of the provisions of EC 9.8320, then a

1 finding of incompatibility would be “logically and legally indefensible.”  
2 Record 400. However, Neighbors fails to quote the hearings officer’s finding  
3 regarding EC 9.8320(13)(2009) in its entirety. While the hearings officer  
4 concluded that findings of compliance with all of the applicable provisions of  
5 EC 9.8320 would support a finding that the proposed PUD is reasonably  
6 compatible and harmonious with adjacent and nearby land uses, he also  
7 adopted additional findings that conclude:

8 “The Hearings Official is also persuaded that the proposed co-  
9 house will be compatible and harmonious for the following  
10 reasons: 1) the development will be at the end of the street where  
11 comparatively fewer property owners along Oakleigh Lane will be  
12 affected visually, 2) the scale of the buildings, as the applicant  
13 points out, are within the range of typical single family homes.  
14 The applicant states that the common house is similar in size to a  
15 large home and the other buildings are similar to smaller single  
16 family homes, 3) the proposed density is less than the maximum  
17 and the proposed height is less than the maximum height allowed,  
18 and 4) the proposed use is residential (as opposed to some  
19 conditional use allowed in the zone). \* \* \*” Record 401.

20 As Meadows points out, Neighbors do not acknowledge or challenge these  
21 findings. Accordingly, Neighbors’ challenge to the city’s conclusion that the  
22 proposed PUD satisfies EC 9.8320(13)(2009) provides no basis for reversal or  
23 remand of the decision. *See Protect Grand Island Farms v. Yamhill County*, 66  
24 Or LUBA 291, 295-96 (2012) (to demonstrate that a local government adopted  
25 a decision that is not supported by adequate findings, a petitioner should  
26 address and as necessary assign error to all independent findings adopted in  
27 support of a decision that a particular criterion is or is not satisfied).

28 In his third assignment of error, Conte argues that the hearings officer  
29 improperly construed EC 9.8320(13)(2009) with regard to the compatibility of

1 traffic generated by the PUD and challenges the city's findings regarding  
2 traffic impacts. The hearings officer found:

3 "As to arguments about traffic impacts, the Hearing Official  
4 adopts the findings for EC 9.8320(12) here by this reference.  
5 Evidence of a modest increase in total vehicle trips, where there is  
6 no evidence of associated traffic problems, is sufficient to  
7 demonstrate that the proposed PUD will be compatible with  
8 adjacent and nearby uses." Record 401.

9 Conte argues that the city's public works staff concluded that an increase in  
10 traffic would create unsafe conditions on Oakleigh Lane, and that the hearings  
11 officer's findings fail to explain how unsafe traffic conditions are harmonious  
12 and compatible with the adjacent land uses. Conte also faults the hearings  
13 officer for relying on the findings regarding a different criterion, EC  
14 9.8320(12), because according to Conte, the two criteria require different  
15 analyses.

16 We understand the hearings officer to have concluded, based on the  
17 evidence in the record from Meadows, the city's public works staff, and others,  
18 that the proposed PUD is reasonably compatible and harmonious with the  
19 adjacent and nearby land uses because the new traffic from the PUD will create  
20 only a modest increase in vehicle trips. Conte does not point to any evidence in  
21 the record that contradicts the hearings officer's conclusion that only a modest  
22 increase in vehicle trips will result from the PUD. A reasonable person could  
23 find based on the evidence in the record that where only a modest increase in  
24 vehicle trips is created by a PUD, the PUD is compatible with adjacent and  
25 nearby land uses, particularly given the inherently subjective nature of the  
26 criterion. *Olson v. City of Springfield*, 56 Or LUBA 229, 237 (2008).  
27 Moreover, the hearings officer's reliance on the same evidence that he relied on  
28 to find compliance with EC 9.8320(12) is not error, and is not particularly

1 unusual where the two criteria require evaluation of similar evidence. We  
 2 cannot say that the hearings officer's findings are inadequate or represent an  
 3 erroneous interpretation and application of EC 9.8320(13).

4 Finally, we also understand Neighbors to argue that the proposed PUD is  
 5 not reasonably compatible and harmonious with the use of the adjacent  
 6 property to the north, because the PUD could harm cedar trees located on that  
 7 property. Neighbors' Petition for Review 27-28. We reject the argument for  
 8 two reasons. First, it is insufficiently developed for review. *Deschutes*  
 9 *Development v. Deschutes County*, 5 Or LUBA 218 (1982). Second, the  
 10 argument fails to recognize or address a condition of approval imposed by the  
 11 decision that requires Meadows to demonstrate that the cedar trees can survive  
 12 the construction impacts and take any necessary protection measures to ensure  
 13 their survival. Record 409.

14 This portion of Neighbors third assignment of error and Conte's third  
 15 assignment of error is denied.

16 **D. Minimize Impacts to Significant Trees (EC 9.8320(4)(b))**

17 EC 9.8320(4)(b) requires the PUD to be "designed and sited to preserve  
 18 significant trees to the greatest degree attainable or feasible \* \* \*." In a portion  
 19 of their third assignment of error, Neighbors argue that the city erred in finding  
 20 that the proposed PUD satisfies EC 9.8320(4)(b) because Meadows proposes to  
 21 remove the four significant trees on the property. Neighbors' Petition for  
 22 Review 26-27.

23 Meadows responds that Neighbors are precluded from raising the issue  
 24 under *Miles* and ORS 197.825(2). Neighbors has not responded to Meadows'  
 25 exhaustion waiver argument. We agree with Meadows that Neighbors'

1 challenge to the city’s conclusion that the PUD satisfies EC 9.8320(4)(b) is not  
2 preserved for our review.

3 This portion of Neighbors’ third assignment of error is denied.

4 **E. Parking Area and Garbage Screening Standards (EC**  
5 **9.6420/9.6205)**

6 In their third assignment of error, Neighbors also argues that the garages  
7 and parking areas “violate EC 9.6420 (parking area standards) by permitting  
8 gravel surfacing, and EC 9.6205 regarding requirements for high screens and  
9 full screen fencing adjacent to recycling and garbage areas.” Neighbors’  
10 Petition for Review 26. Meadows responds that neighbors are precluded under  
11 *Miles* and ORS 197.825(2) from raising those issues. Neighbors has not  
12 responded to Meadows’ exhaustion waiver argument. We agree with Meadows  
13 that the issues are not preserved for our review.

14 **F. Minimal Off-Site Impacts (EC 9.8320(12))**

15 EC 9.8320(12) requires the city to determine that the PUD “shall have  
16 minimal off-site impacts, including impacts such as traffic, noise, stormwater  
17 runoff and environmental quality.” The hearings officer concluded that traffic  
18 impacts off-site would be minimal. The hearings officer relied on his  
19 conclusions, based on peak vehicle trip estimates and traffic projections  
20 provided by Meadows, that (1) a traffic impact analysis (TIA) is not required  
21 under EC 9.6870 because the PUD will not generate additional traffic above  
22 the threshold required for a TIA, and (2) no level of service deficiencies would  
23 occur based on new trips added to the area. The hearings officer rejected  
24 opponents’ arguments that the projected doubling of average daily trips over  
25 current levels traffic impacts would have more than minimal impacts off-site.  
26 Record 397-99.

1           In Conte's second assignment of error, we understand Conte to argue  
2 that the hearings officer's interpretation of EC 9.8320(12) misconstrues the  
3 provision and equates a finding of compliance with EC 9.8320(5), discussed  
4 below, with a finding of compliance with EC 9.8320(12). We also understand  
5 Conte to challenge the hearings officer's reliance on the same evidence that he  
6 relied on to conclude (1) that EC 9.8320(5) is met, (2) that a traffic impact  
7 analysis would not be required under EC 9.6870, and (2) that no level of  
8 service deficiencies would occur, and to challenge the hearings officer's failure  
9 to rely on other evidence introduced by opponents in determining that the PUD  
10 will have minimal impacts on traffic off-site.

