

Appeal Testimony re PDT 13-1

July 27, 2015

Eugene Planning Commission
c/o Gabe Flock, Planner
City of Eugene
99 West 10th Avenue,
Eugene, OR 97401

Submitted by: Simon Trautman
Send notices to: 2303 C Street, Bellingham, WA 98225

Re: City File No. PDT 13-1; Oakleigh PUD
Opposition to Hearings Official Decision

Dear Commissioners:

The November 22, 2013 Appeal Statement ("Appeal Statement") for PDT 13-1 identified ten assignments of error. This letter provides further explanation of several errors that are enumerated in the Appeal Statement. Several of the Hearings Official's errors concerned the right-of-way and improvements (such as paving) for Oakleigh Lane.

To begin with, the Hearings Official erroneously claimed that the record contained no evidence of associated traffic problems. HO Decision, marked "D-3", at 55. Contrary to that misleading assertion, the truth is that I submitted concrete evidence into the record on September 1, 2013, including a photograph, of the accident in which I was injured at the intersection of Oakleigh Lane and River Road. PH-49.

My testimony provided an explanation of how that accident was directly related to existing street conditions that would leave drivers, pedestrians and cyclists at risk on Oakleigh Lane if twenty-nine new dwellings were added at the far end. My testimony here is based on a *first-hand* understanding of how critical it is that my neighbors and our kids not be endangered by more than doubling the traffic on Oakleigh Lane in its current condition.

I know it may be tempting for some commissioners to consider that these appeal issues were fully and properly addressed by the Eugene Planning Commission (EPC) in your appeal decision of December 16, 2013 (EPC Decision), and that you can breeze over my testimony without paying close attention.

That would be both unwise and a shirking of your responsibilities in this quasi-judicial proceeding.

If you will *carefully* follow what I present below, you should recognize that your original decision was based on incorrect facts and multiple misunderstandings of the issues and the law.

And, while LUBA affirmed the City's decisions on these issues, if you read the sections of LUBA's order that are related to the issues I discuss below, you'll find that the author of LUBA's decision did little more than quickly skim over the issues and parrot the City's flawed explanations.

It would be prudent for commissioners to take into account that LUBA's initial decision regarding the City's inadequate public process failed muster with the Court of Appeals, and so you shouldn't take for granted that you and LUBA got it right on the street-related issues, either. The Court of Appeals has demonstrated that they'll take the time to dig into the details more thoroughly than LUBA, and I'm confident a future Court of Appeals review would correctly find that the Hearings Official erred, regardless of what LUBA might decide on another appeal.

Summary of Testimony

- The Public Works report contains three statements that the Hearings Official and Planning Commission relied upon for findings regarding whether Oakleigh Lane in its current condition would be safe and adequate and meet the approval criteria in EC 9.8320(5), (6) and (11). These statements are inconsistent, and the Hearings Official neglected to adequately and properly explain how these inconsistencies were resolved, as required by the Oregon Supreme Court and the Oregon Court of Appeals.
- Approximately 6 feet of the paving on the 250-foot segment of Oakleigh Lane immediately to the west of the subject property lies outside the 20-foot public right-of-way and on private property. The Public Works Report, on which the Hearings Official relied, assumed a 19-foot wide, unobstructed pavement as the basis for the report's conclusion that Oakleigh Lane's existing pavement was adequate and safe.

The Hearings Official's findings did not explain how the decision would ensure that the entire 19-foot pavement width would remain available for public use and that cars wouldn't be legally parked on the pavement on private property and thus obstruct the pavement. Accordingly, all conclusions regarding the safety and adequacy of Oakleigh Lane that are based on a "19-foot pavement width" are not valid and cannot be relied upon.

- The only technical analysis in the record that actually dealt with the right-of-way width adjacent to the subject property concluded that a 45-foot right-of-way was necessary for the public safety and compliance with the approval criterion EC 9.8320(5)(a). The decision, however, ensures only a 42.5-foot wide right-of-way. The *Nolan/Dolan* limitations apply to exactions, but not to an approval criteria that requires an adequate right-of-way for the public safety. A condition that ensures a 45-foot right-of-way adjacent to the subject property must be added in order to approve the application.
- The Hearings Official misinterpreted and misapplied the approval criterion at EC 9.8320(5). This criterion must be interpreted in a way that ensures the PUD provides safe and adequate transportation systems for its residents, and the "traffic system" must

at least include safe and adequate facilities for vehicular connectivity from the PUD to the City's street network.

The subsections of EC 9.8320(5) cannot be interpreted in isolation from that overarching requirement, as the Hearings Official did. *Essential* components of an "adequate transportation system," such as Oakleigh Lane from the development site to River Road, must comply with the requirements of subsection EC 9.8320(5)(a), including compliance with the right-of-way and pavement width standards in EC 9.6870. To interpret EC 9.8320(5) otherwise would impermissibly omit what is included in the code and would lead to unreasonable results.

The analogy of a requirement to provide a safe and adequate wastewater system is used to illustrate the correct interpretation and application of EC 9.8320(5).

- Similarly, the Hearings Official misinterpreted and misapplied the requirements of EC 9.8320(11)(b) with respect to paving both the section of Oakleigh Lane adjacent to the subject property and for the rest of Oakleigh Lane. Both sections of Oakleigh Lane must have an unobstructed pavement, within the public right-of-way, as set forth in EC 9.6870.
- The Hearings Official misinterpreted and misapplied EC 9.8320(6) by basing his conclusions on the deficient Public Works analysis of paving width (see the second bullet, above) and by not evaluating whether the traffic arising from the PUD would present an "impediment" to emergency response. His interpretation that the land and structures of the PUD were the only things that could create an "impediment" was incorrect and would lead to absurd results if applied to other requirements of EC 9.8320(6), such as adverse health effects arising from air pollutants generated by the PUD.

The Hearings Official further neglected to evaluate whether the traffic arising from the PUD would create a risk to public safety on Oakleigh Lane, in other ways than as an impediment to emergency response.