11           Meadows responds, and we agree, that a reasonable person could find,  
12 based on the evidence in the record, that the PUD will have minimal impact on  
13 traffic off-site, particularly given the inherently subjective nature of the  
14 criterion. Moreover, the hearings officer's reliance on the same evidence that  
15 he relied on to find compliance with EC 9.8320(5) and that a TIA is not  
16 required is not error, and is not unusual where the two criteria require  
17 evaluation of similar evidence. We cannot say that the hearings officer's  
18 findings are inadequate or represent an erroneous interpretation and application  
19 of EC 9.8320(12).

20           This portion of Conte's second assignment of error is denied.

## 21           **G. Conclusion**

22           The portions of Neighbors' second and third assignments of error that  
23 challenge the city's finding that the eastern boundary of the PUD complies with  
24 EC 9.8320(3) because it provides adequate screening from the surrounding  
25 parkland to the east are sustained.

1 All other portions of Neighbors’ second and third assignments of error  
2 are denied.

3 Conte’s second and third assignments of error are denied.

4 **CONTE’S FIRST ASSIGNMENT OF ERROR/NEIGHBORS’ FOURTH**  
5 **ASSIGNMENT OF ERROR**

6 EC 9.8320(5) requires the city to find that “[t]he PUD provides safe and  
7 adequate transportation systems through compliance with the following:

8 “(a) EC 9.6800 through EC 9.6875 Standards for Streets, Alleys,  
9 and Other Public Ways (not subject to modifications set  
10 forth in subsection (11) below).

11 “(b) Pedestrian, bicycle and transit circulation, including related  
12 facilities, as needed among buildings and related uses on the  
13 development site, as well as to adjacent and nearby  
14 residential areas, transit stops, neighborhood activity  
15 centers, office parks, and industrial parks, provided the city  
16 makes findings to demonstrate consistency with  
17 constitutional requirements. ‘Nearby’ means uses within  
18 1/4 mile that can reasonably be expected to be used by  
19 pedestrians, and uses within 2 miles that can reasonably be  
20 expected to be used by bicyclists.

21 “(c) The provisions of the Traffic Impact Analysis Review of EC  
22 9.8650 through 9.8680 where applicable.”

23 As relevant here, EC 9.8320(6) requires the city to find that “[t]he PUD will  
24 not be a significant risk to public health and safety \* \* \* or an impediment to  
25 emergency response.” Conte’s first assignment of error and Neighbors’ fourth  
26 assignment of error challenge the city’s conclusion that the PUD meets EC  
27 9.8320(5) and (6).

28 **A. Motion to Strike**

29 The city moves to strike Exhibit A to Conte’s brief, arguing that Exhibit  
30 A is not included in the record. We agree that Exhibit A is not included in the

1 record. LUBA's review is limited to the record filed by the local government.  
 2 ORS 197.835(2). The city's motion to strike Exhibit A is granted.

3 **B. EC 9.8320(5)(a) and (b)/EC 9.8320(6)**

4 **1. Oakleigh Lane from River Road to the Subject Property**

5 In a portion of his first assignment of error, we understand Conte to  
 6 argue that the city improperly construed EC 9.8320(5)(a) in failing to require  
 7 Meadows to demonstrate that the entirety of Oakleigh Lane, from its  
 8 intersection with River Road to the subject property, "provides a safe and  
 9 adequate transportation system" and meets all standards under EC 9.6800  
 10 through 9.6875. Conte Petition for Review 10, 11, 13, 16-22, 29. First,  
 11 according to Conte, EC 9.8320(5) requires the entirety of Oakleigh Lane to  
 12 meet the standards in EC 9.8320(5)(a), (b) and (c) and requires Oakleigh  
 13 Lane's existing right of way to be widened and improved to 45 feet, consistent  
 14 with EC 9.6870.<sup>10</sup>

15 The planning commission found that compliance with EC 9.8320(5) is  
 16 demonstrated by compliance with subsections (a), (b), and (c), and that EC  
 17 9.8320(5) does not contain an independent requirement to determine whether a

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<sup>10</sup> EC 9.6870 provides:

"Street Width. Unless an alternative width is approved through use of other procedures in this code, the right-of-way width and paving width of streets and alleys dedicated shall conform to those designated on the adopted Street Right-of-Way map. \* \* \*"

Oakleigh Lane is a low volume residential local street and the street right of way map designates the right of way width between 45-55 feet.

1 PUD provides a “safe and adequate transportation system” beyond determining  
2 compliance with (a), (b), and (c). The planning commission also rejected  
3 Conte’s interpretation of EC 9.8320(5)(a) as requiring the entirety of Oakleigh  
4 Lane to meet existing right-of-way standards and be improved to city  
5 standards:

6 “[N]either EC 9.8320(5)(a) nor EC 9.6800 through 9.6875 require  
7 that an existing street must meet certain standards in order to  
8 serve a proposed development. EC 9.6870 only provides the  
9 required paving widths for certain types of streets when and if  
10 those streets are fully improved to City standards.” Record 8.

11 Respondents respond that the planning commission’s interpretation of  
12 EC 9.8320(5) is correct, and that nothing in the EC requires the entirety of  
13 Oakleigh Lane to meet the standards in EC 9.8320(5) in order for the PUD to  
14 be approved. We agree with respondents. The plain language of EC 9.8320(5)  
15 requires the city to determine that “the PUD” meets the standards in (a). It does  
16 not require “all streets serving the PUD” to meet the standards if those streets  
17 are not located within the PUD. In addition, the EC 9.6870 requirements for  
18 right of way widths apply to “dedicated” streets. It does not require Meadows  
19 to dedicate right of way on land that it does not own or to improve land it does  
20 not own.

21 In another portion of his first assignment of error, we understand Conte  
22 to argue that the city improperly construed EC 9.8320(5)(b) in failing to require  
23 Meadows to demonstrate that the entirety of Oakleigh Lane provides safe and  
24 adequate “pedestrian, bicycle and transit circulation.” Conte Petition for  
25 Review 22. According to Conte, there is evidence in the record that without  
26 widening Oakleigh Lane, pedestrian and bicycle traffic will not be safe.  
27 Conte Petition for Review 24.

1           The language of EC 9.8320(5)(b) does refer to lands beyond the PUD  
2 boundaries, and requires safe and adequate pedestrian, bicycle and transit  
3 circulation both within the PUD and “as well as to adjacent and nearby  
4 residential areas, transit stops \* \* \* provided the city makes findings to  
5 demonstrate consistency with constitutional requirements. \* \* \*” Thus while  
6 the city is not limited in its consideration of whether the PUD satisfies EC  
7 9.8320(5)(b) to on-site pedestrian and bicycle circulation, it is limited in its  
8 ability to remedy any deficiencies in off-site circulation and connectivity by the  
9 portion of the provision that requires the city “to demonstrate consistency with  
10 constitutional requirements.”

11           However, Conte is simply mistaken when he argues that the city failed to  
12 consider off-site circulation and connectivity for pedestrians and bicycles along  
13 the entirety of Oakleigh Lane. The city did consider off-site circulation and  
14 connectivity and concluded that the PUD meets EC 9.8320(5)(b):

15           “With regard to bicycles and pedestrians traveling westward on  
16 Oakleigh Lane toward transit services on River Road, referral  
17 comments from Public Works staff state that, for unimproved local  
18 streets in the River Road area (i.e., streets that lack sidewalks and  
19 have not been striped to identify dedicated travel lanes), the  
20 expectation is that pedestrians and bicyclists will share the paved  
21 surface with vehicles. Additionally, there is a tendency on dead  
22 end streets such as Oakleigh Lane, for motorists to travel at  
23 slower, more cautious speeds, because of the perceived  
24 narrowness of the street.