- The Planning Commission must correct the findings to be in accord with the evidence and the law and either deny the application or add conditions of approval that are sufficient to ensure the application complies with EC 9.8320(5), EC 9.8320(6) and EC 9.8320(11).
- To preserve my appeal rights on a potential procedural error, should the Eugene Planning Commission allow the introduction of new evidence into the record by the applicant, City, a commissioner or any other party, I am requesting that the Planning Commission re-open the hearing to me and all other persons who testified in the original proceedings. Should new evidence be allowed and my request is denied, I am objecting to this as a procedural error that prejudices my substantial rights to participate in this appeal.

Further, I am objecting to the Eugene Planning Commission allowing the applicant to introduce any testimony into the record, other than argument in direct response to my

testimony, without re-opening the hearing to me and all other persons who testified in the original proceedings.

The elephant in the room – Conflicting Statements in the Public Works Report

Regardless of how the applicant or city staff wish to wriggle around the fundamental code requirements in EC 9.8320(5) and EC 9.8320(6) that PUD residents are provided a transportation system that is safe and adequate, the inescapable question that the Planning Commission has an obligation to answer is this:

Will Oakleigh Lane be safe and adequate once the PUD is developed?

You must base your answer on the correct interpretation of the law and reliable evidence that's in the record.

As most commissioners no doubt recall, the Hearings Official relied entirely on the Public Works Report for his findings regarding the safety and adequacy of Oakleigh Lane in its present condition.^{1,2}

¹ For example, the Hearings Official's findings for EC 9.6505(3) Streets and Alleys and (4) Sidewalks at D-3 37-38, include the statement:

"... the 19-foot wide pavement width provides safe passage for two-way traffic." This was copied from the Planning Division Staff Report dated September 25, 2014 at 23. The Planning Commission relied on this statement, as well, by incorporating it by reference into the appeal decision. EPC Decision at 5.

² Under EC 9.8320(5)(b), the Hearings Official also references a city standard, which is wholly irrelevant:

"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 referenced city standard is completely inapplicable to the conditions on Oakleigh Lane and provides no probative evidence regarding EC 9.8320(5)(b). The Hearings Official apparently did not realize that the cited standard makes clear that the street must be designed and striped for a single traffic lane and at least one parking lane:

"The single traffic lane is intended to create a 'queuing street', such that when opposing vehicles meet, one of the vehicles must yield by pulling into a vacant portion of the adjacent parking lane." PT-4, Attachment B "Design Standards for and Guidelines for Eugene Streets, Sidewalks, Bikeways and Accessways," page 36.

The cited standard also says nothing about a "queuing street" that does not have sidewalks and therefore forces pedestrians to walk in the street. Oakleigh Lane clearly does not meet the standards for a "queuing street," and thus the "queuing effect" cannot be relevant to this case unless the Planning Commission imposes adequate conditions of approval for the entirety of Oakleigh Lane to have the necessary right-of-way, striped lanes, and sidewalks to meet the standards necessary for a safe and adequate "queuing street."

The applicant's attorney also claimed in his LUBA brief (provided on the attached CD, and incorporated herein) that "licensed professional traffic engineer Mike Weishar, with Access Engineering, concurred that the development would not "reduce safety or service levels in the area." However, the entire content related to traffic safety that's found in the September 27, 2013 letter from Access Engineering (Exhibit PT-17) states: "I concur with staff findings that this development will not require further traffic analysis or reduce safety or service levels in the area."

This is nothing more than a conclusory statement, with no supporting evidence or analysis, which cannot be relied upon for findings. The letter doesn't even reference anything in the record in support of the conclusion that the development will not reduce safety or service levels in the area. The letter also does not address the critical fact that at least six feet of the 19-foot-wide paving is on private property.

Specifically, the report contains statements under three different sections:

Under subsection (a) of EC 9.8320(5), the report provided its most extensive analysis and found that the EC 9.8320(5) requirement that the PUD provide a “safe and adequate transportation system” could not be met unless Oakleigh Lane had a 45-foot right-of-way:

“Without the additional right-of-way, Oakleigh Lane cannot be improved to the City’s minimum street design standards³ and the 168 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.” PH-30 at 3. (Emphasis added.)

Under subsection (c) of EC 9.8320(5), the report presented an inconsistent, conclusory statement, without any supporting analysis, as the basis for not requiring a Traffic Impact Analysis:

“Further, staff has no concerns related to traffic safety issues or poor service levels which will result from this development.” PH-30 at 11.

And finally, under subsection (b) of EC 9.8320(11), the report stated a conditional finding that a 19-foot wide paving width would be safe – but only if it were ensured that the paving wasn’t obstructed by parked vehicles:

“Oakleigh Lane has an approximate 19 foot wide paved surface, but has not been improved to city standards, lacking curbs and gutters, storm drainage, sidewalks, and street trees. As is typical for unimproved local streets in the River Road area, i.e., those streets which do not have paving, curb & gutter and sidewalks or which 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 for motorists to travel at slower, more cautious speeds, because of the perceived narrowness of the street. Until such time that property owners elect to improve Oakleigh Lane to full City standards, including sidewalks, the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles. Since the existing paved surface provides safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles, and since there is nothing to suggest that the impacts of the proposed development will result in unsafe conditions in

The Hearings Official cannot rely on mere conclusory statements, even by experts, when opponents have offered a detailed explanation, consistent with City traffic engineering staff’s specific analysis, for why Oakleigh Lane would not be able to safely and efficiently accommodate the increased traffic under its current configuration and conditions.

“While the hearing official is entitled to rely on the expert opinion of the county sanitarian, where opponents have offered a detailed explanation for why the subject property may not be able to accommodate the required expansion and replacement drainfield, we agree that more than an unexplained expression of belief that it will be possible is required. *Bartels v. City of Portland*, 20 Or LUBA 303, 308 (1990).” See also *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

³ The City’s minimum street standards require at least a 45-foot right-of-way.

Oakleigh Lane, it is appropriate to defer public improvements via an irrevocable petition.” PH-30 at 14. (Emphasis added)

As discussed at more length below, the Hearings Official’s decision (and the Planning Commission’s prior decision) never addressed the obvious inconsistency between the conclusory expression of “no concerns related to traffic safety” under the TIA subsection and the conflicting findings that were based on the extensive analysis of what would be required for a “safe” transportation system, i.e., that unless Oakleigh Lane could “be improved to the City’s minimum street design standards,” PUD residents “will not be assured of safe access via Oakleigh Lane.”

Similarly, the Hearings Official’s decision (and the Planning Commission’s prior decision) never addressed the inconsistency between the report’s findings under the “safe transportation system” requirement of EC 9.8320(5) and those under the paving requirements of EC 9.8320(11)(b).

Instead, both the Hearings Official and the Planning Commission tried to put a wall around the EC 9.8320(5) findings and dismiss those findings as having no relevance to the overall safety and adequacy of the only street serving the PUD. In both decisions it almost appears as if the findings regarding the segment at the end of Oakleigh Lane, adjacent to the subject site, apply to an entirely different street than the 870 feet of Oakleigh Lane between the subject site and River Road.

There are two ways in which the decisions attempt to avoid dealing with the city engineering staff’s findings that PUD residents would be “at risk” unless Oakleigh Lane had a 45-foot right-of-way and adequate paving.

First, without ever directly claiming that the *Dolan* constraints on exactions actually prevented the City from requiring that Oakleigh Lane have a 45-foot right-of-way, the two decisions repeatedly cite the *Dolan* limitations within the same text where the decisions claim that the Public Works analysis under EC 9.8320(5) doesn’t apply to most of Oakleigh Lane. The short answer on this issue is: *Dolan* does not prevent the City from requiring that some or all of Oakleigh Lane have a 45-foot right-of-way.

LUBA has made clear that *Dolan* does *not* apply to conditions of approval that aren’t exactions:

“Aside from the requirement under *Dolan v. City of Tigard* for an ‘individualized determination’ justifying a condition of approval imposing an exaction, there is no generally applicable requirement that conditions of land use approval be supported by findings that justify imposing the condition.” *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

The second way the two decisions attempt to dismiss the analysis under EC 9.8320(5) is to regurgitate the staff’s demonstrably false statement that the Public Works analysis under EC 9.8320(5) concerns only “future needs” and isn’t at all related to impacts arising from the PUD:

“... [the] right-of-way dedication and an Irrevocable Petition are being required to enable future public improvements.” Staff findings in D-3 at 50, incorporated by the Hearings Official at 51.

“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.” EPC Decision at 4.

The applicant’s attorney and City Attorney have repeated this specious claim that the Public Works analysis under EC 9.8320(5) wasn’t really specific to the impacts of the proposed development, but rather was just a standard practice in order to acquire right-of-way whenever new development occurred on a substandard street.

The applicant’s attorney stated:

“As the City found, the half-street dedication was required to meet future transportation needs, and not to address immediate safety concerns.” *Oakleigh Meadows Cohousing Answering Brief*, dated, October 22, 2014 at 27. (Provided in attached CD.)

“... the City did not determine that that [sic] a 45-foot right-of-way was necessary for safety.” *Ibid* at 29.

The City Attorney stated:

“We need this dedication for future. And the safety issues that came up regarding that dedication were for future, um, not safety issues now. The City Public Works Department never said that we think Oakleigh is unsafe unless you improve it at this time.” LUBA oral arguments audio recording at 31:36. (The audio recording that is provided on the accompanying CD is incorporated herein.)

Such claims are easily exposed as untrue by simply re-reading what the Public Works Report actually states:

“Without the additional right-of-way, Oakleigh Lane cannot be improved to the City’s minimum street design standards⁴ and the 168 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. PH-30 at 3. (Emphasis added)

The analysis *specifically* refers to the “new vehicle trips ... generated by the proposed development ... [which] will not be assured of safe access.” The applicant’s attorney and City Attorney should not attempt any further to disassociate the city’s own technical staff’s analysis from the potential traffic impacts of the proposed PUD.

This time around, the Planning Commission must not avoid resolving the inconsistencies in the Public Works Report. The sections below will make clear that the findings under EC 9.8320(5) reflect the only reliable analysis and the conclusions under EC 9.8320(5) must be applied to the entire length of Oakleigh Lane.

⁴ The City’s minimum street standards require at least a 45-foot right-of-way.

The City cannot continue to clap its hands over its eyes and attempt to pick-and-choose where it will apply the evidence provided by its own traffic engineering staff's technical analysis. Accordingly, the Planning Commission must *explain* how its decision resolves the three statements above and how its decision is based on reliable evidence in the record.

As the Supreme Court noted some time ago:

"We wish to make it clear that by insisting on adequate findings of fact we are not simply imposing legalistic notions of proper form, or setting an empty exercise for local governments to follow. No particular form is required, and no magic words need be employed. What is needed for adequate judicial review is a clear statement of what, specifically, the decision making body believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based. Conclusions are not sufficient." *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977); see also *Martin v. Board of Parole*, 327 Or 147, 157, 957 P2d 1210 (1998). (Emphasis added)

The Oregon Court of Appeals has also made clear that local governments must *specifically* articulate their findings and explain how the evidence factored into their decisions. *1000 Fiends of Oregon v. Metro*, 174 Or App 406, 410, 26 Pad 151 (2001). Neither the Hearings Official nor the Planning Commission provided the required explanations in their previous decisions, choosing instead to accept staff's false claim that the analysis under EC 9.8320(5) had no relationship to the PUD's projected traffic impacts.

The Second Elephant in the Room – Oakleigh Lane Does Not Have a Public 19-Foot Wide Pavement.