25           “Public works staff confirm that, until such time that property  
26 owners elect to improve Oakleigh Lane to full city standards  
27 (including sidewalks), the existing paved surface of Oakleigh Lane  
28 will continue to adequately provide for vehicle and pedestrian  
29 traffic, as well as for emergency vehicles and delivery services,  
30 provided the paved surface is not blocked by parked vehicles. \* \*  
31 \*

1 “Public Works staff states that the existing paved surface provides  
2 safe passage for two-way vehicular traffic, bicycles, pedestrians  
3 and emergency vehicles. As such, Public Works staff indicates  
4 that there is nothing to suggest that the impacts of the proposed  
5 development will result in unsafe conditions in Oakleigh Lane.”  
6 Record 372.

7 The planning commission also found that Oakleigh Lane from River Road to  
8 the subject property is presently safe and will be safe if the PUD is approved.  
9 Record 9.

10 In a portion of his first assignment of error, we also understand Conte to  
11 argue that the planning commission’s conclusion that Oakleigh Lane is  
12 presently safe and will be safe after the PUD is built is not supported by  
13 substantial evidence in the record. ORS 197.835(9)(a)(C). The hearings  
14 officer and planning commission relied on the evidence in the record, including  
15 evidence from Meadows and from the city’s public works staff, that Oakleigh  
16 Lane will provide safe and adequate transportation with the additional vehicle  
17 trips generated by the PUD. Record 9, 372, 1255-76. The planning  
18 commission understood the public works staff comments regarding the need for  
19 a 45-foot right of way for Oakleigh Lane to be limited to the portion of  
20 Oakleigh Lane within the proposed PUD and to address constitutional  
21 requirements for exacting a portion of Meadows’ property for widening of  
22 Oakleigh Lane on the subject property, and found that the comments do not  
23 provide evidence that Oakleigh Lane in its entirety is unsafe. Record 9-10, 15.

24 Conte reads the evidence supplied by the city’s public works staff  
25 differently than the planning commission did. Conte argues that the city’s  
26 public works staff took the position that the entirety of Oakleigh Lane must  
27 have a 45-foot wide right of way in order to be safe. Conte Petition for Review

1 29, 37-39. Respondents respond that the public works comments that Conte  
2 relies on in support of his argument do not say what he argues they say.<sup>11</sup>

3 We have reviewed the public works staff comments on the proposed  
4 PUD at Record 1255-76 and 1268-69 and we think the planning commission  
5 and respondents' description and understanding of the comments and the  
6 evidence provided in them regarding whether the PUD satisfies the applicable  
7 criteria is the accurate one. It is also evidence that a reasonable person would  
8 rely on in reaching a decision. *City of Portland v. Bureau of Labor and*  
9 *Industries*, 298 Or 104, 119, 690 P2d 475 (1984).

10 We also understand Conte to argue that the city improperly construed EC  
11 9.8320(6) because it failed to consider whether the "configuration of Oakleigh  
12 Lane" will be "a significant risk to public health and safety or \* \* \* be an  
13 impediment to emergency response." Conte Petition for Review 34. Meadows  
14 responds that Conte's argument misconstrues the plain language of EC  
15 9.8320(6) and impermissibly adds language to it. Meadows points out that EC  
16 9.8320(6) requires the city to determine whether "the PUD" is an impediment  
17 to emergency response, not whether "the configuration of Oakleigh Lane" or  
18 all off-site streets would be an impediment. Meadows also points to the city's  
19 findings that the PUD will not be a "significant risk to public \* \* \* safety \* \* \*  
20 or an impediment to emergency response" based on the future possible  
21 hammerhead turnaround and the condition of approval requiring a temporary

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<sup>11</sup> Conte concedes "[a]lthough the [public works staff] findings do not state explicitly that Oakleigh Lane would be unsafe after the PUD is developed unless all or most of Oakleigh Lane is also widened from the development site to River Road, such a statement is unnecessary for Conte's argument since no other reasonable conclusion can be drawn from the [public works staff] findings. \* \* \*" Conte Petition for Review 39.

1 emergency access easement on the temporary emergency turnaround on the  
2 property until the permanent hammerhead is developed. Record 375-76.

3 We agree with Meadows that the city properly understood the inquiry  
4 under EC 9.8320(6) to be limited to a determination of whether the PUD is an  
5 impediment to emergency response, and there is no basis in the express  
6 language of the provision to support Conte's argument that the city was  
7 required to consider whether "the configuration of Oakleigh Lane" off-site will  
8 be an impediment. We also agree with Meadows that the city's findings are  
9 adequate to explain why the city concluded that "the PUD is not a significant  
10 risk to public health and safety \* \* \* or an impediment to emergency response"  
11 based on the portion of Oakleigh Lane that is located on the subject property.

## 12 **2. Oakleigh Lane on the Subject Property**

### 13 **a. Right of Way Dedication**

14 The existing right of way of Oakleigh Lane is located entirely on the  
15 adjacent parcel to the north of the subject property, and is 20 feet. Conte  
16 argues that the city misconstrued EC 9.8320(5)(a) and EC 9.6870 by only  
17 requiring a dedication of 22.5 feet of the portion of Oakleigh Lane located on  
18 the subject property, because Oakleigh Lane's right of way, considering the 20  
19 foot right of way on the property to the north and the 22.5 feet on the subject  
20 property, will be only 42.5 feet, and not 45 feet and thus will not meet the  
21 minimum right of way for a low volume residential street under EC 9.6870.  
22 Conte Petition for Review 15-16. Respondents respond that constitutional  
23 limitations placed on the city by the Fifth Amendment to the U.S. Constitution  
24 allow the city to require dedication at most one-half of Oakleigh Lane. We  
25 agree with respondents that Conte has not demonstrated that EC 9.6870 or any

1 other authority allows the city to require Meadows to dedicate more than one-  
2 half of Oakleigh Lane.

3 **b. Future Street Improvements**

4 Conte argues that the city misconstrued EC 9.8320(11)(b) and  
5 9.6505(3)(b) in failing to require the portion of Oakleigh Lane located on the  
6 subject property to be improved (paved with curbs, gutters and sidewalks  
7 installed) to the paving width standards in EC 9.6870 upon construction of the  
8 PUD, and instead requiring Meadows to sign an irrevocable petition for public  
9 improvements and assessment for the improvements if and when the city  
10 initiates a local improvement process.<sup>12</sup> Conte Petition for Review 35-37.

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<sup>12</sup> EC 9.6505 provides in relevant part:

“Improvements - Specifications. All public improvements shall be designed and constructed in accordance with adopted plans and policies, the procedures specified in Chapter 7 of this code, and standards and specifications adopted pursuant to Chapter 7 of this code. Additionally, all developments shall make and be served by the following infrastructure improvements:

“(3) Streets and Alleys.

“\* \* \* \* \*

“(b) The developer shall pave streets and alleys adjacent to the development site to the width specified in EC 9.6870 Street Width, unless such streets and alleys are already paved to that width, provided the City makes findings to demonstrate consistency with constitutional requirements. All paving shall provide for drainage of all such streets and alleys, and construct curbs and gutters, sidewalks, street trees and street lights adjacent to the development site according to the Design Standards and Guidelines for

1 Respondents respond that EC 9.8360(5)(b), which applies to final PUD  
 2 approval, expressly allows deferral of public improvements beyond final PUD  
 3 approval where an irrevocable petition has been signed by the property owner  
 4 and accepted by the city, and the city imposed a condition of approval requiring  
 5 exactly that.<sup>13</sup> We agree with respondents that the city did not misconstrue EC  
 6 9.6505 in failing to require Oakleigh Lane to be improved before the PUD is  
 7 developed.