The Hearings Official and Planning Commission decisions relied most heavily on the Public Works Report's findings under EC 9.8320(11)(b), which stated a conditional finding that a 19-foot wide paving width would be safe – but only if were ensured that Oakleigh Lane wasn't obstructed by parked vehicles.

As it turns out, an extensive segment of the Oakleigh Lane right-of-way doesn't actually contain a 19-foot wide pavement, and the Public Works Report conclusion that Oakleigh Lane would be safe in its current configuration didn't take that deficiency into account.⁵

The complete excerpt from the Public Works Report is provided above, but the salient text is:

"Oakleigh Lane has an approximate 19 foot wide paved surface, ... the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles. Since the existing paved surface provides safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles, and since there is nothing to suggest that the impacts of the proposed development will

⁵ The inadequate paving width and the erroneous finding that Oakleigh Lane was safe and adequate, based on a 19-foot paving width, were raised under the Appeal Statement's Second, Third, Fourth and Tenth Assignments of Error.

result in unsafe conditions in Oakleigh Lane, it is appropriate to defer public improvements via an irrevocable petition.” PH-30 at 14. (Emphasis added)

Note well that this conclusion depends entirely on the assertion that a 19-foot wide, “existing” paved surface – *that is unobstructed* – will “provide[] safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles.”

The Public Works report provides no analysis at all of a paved surface that is less than 19-feet wide or that is sometimes obstructed by parked vehicles.

As I discuss later, there are multiple problems with the Hearings Official’s reliance on this statement, but the most glaring is that the evidence makes clear that a 250-foot long segment of the Oakleigh Lane public right-of-way does not contain anywhere near a 19-foot wide paved surface.

The Oregon Map aerial view provided in the October 9, 2013 testimony by Paul Conte (PT-4 Attachment C, and provided as Attachment A to this testimony.⁶) clearly shows that almost half the width of the paved surface at the end of Oakleigh Lane lies *outside* the public right-of-way and on the private property of the development site and the three lots immediately to the west (lots 10100, 5800 and 5900)⁷. Here is an excerpt from that map:



Figure 1. Color excerpt from PT-4 Attachment C

⁶ Also see PH-53, City posted notice with outline of rights-of-way. Also see PH-1.B, City provided Oregon Map with requested right-of-way dedications.

⁷ These three lots have the following frontages, as documented in the attachments to the October 15, 2013 letter from Poage Engineering and Surveying, Inc. PT.R-4. Lot 5800 22.27 feet, Lot 5900 125 feet, Lot 10100 102.73 feet. The total is also documented in this letter:

“The result of these cumulative road dedications is to establish a right of way width of 32 feet for Oakleigh Lane beginning at the east margin of River Road and extending easterly approximately 630 feet to a point approximately 250 feet westerly of your western boundary. From this point easterly, and along the entire frontage of your property abutting Oakleigh Lane, the right of way remains 20 feet in width.”

The Hearings Official himself documented this fact with respect to the development site:

“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.” D-3 at 18.

“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.” D-3 at 19. (Emphasis added)

As can be seen on the Oregon Map, the edge of the paving continues in nearly a straight line across the subject property and continues straight across the three properties on the west. It’s therefore incontestable that at least six feet, more-or-less, of the paved surface is outside the public right-of-way. There is no evidence in the record to the contrary.

As a consequence, the paving on the public right-of-way along this long stretch can only be assumed to be, at best, about thirteen feet wide – *not the 19 feet assumed by the Public Works analysis*.

There is no evidence in the record that the unpaved portion of the 20-foot right-of-way will be paved to provide a paving width of 19’ or greater wholly within the public right-of-way. There is no evidence in the record that, as a matter of law, vehicles can and will be ensured permanent, unobstructed use of the paving that’s on private property and not in the right-of-way. And there is no evidence in the record that the City can, and will, prevent cars from parking on the paving that’s on private property and not in the right-of-way, and thereby obstruct the pavement.

The Hearings Official neglected to include in any finding the critical fact that along this 250-foot long segment of Oakleigh Lane, there is only a 13-foot wide strip of pavement that is in the public right-of-way and of which the public’s use can be ensured.

The Public Works Report didn’t document this deficiency. The report didn’t analyze the adequacy and safety of a 13-foot wide pavement (or any width less than 19 feet); and the report does not include any finding that a *13-foot wide* “paved surface [would] provide[] safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles.” The report also didn’t address at all any remedies that would ensure at least a 19-foot wide, unobstructed pavement within the right-of-way for the entirety of Oakleigh Lane.

With the true condition of the pavement on Oakleigh Lane now brought to the commissioners’ attention, the Planning Commission has no choice but to adopt a finding documenting the 250-foot segment of Oakleigh Lane that has no more than an approximately 13-foot wide paved strip within the public right-of-way.

Based on that finding, the Planning Commission must also find that the Public Works Report’s conclusions regarding the safety of Oakleigh Lane are based on the erroneous assumption of a legal and unobstructed 19-foot paving width. Consequently, all of the Hearings

Official's findings that relied directly or implicitly on this analysis must be rejected because the analysis didn't consider the consequences of six feet of the paving being on private property outside the public right-of-way.

The Gnat in the Room – The Conclusory Statement under EC 9.8320(5)(c) Isn't Adequate Evidence

The only other finding in the Public Works Report that the Hearings Official and Planning Commission decisions relied on for their findings that Oakleigh Lane would be safe and adequate in its current condition was the following under EC 9.8320(5)(c):

“Further, staff has no concerns related to traffic safety issues or poor service levels which will result from this development.” PH-30 at 11.

There is no accompanying analysis, and as the Oregon Supreme Court made clear – “Conclusions are not sufficient.” LUBA has also emphasized in *Phillips v. Lane County* that conclusory statements, even by experts, are not sufficient for findings.

Even if one allows (and I don't) that this conclusion is based on the report's analysis under EC 9.8320(11)(b), that analysis is a) based on a flawed assumption regarding Oakleigh Lane's paving width, and b) is conditional on Oakleigh Lane not being obstructed by parked vehicles. A conclusion by staff that they “have no concerns” is glaringly inconsistent with the concern expressed about parked cars obstructing Oakleigh Lane.

In sum, the Public Works Report statement under EC 9.8320(5)(c) has no evidentiary value at all, and to rely on this statement would invite another remand.

Reality-Check – Findings That Are Based on Reliable Evidence in the Record.

The only reliable evidence in the record regarding the safety and adequacy of Oakleigh Lane is the thorough analysis that the city's own experts did regarding compliance with EC 9.8320(5).

The Planning Commission should keep in mind that when the evidence in the record is conflicting and the contrary evidence so undermines the evidence relied upon by the local decision maker that it is unreasonable for the decision maker to rely upon it, LUBA will reverse or remand the decision. Consequently, the Planning Commission should expect another remand if it relies on the Public Works Report flawed conclusions under EC 9.8320(11)(b) and EC 9.8320(5)(c) over the thorough analysis under EC 9.8320(5)(a).

With the above review of the evidence, I'll discuss what is the simplest error and one that requires no difficult interpretation to understand and resolve.

The Hearings Official erred in concluding that a condition requiring dedication of a 22.5 foot right-of-way on a portion of the north side of the subject property would satisfy the requirements of Eugene Code 9.8320(5)(a) with respect to that segment of Oakleigh Lane adjacent to the subject property.⁸

The question here is very simple and narrow in scope:

Does Condition #3 of the Hearings Official's Decision ensure there will be adequate Oakleigh Lane right-of-way along the frontage of the development property?

The City Attorney has confirmed that, with respect to EC 9.8320(5)(a) and EC 9.6870 Street Width:

"For purposes of EC 9.8320(5), the criteria for approval of a tentative PUD application, the standards in EC 9.6870 that apply in this instance are those that regulate the required width of dedicated right-of-ways." (City's LUBA brief at 13, provided in attached CD)

The City also does not contest, and the record contains no dispute with, the simple and direct conclusion in the Eugene Public Works Department Report submitted September 13, 2013, under their findings for EC 9.8320(5)(a), that Oakleigh Lane requires a 45-foot right-of-way along the frontage of the proposed PUD in order to ensure safe vehicular, pedestrian and bicycle travel, as well as adequate emergency response and access:

"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 foot and 13 foot strips of right-of-way are not dedicated.

...

Without the additional right-of-way, Oakleigh Lane cannot be improved to the City's minimum street design standards⁹ and the 168 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." PH-30 at 3. (Emphasis added.)

Condition #3 in the Hearings Official's decision, however, clearly does *not* ensure that Oakleigh Lane will have the 45-foot right-of-way necessary to ensure the public's safety, *at the time of development or any time in the future*. Condition #3 ensures *only* a 42.5-foot right-of-way:

⁸ This error was raised under the Appeal Statement's Second Assignment of Error.

⁹ The City's minimum street standards require at least a 45-foot right-of-way.

"[Condition] 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 [sic] 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)." D-3 at 63.

Added to Oakleigh Lane's existing 20-foot right-of-way, the required 22.5 right-of-way dedication would result in a 42.5 right-of-way.

Neither the applicant nor the City have provided any specific evidence or analysis that the missing 2.5 feet is unnecessary or that an additional 2.5 feet of right-of-way can be, or ever will be, obtained. Of course, it *may* be possible to obtain this additional right-of-way, either by a wider dedication from the applicant¹⁰, a future private or public purchase or condemnation by the City; and I don't argue that a 45-foot right-of-way isn't *feasible*.

But the law requires that conditions of approval must *guarantee* that a mandatory approval criteria will be met before the development occurs or at the time of development. Condition #3 does not ensure that Oakleigh Lane will ever have the 45-foot right-of-way necessary – by the City's own analysis – to be consistent with the mandatory approval criteria set forth in EC 9.8320(5) and EC 9.8320(5)(a).

"A local government may find compliance with approval criteria by finding that the proposed means to achieve compliance is feasible, and imposing conditions of approval to ensure that the criteria are met." *Stockwell v. Benton County*, 38 Or LUBA 621 (2000). (Emphasis added)

With respect to the Oakleigh Lane right-of-way along the 50-foot frontage of the subject property, there's a simple and necessary way that the Planning Commission must address the application's compliance with EC 9.8320(5). As a prerequisite to approving the application, the Planning Commission must include the following in their decision:

- a. A finding that it is feasible (e.g., by purchase or condemnation) to create a 45-foot right away along the 50-foot frontage of the subject property; and
- b. A condition that, prior to final PUD approval, the applicant must show on final plat documents a 45-foot wide right-of-way along the 50-foot segment of Oakleigh Lane adjacent to the subject property, dedicated to the City of Eugene or Lane County.¹¹

¹⁰ From the applicant's plans, it would seem quite feasible for them to dedicate a 25-foot right-of-way, but that would be entirely up to the applicant and is not something I'm seeking or that the City can require.

¹¹ On page 3 of *Butte Conservancy v. City of Gresham*, in Attachment C, you can read the virtually identical condition of approval that LUBA approved when the City of Gresham dealt with a similar right-of-way situation. Note that this condition does *not* require the applicant to dedicate anything.

The circumstances regarding the Oakleigh Lane right-of-way in this case present the same questions that LUBA resolved in *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006). LUBA stated:

“In our view, it is sufficient for the local government in such circumstances to

- (1) adopt findings that establish that fulfillment of the condition of approval is not precluded as a matter of law, and
- (2) ensure, in imposing the condition of approval, that the condition will be fulfilled prior to final development approvals or actual development.”

(Found on page 6 of the *Butte Conservancy* LUBA decision, provided as Attachment C; emphasis added)

Neither the Hearings Official’s decision (nor the Planning Commission’s prior decision) satisfied either of these requirements.¹²

Instead, the Hearings Official (and Planning Commission) appear to have mistakenly assumed that the constitutional limitations that apply to *exactions* also constrain what requirements a City can impose regarding physical conditions and/or infrastructure to ensure the public’s safety.