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Eugene Streets, Sidewalks, Bikeways and Accessways and standards and specifications adopted pursuant to Chapter 7 of this code and other adopted plans and policies.” (Underlining in original).

<sup>13</sup> EC 9.8360(5)(b) provides:

“Planned Unit Development, Final Plan Application Requirements. In addition to the provisions in EC 9.7010 Application Filing, the following specific requirements apply to PUD final plan applications:

“ \* \* \* \* \*

“(5) Public improvements as required by this land use code or as a condition of tentative plan approval have been completed, or:

“(a) A performance bond or suitable substitute as agreed upon by the city has been filed with the city finance officer in an amount sufficient to assure the completion of all required public improvements; or

“(b) A petition for public improvements and for the assessment of the real property for the improvements has been signed by the property owner seeking the subdivision, and the petition has been accepted by the city engineer.”



1 access standard if the applicant provides a street connection study that  
2 demonstrates

3 “a. [t]hat the proposed street system meets the intent of street  
4 connectivity provisions of this land use code as expressed in  
5 EC 9.6815(1) \* \* \* and

6 “b. How undeveloped or partially developed properties within a  
7 quarter mile can be adequately served by alternative street  
8 layouts.”

9 Meadows provided a street connection study that demonstrated how  
10 undeveloped properties on the east end of Oakleigh Lane, to the north, can be  
11 adequately served without a secondary access for fire and emergency vehicles,  
12 by constructing a hammerhead turnround at the east end of Oakleigh Lane that  
13 could provide access to the property to the north. The city concluded that the  
14 possibility of a hammerhead turnaround would satisfy the intent of EC  
15 9.6815(1) and demonstrated how the properties to the north could be  
16 adequately served, and granted the exception.

17 In their fourth assignment of error, Neighbors assert that the street  
18 connection study that shows a portion of the possible hammerhead turnaround  
19 on the property to the north is inconsistent with the city’s condition requiring a  
20 dedication of only 13 feet of right of way, and not 20 feet, in the area of the  
21 possible hammerhead turnaround, because the street connection study assumed  
22 a total 40-foot right of way. We understand Neighbors’ argument to take the  
23 position that the street connection study does not provide substantial evidence  
24 that an exception to the street connectivity standards is justified. ORS  
25 197.835(9)(a)(C). Neighbors also argue that the street connection study that  
26 reflects a portion of the possible hammerhead turnaround on the property to the

1 north is a taking of the property to the north without just compensation as  
2 required by the Fifth Amendment to the U.S. Constitution.

3 Respondents respond, and we agree, that the street connection study is  
4 substantial evidence in support of the city’s decision to grant an exception to  
5 the street connectivity standard at EC 9.6815(2)(d), and a reasonable person  
6 would rely on it to grant the exception. Respondents also respond, and we  
7 agree, that the street connection study’s depiction of the property to the north in  
8 the possible future hammerhead turnaround is not a taking of the property to  
9 the north and does not require the property to the north to dedicate any land.

### 10 C. EC 9.8320(5)(c) (TIA Requirements)

11 EC 9.8320(5)(c) requires the city to determine that “the PUD provides  
12 safe and adequate transportation systems through compliance with \* \* \* [t]he  
13 provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680  
14 where applicable and 9.8650 through 9.8680.” EC 9.8670 specifies the  
15 circumstances when a TIA is required, which include, as relevant here:

16 “Applicability. Traffic Impact Analysis Review is required when  
17 one of the conditions in subsections (1) – (4) of this section exist \*  
18 \* \*

19 “\* \* \* \* \*

20 “(2) The increased traffic resulting from the development will  
21 contribute to traffic problems in the area based on current  
22 accident rates, traffic volumes or speeds that warrant action  
23 under the city’s traffic calming program, and identified  
24 locations where pedestrian and/or bicyclist safety is a  
25 concern by the city that is documented. \* \* \*”

26 The hearings officer concluded that the increased traffic generated by the PUD  
27 will not contribute to traffic problems in the area, considering the factors set  
28 out in EC 9.8670(2). Record 374-75. The hearings officer relied on the

1 evidence in the record that demonstrated that the increase in peak vehicle trips  
2 is less than 100 trips, the evidence in the record demonstrating no current  
3 traffic problems, evidenced by accident rates, traffic volumes, or speeds, the  
4 lack of documented concern by the city regarding pedestrian or bicyclist safety,  
5 and the fact that that the level of service for roads and intersections in the  
6 immediate vicinity is adequate. The hearings officer additionally rejected  
7 opponents' arguments that traffic problems will result from the PUD:

8       “Although the Hearings Official understands the neighbors’  
9 concerns about increased numbers of vehicles using Oakleigh  
10 Lane, the strong assertion that an increase in ADT will result in  
11 traffic accidents or actual danger to pedestrians and bicyclists is  
12 not supported by evidence in the record. Assertion[s] [are] not  
13 evidence, and neither is an explanation of inductive reasoning.  
14 Therefore, the Hearings Official cannot substitute the neighbors’  
15 very strongly held opinions that more cars will necessarily  
16 decrease traffic safety for actual evidence. Anecdotal instances of  
17 unsafe traffic conditions are also not enough to trigger a TIA.

18       “ \* \* \* \* \*

19       “The Hearings Official has not been directed to evidence in the  
20 record that shows accident rates for Oakleigh Lane or at the  
21 intersection with River Road are a problem. Nor have other  
22 documented ‘problems’ with traffic volumes or speed been  
23 submitted by any party. Contrary to Mr. Conte’s assertion, Staff’s  
24 position that there are no traffic safety concerns associated with  
25 the proposal or Oakleigh Lane is some evidence that a TIA under  
26 EC 9.8670(2) is not necessary. Public works did a lengthy and  
27 thorough analysis of traffic conditions that is largely repeated in  
28 the staff report. Neither Mr. Conte nor any other party submitted  
29 evidence to the contrary, and that is what is required in order for  
30 Staff or the Hearings Official to determine that EC 9.8670(2)  
31 might be implicated by this application. \* \* \*” Record 374-75.

32       In a portion of the first assignment of error, we understand Conte to  
33 argue that the city’s conclusion that a TIA is not required under EC 9.8760(2)

1 is not supported by substantial evidence in the record. Conte Petition for  
2 Review 30-32. According to Conte, the city's public works staff's analysis  
3 provides substantial evidence of "a documented concern" about pedestrian and  
4 bicycle safety. However, similar to our conclusion above, we agree with  
5 respondents that the public works staff's comments simply do not say what  
6 Conte argues they say.<sup>14</sup> The city's conclusion that a TIA is not required  
7 under EC 9.8760(2) is supported by substantial evidence in the record. ORS  
8 197.835(9)(a)(C).

9 Conte's first assignment of error is denied. Neighbors' fourth  
10 assignment of error is denied.

11 The city's decision is remanded.

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<sup>14</sup> The city's public works staff's comments provide, in relevant part:

"The development and existing street system do not warrant review under [EC 9.8320(5)(c)], pursuant to the applicability criteria at EC 9.8670. The applicant notes that the development will generate roughly 15 pm peak hour trips, which is well below the 100 trip threshold of these standards. Further, staff has no concerns related to traffic safety issues or poor service levels which result from this development. \* \* \*" Record 1265.

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February 19, 2015

No. 61

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

OAKLEIGH-McCLURE NEIGHBORS;  
Bryn Thoms; Sandy Thoms; Tammy Crafton;  
Karen Fleener-Gould; Scott Fleener-Gould;  
Cecelia Baxter-Heintz; and Paul Baxter-Heintz,  
*Petitioners below,*

*and*

Paul CONTE  
and Simon Trautman,  
*Petitioners,*

*v.*

CITY OF EUGENE  
and Oakleigh Meadows Co-Housing, LLC,  
*Respondents.*

Land Use Board of Appeals  
2014001; A157756

Argued and submitted November 24, 2014.