Commissioners should note the following point well, because it has been misunderstood throughout all the decision-makers’ findings:

Requiring a minimum width for the right-of-way of the only public street adjacent to and serving the development is not the same as exaction of a portion of right-of-way from an applicant’s development property.

To understand this point better, consider a hypothetical case where the City determined that adequate wastewater conveyance could be provided only through the use of a larger pipe than the existing pipe adjacent to, and serving, a PUD site. The City could clearly require that a sufficient wastewater system be in place. And while the City could not impose on the developer a burden of installing a new pipe that exceeded the proportionality limitations of *Dolan v. City of Tigard*, 512 US 374 (1994), the City also could not approve a PUD development that would be served by an inadequate wastewater system that could potentially create unsafe conditions on either the applicant’s property or the neighbors’. The City’s reasonable and necessary action would be to require a sufficiently large pipe to be in place as a requirement for final approval.

¹² In its Final Opinion and Order, LUBA merely regurgitated the City’s response to this issue claiming that constitutional limitations placed on the City by the Fifth Amendment to the U.S. Constitution allow the city to require dedication of at most one-half of Oakleigh Lane and, therefore, Conte had not demonstrated that EC 9.6870 or any other authority allows the city to require Oakleigh Meadows to dedicate more than one-half of Oakleigh Lane. (LUBA Decision at 35-36.) LUBA misunderstood Mr. Conte’s argument and erred by accepting the City’s framing of the issue.

Conte never asserted any argument that the City had to require the applicant to dedicate more property. Instead, Conte noted that, the only evidence in the record indicated that the full 45-foot right-of-way was required in order to provide safe access.

Conte’s argument was not that the applicant had to dedicate all of the 25 feet necessary to provide the required 45-foot right-of-way. Conte argued simply that the City had to adopt a condition of approval that would ensure Oakleigh Lane would have the required 45 feet of right-of-way.

The City would not have to address who would provide the pipe, just that it was feasible in some manner.

While transportation systems are different than wastewater systems, facilities for both must be adequate and safe, and the proper interpretation of the City's code in EC 9.8320(5) serves exactly that purpose for transportation systems. While constitutional limitations constrain how much of the burden an applicant can be required to assume, they do not in any way negate or diminish the standards that must be met to ensure the public safety.

In this case, the City has unequivocally determined that Oakleigh Lane must have a 45-foot right-of-way adjacent to the PUD to be sufficient for safe and adequate use that would arise from the increased traffic generated by the PUD. The City cannot neglect to ensure that happens.

If this point isn't clear by now, let me emphasize again that the following justification, whether repeated in this remand proceeding, or as found in the Planning Commission's prior appeal decision, doesn't provide any analysis at all of the actual issue:

"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." Planning Commission Final Order dated December 13, 2013 at 4.

Whether or not the only way that Public Works used their own analysis of Oakleigh Lane was to justify the exaction of a 22.5-foot right-of-way, their findings regarding the public's safety were unambiguous -- Oakleigh Lane must have a 45-foot right-of-way to ensure the public will be assured of safe access. Here it is again in black-and-white:

"Without the additional right-of-way, Oakleigh Lane cannot be improved to the City's minimum street design standards¹³ and the 168 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." PH-30 at 3.

Note that *nowhere* at all in the Hearings Official's decision (or in the Planning Commission's prior decision or the City's LUBA brief) is there any claim that *Dolan* actually prevents the City from requiring that Oakleigh Lane have a minimum 45-foot right-of-way along the development frontage. Instead, the valid claim that *Dolan* limits the right-of-way exaction has simply been repeated in findings regarding the required Oakleigh Lane right-of-way, *as if Dolan applied*. But, as LUBA made clear in *Stockwell v. Benton County*, *Dolan* does not apply to a requirement that Oakleigh Lane have an adequate right-of-way because that requirement would not be a "taking."

The applicant's attorney also claimed that "the City Public Works staff [has] answered" "the question of how the City intends to get to a 45-foot right-of-way from the applicant's 22.5-foot street dedication, and the 20-foot existing right-of-way for Oakleigh Lane." OMC

¹³ The City's minimum street standards require at least a 45-foot right-of-way.

Answering Brief at 29, provided in the accompanying CD. The applicant's attorney cited the following from the Public Works Report:

"This [22.5-foot] dedication would satisfy the right-of-way requirements for the properties south of the centerline, with **the remainder of the 45' right-of-way being required from the properties on the north side of the property centerline.**" PH-30 at 10 (Emphasis added by applicant's attorney.)

These Public Works staff's comments state nothing more than the way the report's author *assumes* the required 45-foot right-of-way *might* feasibly be obtained. However, nothing in the this statement or elsewhere in the Public Works Report, or in the Hearings Official's decision or the Planning Commission's decision provides a finding and/or condition of approval that explains how the necessary 45-foot right-of-way *will be ensured*. A means to ensure the necessary 45-foot wide right-of-way is what's legally required, but that's altogether missing in the Hearings Official and Planning Commission decisions. The applicant's attorney just hopes to elide over in this legal requirement by foisting off an unsupported assumption about the future of the Oakleigh Lane right-of-way as if it were a guarantee of compliance.

The applicant's attorney has also attempted to finesse the 45-foot right-of-way error by claiming that the Public Works Report had found that until the additional 2.5 feet of right-of-way was dedicated, Oakleigh Lane would continue to provide "safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles" – citing page 14 of the Public Works Report. This claim is a brazen misrepresentation of what the Public Works staff actually wrote, which was:

"Until such time that property owners elect to improve Oakleigh Lane to full City standards; including sidewalks, the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles. Since the existing paved surface provides safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles, and since there is nothing to suggest that the impacts of the proposed development will result in unsafe conditions in Oakleigh Lane, it is appropriate to defer public improvements via an irrevocable petition." PH-30 at 14.