William K. Kabeiseman argued the cause for petitioners.  
With him on the brief was Garvey Schubert Barer.

Anne C. Davies argued the cause for respondent City of  
Eugene. With her on the brief was City Attorney's Office.

Zack P. Mittge argued the cause for respondent Oakleigh  
Meadows Co-Housing, LLC. With him on the brief was  
Hutchinson, Cox, Coons, Orr, & Sherlock, P.C.

Before Armstrong, Presiding Judge, and Nakamoto,  
Judge, and Egan, Judge.

ARMSTRONG, P. J.

Reversed and remanded.

Cite as 269 Or App 176 (2015)

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**ARMSTRONG, P. J.**

Petitioners Paul Conte and Simon Trautman seek judicial review of a final order of the Land Use Board of Appeals (LUBA), affirming, in part, a decision by the City of Eugene (the city) to grant approval to Oakleigh Meadows Co-Housing, LLC (applicant) for a tentative planned unit development. In their first assignment of error on review, petitioners contend that LUBA erred in denying a motion by petitioner Trautman to intervene; they also raise two assignments of error as to the merits of LUBA's final order.<sup>1</sup> Because we agree with petitioners that LUBA erred in denying Trautman's motion to intervene, we reverse and remand LUBA's order on that basis. That disposition, in turn, obviates the need for us to address petitioners' other assignments of error.

We limit our discussion of the facts to those pertinent to our consideration of LUBA's denial of Trautman's motion to intervene. Those facts are undisputed. Applicant applied to the city for tentative planned unit development (PUD) approval for a multi-unit residential development on 2.3 acres of land zoned low-density residential. The city's hearings official held a hearing on the application. Trautman did not appear at the hearing but submitted written testimony in a letter opposing the development. The letter included an address on Oakleigh Lane, which is approximately 275 yards from the proposed development and is owned by Trautman's mother-in-law.<sup>2</sup> On November 12, 2013, the hearings official approved the application, subject

<sup>1</sup> Specifically, in their second assignment of error, petitioners contend that "LUBA Misconstrued the Requirements of [Eugene Code] 9.8320(5) and (6) and Failed to Enforce the Requirement for 'Safe and Adequate Transportation Systems' and to prevent a 'Significant Risk to Public Health and Safety.'" In their third assignment of error, petitioners contend that "LUBA Erred in Concluding that the City Had Imposed a Dedication for the Right-of-Way for the Portion of the Property Adjacent to the Proposed PUD that Satisfied the Requirements of [Eugene Code] 9.8320(5)(a)."

<sup>2</sup> In its brief on judicial review, applicant argues that Trautman did not identify his physical address in his letter testimony. However, the letter states, "We bought the residence at 109 Oakleigh Lane \*\*\*." Indeed, the city eventually mailed notice of the city's decision to Trautman at that address. Applicant also asserts that Trautman was not living at the Oakleigh Lane address at the time, but was in Idaho. We fail to see—nor does applicant explain—the relevance of that fact to our analysis of petitioners' assignment of error.

to conditions. Trautman did not receive notice of the hearings official's decision, as required under Eugene Code (EC) 9.7335(1)(d) and ORS 227.173(4).<sup>3</sup> Others appealed the hearings official's decision to the Eugene Planning Commission. The commission held a public hearing and, on December 16, 2013, issued a final order affirming approval of the PUD with some modifications. Again, the notice of decision was not sent to Trautman, as required by EC 9.7685(1)(d)<sup>4</sup> and ORS 227.173(4), nor did Trautman receive notice of the public hearing.

On January 3, 2014, an association of neighbors and several individuals opposed to the development (neighbors) timely filed a notice of intent to appeal (or NITA) the commission's final order to LUBA and served copies of the notice pursuant to OAR 661-010-0015(2). OAR 661-010-0015(2) requires that, on or before the date the notice of intent to appeal is required to be filed with the board, it "shall be served on \*\*\* all persons identified in the Notice as required by subsection (3)(f)." Subsection (3)(f), in turn, requires the notice of intent to appeal to identify, among others, "[a]ny other person to whom written notice of the land use decision or limited land use decision was mailed *as shown on the governing body's records.*" OAR 661-010-0015(3)(f)(D) (emphasis added). Trautman was not included among those served with neighbors' notice of intent to appeal.

Subsequently, the city discovered that it had failed to mail the notice of decision to everyone who had participated in the proceedings before the city, and, on February 4, 2014, the city mailed notice of the decision to the remaining people who were entitled to receive it, including Trautman.<sup>5</sup> In turn, on February 20, 2014, neighbors provided a certificate of service certifying that they had served a copy of their

<sup>3</sup> EC 9.7335(1)(d) provides that notice of a hearings official's decision must be mailed to "[a]ny group or individual who provided written or oral testimony prior to the close of the public comment period." ORS 227.173(4) provides that "[w]ritten notice of the approval or denial [of a permit application] shall be given to all parties to the proceeding."

<sup>4</sup> EC 9.7685(1)(d) provides that written notice of the planning commission's decision must be mailed to "[a]ny person who provided oral or written testimony in a timely manner during the hearing procedures."

<sup>5</sup> The city mailed the notice to Darian-Trautman at 109 Oakleigh Lane, the address provided in Trautman's testimony.

notice of intent to appeal on the additional parties whom the city had identified as having been mailed written notice of the decision (and who therefore were entitled to receive a copy under OAR 661-010-0015(3)(f)(D)), including Trautman. On March 11, 2014—within 21 days of being served with the notice of intent to appeal, but more than two months after the notice was filed with LUBA—Trautman moved to intervene on the side of neighbors in the appeal before LUBA.

Applicant opposed Trautman's motion to intervene on the ground that it was untimely under ORS 197.830(7), because it was filed more than 21 days after the notice of intent to appeal had been filed.<sup>6</sup> ORS 197.830(7) provides:

“(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person described in paragraph (b) of this subsection may intervene in and be made a party to the review proceeding by filing a motion to intervene and by paying a filing fee of \$100.

“(b) Persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

“(A) The applicant who initiated the action before the local government, special district or state agency; or

“(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

“(c) Failure to comply with the deadline or to pay the filing fee set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene.”<sup>7</sup>

LUBA initially allowed the motion to intervene, relying on its decision in *Mountain West Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000), in which it had granted a motion to intervene that was filed after the 21-day deadline specified in ORS 197.830(7)(a), where the late filing was attributable to the petitioner's failure to serve a copy of the notice of intent to appeal on the applicant intervenor.

<sup>6</sup> The city did not oppose Trautman's motion to intervene.

<sup>7</sup> Similarly, OAR 661-010-0050(2) provides that “[a] motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-010-0015[.]”

However, after applicant renewed its objection to Trautman's motion to intervene in its response brief, LUBA reconsidered its decision and, in its final order, denied Trautman's motion. LUBA found that "Trautman's late filing of his motion to intervene undoubtedly occurred because the city failed to initially mail notice of the decision to all persons who participated orally or in writing during the proceedings, and thus provided inaccurate and incomplete information to Neighbors about who should be served with a copy of the NITA under OAR 661-010-0015(3)(f)(D)." Nevertheless, LUBA concluded that ORS 197.830(7)(c) required it to deny Trautman's late-filed motion. As to *Mountain West Investment Corp.*, on which it had earlier relied, LUBA appeared to reason that, "[t]o the extent *Mountain West Investment* recognizes an exception to the statutory deadline for intervention," that exception is limited to a party who is the "applicant of record."

Petitioners now seek judicial review of LUBA's final order, first assigning error to LUBA's denial of the motion to intervene.<sup>8</sup> Petitioners challenge LUBA's construction of ORS 197.830(7), contending that it is "unlawful in substance." ORS 197.850(9)(a). We agree and, accordingly, reverse and remand.

Petitioners argue that LUBA incorrectly interpreted ORS 197.830(7) and that its ruling "is inconsistent with the policy governing LUBA review of land use decisions." In particular, they contend that the 21-day period for filing a motion to intervene under ORS 197.830(7) is triggered by a notice of intent to appeal under ORS 197.830(1) that is *properly filed*. And, petitioners assert, under OAR 661-010-0015(2), a properly filed notice of intent to appeal requires service of the notice on all parties who participated in the proceeding before the local government. Thus, it follows, in petitioners view, that, "[b]ecause the Notice of Intent to Appeal was not properly served on Mr. Trautman[] until February 20, 2014, the deadline for the motion to intervene was not triggered until that date." They further argue that

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<sup>8</sup> In its final order, LUBA largely affirmed the city, remanding on one assignment of error only; in their second and third assignments of error here, petitioners renew several of the assignments of error that were rejected by LUBA. As noted, we do not reach those assignments.

that understanding is consistent with other relevant context, as well as the legislative history of the statute's enactment. Finally, petitioners argue that "[t]o affirm LUBA's decision would allow a LUBA appellant to prevent the participation of anyone else by simply not serving the NITA on the other parties who participated in the local proceeding," an "absurd" result that is "contrary to sound principles of judicial review."

For its part, applicant responds that "LUBA does not err by applying an unambiguous provision of law in accordance with the plain meaning of its text."<sup>9</sup> According to applicant, ORS 197.830(7) "makes clear that the deadline for filing a Motion to Intervene runs from the date the Notice of Intent to Appeal is 'filed with the board' and not from the date of service of the Notice of Intent to Appeal on any parties," as petitioners assert. (Quoting ORS 197.830(7); bold-face in applicant's brief.) In its view, ORS 197.830(7)(a) and (c) "establish a 21-day period for filing a motion to intervene that runs from the filing of the notice of intent to appeal, and impose a jurisdictional consequence for filing after the deadline"—denial of the motion. Applicant also contends that the legislative history of the enactment of ORS 197.830(7)(c) supports its reading of the statute. Further, according to applicant, the policy concerns raised by petitioners are merely speculative, because "other petitioners were responsible for serving Intervenor-Petitioner Trautman, and not his adversaries," and, in any event, "it is not appropriate to weigh any policy considerations where, as here, the language of the statute is clear in its material respects."

We agree with petitioners' construction of the statute. ORS 197.830(7)(a) provides:

"Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section,<sup>[10]</sup> any person described in paragraph (b) of this subsection may intervene in and be made a party to the review

<sup>9</sup> We reject without discussion applicant's contention that petitioners did not preserve this assignment of error. As was the case before LUBA, the city takes no position on the issue raised by this assignment of error.

<sup>10</sup> Subsection (1) of ORS 197.830 provides that "[r]eview of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals."

proceeding by filing a motion to intervene and by paying a filing fee of \$100.”

Paragraph (b) of ORS 197.830(7), in turn, describes the persons who may intervene and be made a party to the review proceedings, including, as relevant here, “[p]ersons who appeared before the local government \*\*\*, orally or in writing.” ORS 197.830(7)(b)(B). Finally, paragraph (c) states that “[f]ailure to comply with the deadline \*\*\* set forth in paragraph (a) of this subsection *shall* result in denial of a motion to intervene.” (Emphasis added.) In applicant’s view, the plain text of paragraph (c) is thus dispositive: Because Trautman filed his motion to intervene more than 21 days after the notice of intent to appeal was filed, LUBA was required to deny it.

Although that interpretation is certainly reasonable on its face—see *Webster’s Third New Int’l Dictionary* 2085 (unabridged ed 2002) (defining “shall,” in part, as “used in laws, regulations, or directives to express what is mandatory”)—it fails to take into account the relevant statutory context. “We are not to determine the meaning of rules and statutes merely by analyzing their meanings in the abstract[.]” *Assoc. Unit Owners of Timbercrest Condo v. Warren*, 352 Or 583, 595, 288 P3d 859 (2012) (citing *Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997)). Rather, “[i]t is an elementary principle of statutory construction in this state that we examine the meaning of a phrase in its context.” *Suchi v. SAIF*, 238 Or App 48, 54, 241 P3d 1174 (2010), *rev den*, 350 Or 231 (2011) (citations omitted).

The context of a statutory provision includes, among other things, other parts of the same statute and other related statutes. *Jones v. General Motors Corp.*, 325 Or 404, 411, 939 P2d 608 (1997). The “same statute” can refer to the same chapter in which a provision has been codified. *E.g., Morsman v. City of Madras*, 203 Or App 546, 561-62, 126 P3d 6, *rev den*, 340 Or 483 (2006); see also *Pine Ridge Park v. Fugere*, 252 Or App 456, 461, 287 P3d 1268 (2012), *rev den*, 353 Or 280 (2013) (considering the provisions of ORS chapter 19 as relevant context for the interpretation of ORS 105.159(3), “even though the latter statute does not expressly refer to them”).

Under those principles, the context of ORS 197.830(7) includes ORS 197.820, which provides, as relevant:

“(1) The Land Use Board of Appeals shall conduct review proceedings upon petitions filed in the manner prescribed in ORS 197.830.

\*\*\*\*\*

“(4) The board shall adopt rules governing:

“(a) The conduct of review proceedings brought before it under ORS 197.830 to 197.845.”

ORS 197.820 thus requires LUBA (1) to conduct review proceedings on requests for review of land use decisions under ORS 197.830 and (2) to adopt rules governing the conduct of those proceedings. As mandated by subsection (4)(a), LUBA, in turn, adopted OAR 661-010-0015, which prescribes, among other things, requirements for the filing, service, and contents of the notice of intent to appeal under ORS 197.830. As to service, it provides, in part:

“The Notice shall be served on \*\*\* all persons identified in the Notice as required by subsection (3)(f) of this rule on or before the date the notice of intent to appeal is required to be filed.”

OAR 661-010-0015(2). Among the persons required to be identified in the notice is “[a]ny other person to whom written notice of the land use decision or limited land use decision was mailed as shown on the governing body’s records.” OAR 661-010-0015(3)(f)(D). The notice shall also contain “[p]roof of service upon all persons required to be named in the Notice.” OAR 661-010-0015(3)(i).

Given that statutory context, the following becomes clear. As applicant correctly observes, under ORS 197.830(7)(a), it is the *filing* of the notice of intent to appeal that triggers the 21-day deadline to intervene. However, under OAR 661-010-0015, a notice of intent to appeal is only effectively filed as to a person required to be identified in the notice when that person has been served with the notice. The persons required to be identified in the notice of intent to appeal are those who were mailed notice of the local government’s decision, OAR 661-010-0015(3)(f)(D), which includes those who appeared before the local government. *See* EC 9.7685(1)(d)

(set out at 269 Or App 179 n 4). In other words, understanding the statute and implementing rule together—that is, the text in context—the 21-day deadline triggered by the filing of a notice of intent to appeal encompasses service of the notice on the person seeking to intervene.<sup>11</sup>

We are not persuaded by applicant's arguments to the contrary. First, applicant contends that "a delay in service, under the statute, does not extend the deadline for filing a motion to intervene, any more that [*sic*] a delay in mailing notice of a final land use decision tolls the deadline for appealing that decision," citing *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 223, 939 P2d 625, *rev den*, 326 Or 59 (1997). *Wicks-Snodgrass*, however, is materially distinguishable.