As explained above, this quote is not related to the right-of-way requirements of EC 9.8320(5), but is instead addressing only paving width under the EC 9.8320(11) approval criterion. Further, this section of the report doesn't in the slightest explain how to square the staff's comments under EC 9.8320(5) that asserted that a 45-foot right-of-way was required or the public's safety would "be at risk." The applicant's attorney clearly hopes the Planning Commission won't get on to the "shell game" he's playing with the evidence. (And, as discussed above and below, even this part of the report was based on an inaccurate assumption about the width of Oakleigh Lane's existing pavement, and is therefore not reliable evidence.)

The Planning Commission, on this remand, should not accommodate the way the applicant's attorney has played fast-and-loose with the facts and the law. The Planning Commission's decision should, and must, be based on honest facts and reasonable

interpretations of the law – not the contortions that have been attempted in order to win approval of this flawed application by any means possible.

In conclusion on this error, the Hearings Official (and Planning Commission) simply allowed, with no germane or legally-sufficient findings, a portion of the Oakleigh Lane right-of-way to remain two-and-a-half feet narrower than the minimum width the City’s own findings said was essential for safe usage by the PUD’s residents.

That error must be corrected by adding a sufficient condition of approval, keeping in mind that the Court of Appeals has made clear they will reverse a decision “when there is no evidence to support the finding or if the evidence in the case ‘so at odds with LUBA’s evaluation that a reviewing court could infer that LUBA had misapplied or misunderstood its scope of review.’ *Younger v. City of Portland*, 305 Or 346, 359, 752 P2d 262 (1988).” *Citizens for responsibility v. Lane County*, 218 Or App 339, 345, 180 P3d 35 (2008). In this case, the City’s technical staff’s analysis concluded that a 45-foot right-of-way was required along the front of the subject property for compliance with EC 9.8320(5) and there is no reliable evidence that addresses the right-of-way on that segment and concludes that a 42.5-foot right-of-way would be sufficient. Consequently, the decision requires at least a condition of approval that will ensure a 45-foot right-of-way.

The Hearings Official erred in failing to require a sufficient right-of-way for Oakleigh Lane from River Road to the subject property in order to comply with EC 9.8320(5) and EC 9.8320(5)(a).¹⁴

Before I get to the legal issues, let me revisit the wastewater system analogy. Consider the hypothetical case in which the Public Works Department were to determine that conveyance of the wastewater volume that would be generated by a proposed PUD would require a wastewater pipe that’s twenty inches in diameter to be transported safely and adequately to the PUD property line where it would connect with an existing wastewater pipe. If that existing pipe were only ten inches in diameter, and it already served twenty households, would it be reasonable to approve the PUD with no condition other than to provide the twenty-inch pipe on the development site? Obviously not, because the health and safety of the PUD and nearby residents would be put at risk by the inadequacy of the downstream pipe.

As discussed above, the City couldn’t require the PUD applicant to shoulder a disproportionate burden of the cost to replace the existing pipe with a larger one that could handle the projected volume of wastewater. However, the City also couldn’t legally approve the PUD unless an adequate and safe wastewater conveyance facility *downstream* was in some way ensured, such as through an adequate condition of approval.

Many transportation systems have street configurations that are more complex than this simple wastewater pipe analogy, but that’s not the case with Oakleigh Lane. The transportation system that must adequately and safely serve the proposed PUD residents is a single street with no intersections for its entire length (other than at the end where it meets River Road). This one

¹⁴ This error was raised under the Appeal Statement’s Second and Third Assignments of Error.

street must convey all the traffic volume, as well as a large number of pedestrians and bicyclists, from the proposed PUD, just as one pipe in our hypothetical example must carry all the wastewater volume.

The PUD's proposed 29 dwellings would be at the very end of Oakleigh Lane, and every one of the cars, trucks, service and emergency vehicles travelling between the site and the only intersection (at River Road) would have to flow along the entire length of Oakleigh Lane, which is already serving about twenty households.

Thus, on the face of it, it would be unreasonable to conclude – as the Hearings Official (and Planning Commission) did -- that Oakleigh Lane requires a 45-foot right-of-way for the fifty feet that's *adjacent to the proposed PUD* in order to be safe and adequate, and yet the entire 870 feet of the rest of Oakleigh Lane, into which all of the PUD traffic volume would be dumped, is certain to be safe and adequate when it comprises a 250-foot long segment of right-of-way that's only 20 feet wide and an additional 400 feet that has less than a 40-foot right of way. This is like a twenty-inch wastewater pipe on the development site dumping its entire volume into a ten-inch pipe downstream.

But, didn't the Public Works Report nevertheless provide expert analysis as evidence that the longer section of Oakleigh Lane would be safe and adequate with its current narrow, substandard right-of-way?

Actually there is no such finding about Oakleigh Lane's public right-of-way in the Public Works Report.

Nor is there any analysis at all of whether the 20-foot and other narrow rights-of-way between the subject site boundary and the intersection at River Road are consistent with the approval criteria in EC 9.8320(5) and EC 9.8320(5)(a).

Instead, a careful look at the record reveals that the Hearings Official relied upon portions of the Public Works Department Report that actually analyzed *only* the application's compliance with the approval criterion EC 9.8320(11)(b) Public Improvement Standards and the referenced standards in EC 9.6505(3)(b) for paving widths and other improvements:

“Until such time that property owners elect to improve Oakleigh Lane to full City standards; including sidewalks, the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles.” PH-30 at 14. (Emphasis added.)