In *Wicks-Snodgrass*, the question was whether LUBA had erroneously denied the city's motion to dismiss an appeal to LUBA for lack of jurisdiction, where the notice of intent to appeal the city's decision had not been filed within the time limit in ORS 197.830(8) (1997),<sup>12</sup> which required, "as a prerequisite to LUBA's jurisdiction, that a notice of intent to appeal to LUBA from a local land use decision 'be filed not later than 21 days after the date the decision sought to be reviewed becomes final.'" 148 Or App at 219. In deciding that question, we considered, and ultimately

<sup>11</sup> Petitioners also assert that other provisions of the land use scheme lend support to that reading of the statute, in particular, ORS 197.805 (providing that "[i]t is the policy of the Legislative Assembly that \*\*\* decisions [in matters involving land use] be made consistently with sound principles governing judicial review") and Goal One of the Statewide Land Use Planning Goals (requiring local governments to have "a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process"). We agree, to a point. See *DLCD v. Jackson County*, 151 Or App 210, 218, 948 P2d 731 (1997), *rev den*, 327 Or 620 (1998) ("Such expressions [of general policy] can serve as contextual guides to the meaning of particular provisions of the statutes or rules, as much as any other parts of the enactment can." (Emphasis in original.)). However, we are cautious not to place too much emphasis on statements of policy. See *Burke v. DLCD*, 352 Or 428, 441-42, 290 P3d 790 (2012) ("[A] statement of legislative findings, without more, is a slim reed on which to rest an argument that the operative provisions of a statute should be taken to mean something other than what they appear to suggest.").

<sup>12</sup> ORS 197.830(8) (1997) provided, in part, that "[a] notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." The statute has been amended several times since *Wicks-Snodgrass* was decided, and that provision is now included in ORS 197.830(9).

overruled, our earlier decision in *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986), in which we had held that an earlier version of the statute, ORS 197.830(7) (1985), must be read in conjunction with ORS 215.416(8) (1985), which required that written notice of the decision “be given to all parties to the proceeding.” *Wicks-Snodgrass*, 148 Or App at 220, 224.<sup>13</sup> In *League of Women Voters*, we had reasoned, in part, “We do not think that the legislature intended to permit the nonperformance or delayed performance of that duty [to give notice of the decision to all parties to the proceeding] to defeat the possibility of a timely appeal from a county’s land use decision.” 82 Or App at 679-80. We thus held that, “in all LUBA cases to which ORS 215.416(8) applies, the decision becomes final for purposes of appealing to LUBA under ORS 197.830(7) only after the prescribed written notice of the decision is mailed or delivered personally to the party seeking to appeal.” *Id.* at 681 (footnote omitted). In overruling *League of Women Voters* in *Wicks-Snodgrass*, we concluded that we had “given inappropriate weight to \*\*\* policy considerations rather than to the language of the statute that we were required to interpret” and incorrectly relied on the notice provisions of other statutes “as support for the proposition that the time for appealing a local decision is tolled beyond the time that ORS 197.830(8) clearly specifies.” *Wicks-Snodgrass*, 148 Or App at 223.

We note several salient differences here. First, and most significantly, applicant does not provide any support for the proposition that a motion to intervene, like the notice of intent to appeal at issue in *Wicks-Snodgrass*, is *jurisdictional*, and we are aware of none. At the time a motion to intervene is filed, LUBA necessarily has jurisdiction over the appeal pursuant to the timely filing of the notice of intent to appeal under ORS 197.830(1). *See* ORS 197.830(1) (“Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with [LUBA].”); ORS 197.830(9) (“A notice of intent to appeal a land use decision or limited

<sup>13</sup> Both ORS 197.830 and ORS 215.416 have been amended several times since *League of Women Voters* was decided.

land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final.”).

Second, the legislature has, in ORS 197.820(4)(a), specifically directed LUBA to adopt rules for the “conduct of” proceedings under ORS 197.830, which we did not consider in *Wicks-Snodgrass*. And, as noted, those rules require service of the notice of intent to appeal on persons to “whom written notice of the land use decision or limited land use decision was mailed,” OAR 661-010-0015(3)(f)(D), which, by virtue of EC 9.7685(1)(d), must include persons who appeared before the local government. Thus, *Wicks-Snodgrass* is not helpful.

Nor does the legislative history support applicant’s reading of the statute. ORS 197.830(7)(c) was enacted as part of House Bill (HB) 2502 (1997), which also imposed the 21-day deadline for filing a motion to intervene in an appeal before LUBA. Or Laws 1997, ch 187, § 1. Before that enactment, the statute allowed motions to intervene as long as they were filed “[w]ithin a reasonable time” after the notice of intent to appeal was filed. ORS 197.830(6)(a) (1995).<sup>14</sup>

As originally proposed, HB 2502 simply imposed the 21-day deadline; it did not include subsection (c). At a public hearing, the proponent of HB 2502 testified that the purpose of the bill was to establish a time limit for people to decide whether they wanted to intervene to avoid the successive raising of issues, which, in turn, would increase the incentive to mediate disputes before LUBA. Tape Recording, House Committee on Environment and Energy, HB 2502, Mar 17, 1997, Tape 36, Side A (statement of Rep Brian Johnston). At that hearing, Christine Cook, a staff attorney with 1000 Friends of Oregon, raised a concern that the 21-day deadline might be “flexibly enforced” by LUBA and suggested that, if it is intended to be a “hard and fast deadline,” the bill should make clear that “failure to comply with this deadline is not a technical violation but would preclude intervention by the parties seeking to do so.” *Id.* (statement of Christine Cook). In her written testimony before the committee, in which she made the same suggestion, Cook referred, as an example,

<sup>14</sup> At the time, the statute referred to a “petition for review” rather than a notice of intent to appeal.

to a case in which a motion to intervene was allowed, even though it was filed “four months after the notice of intent to appeal was filed, several days after the respondent’s brief was filed, and one week from oral argument.” Testimony, House Committee on Environment and Energy, HB 2502, Mar 17, 1997, Ex A (statement of Christine Cook). In support of her suggestion to amend the bill, she expressed concern that “[m]any deadlines in LUBA appeals are flexible” and commented that “[a] late intervenor can act as a spoiler in mediation proceedings, and can also significantly change the nature, number and intensity of legal arguments in a LUBA appeal, at a time when it is difficult for other parties to respond.” *Id.* The bill was eventually amended to include the requirement, now codified at ORS 197.830(7)(c), that “[f]ailure to comply with the deadline \*\*\* shall result in denial of a motion to intervene.” Thus, although the legislative history supports the notion that the legislature intended to establish a “hard and fast” deadline, it does not address the question raised here—*viz.*, the import of “filing” for the purpose of the commencement of that deadline in light of LUBA’s rules on service of a notice of intent to appeal.

We conclude that a notice of intent to appeal is effectively filed, for purposes of determining the timeliness of a motion to intervene under ORS 197.830(7) by a person required under OAR 661-010-0015(2) to be served with the notice, on the date of that service. Here, Trautman was among the persons required to be served with the notice of intent to appeal because he provided written testimony before the city. He was served with the notice on February 20, 2014. Thus, as to Trautman, the notice of intent to appeal was effectively filed on that date. Trautman filed his motion to intervene on March 11—within 21 days of February 20. Accordingly, it was timely, and LUBA erred in denying his motion.

Reversed and remanded.



BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

OAKLEIGH-MCCLURE NEIGHBORS,  
BRYN THOMS, SANDY THOMS, TAMMY CRAFTON,  
KAREN FLEENER-GOULD, SCOTT FLEENER-GOULD,  
CECELIA BAXTER-HEINTZ and PAUL BAXTER-HEINTZ,  
*Petitioners,*

and

PAUL CONTE and SIMON TRAUTMAN,  
*Intervenors-Petitioners,*

05/15/15 AM 8:17 LUBA

vs.

CITY OF EUGENE,  
*Respondent,*

and

OAKLEIGH MEADOWS CO-HOUSING, LLC,  
*Intervenor-Respondent.*

LUBA No. 2014-001

FINAL OPINION  
AND ORDER

Appeal on remand from the Court of Appeals.

Lauren C. Regan, Eugene, represented petitioners.

William K. Kabeiseman, Portland, represented intervenors-petitioners  
Paul Conte and Simon Trautman.

Anne C. Davies, Eugene, represented respondent.

Zack P. Mittge, Eugene, represented intervenor-respondent.

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

REMANDED 05/15/2015

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

## Opinion by Ryan.

1  
2 In *Oakleigh-McClure Neighbors v. City of Eugene*, \_\_\_ Or LUBA \_\_\_  
3 (LUBA No. 2014-001, August 21, 2014) (*Oakleigh I*), we remanded a decision  
4 by the city approving a tentative planned unit development application for the  
5 reasons set forth in our opinion. As relevant here, after intervenor-petitioner  
6 Simon Trautman (Trautman) filed his petition for review, we denied  
7 Trautman's motion to intervene because we determined that he had failed to  
8 file his motion within the deadline set out in ORS 197.830(7). Trautman  
9 appealed our decision to the Court of Appeals, and the Court of Appeals  
10 reversed our decision, concluding that Trautman's motion to intervene was  
11 timely filed under ORS 197.830(7). *Oakleigh-McClure Neighbors et al. v.*  
12 *City of Eugene*, 269 Or App 176, 188, 344 P3d 503 (2015) (*Oakleigh II*).  
13 Trautman's motion to intervene is therefore allowed.

14 After the Court of Appeals issued the appellate judgment on April 15,  
15 2015, Trautman and intervenor-petitioner Conte moved to allow additional  
16 briefing on the assignment of error raised in Trautman's petition for review that  
17 was filed on June 7, 2014, in order "to address the scope of the remanded  
18 decision before the [city] \* \* \* " and "to address the appropriate remedy for the  
19 city's failure to adequately provide notices of the hearings and notices to  
20 persons within the notice area." Motion to Allow Briefing on Remand Issue 1,  
21 2. We issued an order allowing petitioners, the city, and intervenor-respondent  
22 Oakleigh Meadows Co-Housing, LLC (Meadows) to respond to the motion.  
23 Petitioners support the motion for the same reasons that are set forth in the  
24 motion. Meadows objects to the motion, pointing out that ORS 197.850(11)  
25 requires LUBA to "respond to the court's appellate judgment within 30 days."

1 Meadows argues that additional briefing would cause further delay in  
2 contravention of ORS 197.850(11).

3 We conclude that we have already received adequate briefing from the  
4 parties on the issue presented in Trautman's petition for review and that  
5 additional briefing is not warranted. We now resolve the assignment of error in  
6 Trautman's petition for review.

## 7 **TRAUTMAN ASSIGNMENT OF ERROR**

### 8 **A. Motion to Take Evidence Not in the Record and Reply Brief**

9 In its response brief, Meadows moves to take evidence not in the record  
10 which, as we understand it, seeks to establish that Trautman was living in Idaho  
11 at the time his letter to the hearings officer found at Record 1308 was submitted  
12 into the record. In *Oakleigh II*, the Court of Appeals questioned the relevance  
13 of a similar argument by Meadows regarding whether Trautman was living in  
14 Idaho at the time his letter was submitted into the record. *Oakleigh II*, 269 Or  
15 App at 178 n 2. We also fail to see the relevance of Meadows' argument to  
16 Trautman's assignment of error. The motion to take evidence is denied.

17 Trautman filed a reply brief to respond to Meadows' response brief.  
18 The reply brief is allowed.

### 19 **B. Assignment of Error**

20 As we explained in *Oakleigh I*, the hearings officer's decision approved  
21 the application for a tentative planned unit development, and some of the  
22 petitioners appealed the hearings officer's decision to the planning  
23 commission. Prior to the initial hearings officer's decision, Trautman, along  
24 with his wife and mother-in-law, submitted a letter into the record opposing the  
25 application. Record 1308. The city did not provide notice of the hearings  
26 officer's decision to Trautman as required by Eugene Code (EC) 9.7335(1)(d),

1 which requires the city to provide notice of the hearings officer's decision to  
2 "[a]ny group or individual who provided written or oral testimony prior to the  
3 close of the public comment period[.]"<sup>1</sup> The city also did not provide notice of  
4 the planning commission appeal hearing to Trautman as required by EC  
5 9.7665(1)(e), which requires the city to provide written notice of the appeal  
6 hearing to "[a]ny person who submitted written comments in regards to the  
7 original application."

8 In his assignment of error, Trautman argues that the city's procedural  
9 errors in failing to provide the required notice of the hearings officer's decision  
10 and notice of the appeal hearing "meant that Trautman was not able to review  
11 the Hearings Official's decision and present contrary argument in the local  
12 appeal proceedings." Trautman Petition for Review 6. Citing *Johnson v.*  
13 *Jackson County*, 59 Or LUBA 94 (2009), we understand Trautman to argue  
14 that failure on the city's part deprived Trautman of his substantial rights to  
15 participate in the appeal hearing before the planning commission.

16 Meadows responds that Trautman failed to provide the city with a  
17 correct address for purposes of mailing notice of the decision and notice of the  
18 appeal hearing, and that Trautman lived in Idaho when both notices were sent,  
19 and for those reasons he has failed to establish that the city's failure to provide  
20 the required notices prejudiced his substantial rights. Meadows also contends  
21 that the city provided notices of the decision and appeal hearing to the attorney  
22 who is representing petitioners at LUBA and therefore satisfied its obligation  
23 to provide notice to Trautman.

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<sup>1</sup> ORS 227.173(4) requires "[w]ritten notice of the approval or denial shall be given to all parties to the proceeding."

1 In his reply brief, Trautman responds that his residency in Idaho is  
2 irrelevant in determining whether the city was obligated to provide him with  
3 notices of the decision and the appeal hearing. Trautman also responds that  
4 petitioners' attorney never represented him during the proceedings below.

5 As we explained above, like the Court of Appeals we fail to see the  
6 relevancy of Trautman's actual state of residence to whether the city committed  
7 a procedural error. In addition, we see no evidence in the record that  
8 petitioners' attorney represented Trautman during the proceedings before the  
9 city.

10 ORS 197.835(9)(a)(B) authorizes LUBA to remand for procedural errors  
11 that prejudice the substantial rights of the petitioner. We agree with Trautman  
12 that the city's failure to provide Trautman with notice of the hearings officer's  
13 decision and with notice of the appeal hearing prejudiced his right to  
14 participate in the planning commission hearing on the appeal of that hearings  
15 officer's decision. *See Muller v. Polk County*, 16 Or LUBA 771, 775 (1988)  
16 (“[u]nder ORS 197.835[(9) (a)(B)] the ‘substantial rights’ of parties that may  
17 be prejudiced by failure to observe applicable procedures are the rights to an  
18 adequate opportunity to prepare and submit their case and a full and fair  
19 hearing.”) Accordingly, remand is required.

20 The city's decision is remanded.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2014-001 on May 15, 2015, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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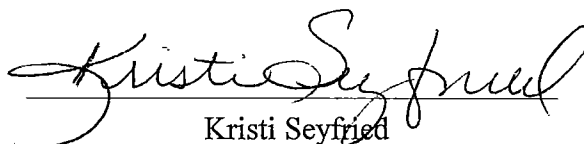
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Dated this 15th day of May, 2015.

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