The Public Works Department Report findings in this section do not even mention right-of-way, and they do not in any way speak to the application's compliance with the right-of-way requirements of EC 9.6870, which are referenced by the EC 9.8320(5)(a) approval criterion that is at issue in this appeal. Nowhere else in the Public Works Department Report is there any mention of Oakleigh Lane's grossly substandard right-of-way being sufficient for compliance with the EC 9.8320(5) approval criterion. *In other words, there is no Public Works analysis in the record that concludes that a right-of-way width less than 45 feet would provide a safe and adequate transportation system.*

Furthermore, the Public Works Report's analysis of compliance with paving width standards does *not* contain an unqualified conclusion that Oakleigh Lane would adequately provide for motorized and foot traffic, as well as emergency vehicles and delivery services as the Hearings Official claimed. The Public Works Report makes clear that providing an adequate transportation system that relies solely on Oakleigh Lane is wholly dependent on ensuring that parked vehicles do not block Oakleigh Lane's narrow paved surface. The Hearings Official and Planning Commission ignored this qualification, and neither of them provided a finding that the necessary condition for an *unobstructed* Oakleigh Lane would, or could, be met in order to satisfy the EC 9.8320(11)(b) Public Improvement Standards approval criteria. Therefore, this particular part of the Public Works Report analysis is not adequate or probative evidence sufficient to support the Hearings Official's finding that the application satisfied the requirements of EC 9.8320(5).

Of course, the applicant or staff may argue that if the pavement is wide enough to be safe, then obviously that's all that's necessary. But there are three fatal problems with that conclusory leap:

1. As shown above, significant portions of the pavement are outside the right-of-way and on private land. At any time, the respective property owners could forbid vehicles from crossing their property, thus significantly narrowing the useful pavement width. The record contains no analysis of this possibility.
2. As explained above, there would have to be a finding that *ensured* the entire 19-foot width of the pavement would remain unobstructed. In fact, property owners can *legally* park on the paving that's on their own property, thus obstructing the pavement.
3. It is precisely the City street standards' requirement for a right-of-way on a Low Volume Street that is *wider* than the paving that allows for sidewalk(s) to separate pedestrians from traffic, and thereby ensure the pedestrians' safety. The Public Works Report is clear on this point:

"Staff notes that while the applicant's proposal is sufficient to accommodate the turnaround, the proposal does not include a sidewalk along the south side of the turnaround which would be necessary 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 33' or 13' on the south side of the existing centerline, which as previously noted is co-incident with the property line. These dimensions assume a 21' wide paved surface that is shown on the tentative plan as being located 6' south of the existing northerly right-of-way line, a 6" curb, a 5' sidewalk and a 6" area adjacent to the sidewalk for construction and maintenance purposes." PH-30 at 10.

In sum, the record contains unchallenged evidence from the Public Works Report's analysis of EC 9.8320(5)(a) from which a reasonable person could only conclude that Oakleigh Lane must have at least a 45-foot right of way for its entire length to be consistent with EC 9.8320(5). And

the record contains no contrary evidence supporting a finding that a lesser right-of-way width would be consistent with EC 9.8320(5).

In retrospect, it's clear that, lacking any genuine analysis of the right-of-way requirements for the greater part of Oakleigh Lane, the Hearings Official merely attempted to put a wall around the Public Works findings under EC 9.8320(5) and rely instead on a misrepresentation of the findings under EC 9.8320(11)(b). As explained above, however, no matter in what respect the Public Works staff themselves may have intended to use their own analysis, the analysis results cannot be quarantined. And, as explained, the flawed analysis and conclusions regarding paving width under EC 9.8320(11)(b) do not support the Hearings Official's finding that Oakleigh Lane in its current condition is safe or meets the right-of-way requirements of EC 9.8320(5).

What's left after clearing up the Hearings Official's misrepresentations of what's in the record and his misapplication of *Dolan* is a completely different picture of what the evidence in the record supports, and that picture is consistent with common sense, as well. Oakleigh Lane must have a much wider right-of-way, at least 45 feet by City standards, to adequately and safely handle the additional volume of traffic that will arise from the proposed PUD.

The Planning Commission must now revisit and revise its findings so the findings are in accord with the law and the evidence. In doing so, the Planning Commission is required to *explain* how it reaches its findings and the evidence upon which it relied; and that evidence must be reliable and probative. With a clearer picture of the Hearings Officials' errors, the Planning Commission cannot simply recycle their prior decision.

Finally, I want to dispense with one other argument by the Hearings Official – that the specific right-of-way standards for EC 9.8320(5) (set forth under EC 9.8320(5)(a) and found in EC 9.6800 through EC 9.6875) apply only to land “dedicated” by the applicant. The Planning Commission rejected this ridiculous argument, as it would rob EC 9.8320(5) of any way to ensure PUD residents were provided safe and adequate transportation systems.

However, the Planning Commission's prior finding 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”¹⁵ is just as unreasonable with respect to the minimum width of Oakleigh Lane's right-of-way that's necessary to provide an adequate and safe transportation system for the PUD. Notably, the Planning Commission decision offered no alternative to the standards in EC 9.6870, nor did the Planning Commission point to any analysis to justify accepting Oakleigh Lane's grossly substandard right-of-way widths as adequate.

It should be obvious that to ensure that PUD residents would be provided safe and adequate transportation systems, the street standards in EC 9.6800 through EC 9.6875 have to be applied to Oakleigh Lane because it's the *only* street that provides PUD residents, delivery and service vehicles, and emergency vehicles with vehicular access. An “adequate transportation system” for a PUD cannot reasonably be limited to just vehicle use areas on the PUD site itself or just to the immediately adjacent street segment; and Oakleigh Lane must have an adequate

¹⁵ Planning Commission Final Order at 3.

right-of-way because, as the only means of vehicular access to and from the PUD, Oakleigh Lane is an essential element of the transportation system that connects the PUD to the larger street network.

As a matter of law, the Planning Commission’s prior interpretation of EC 9.8320(5) and EC 9.8320(5)(a) ignores the text’s explicit requirement for a “safe and adequate transportation system” and would allow absurd results. According to this interpretation, Oakleigh Lane could be practically impassable, except by 4-wheel drive vehicles, and that condition would still be considered consistent within the Planning Commission’s interpretation of the extremely limited scope to which EC 9.8320(5)(a) applies.

Even the City Attorney stated otherwise with regard to Oakleigh Lane’s right-of-way.

“For purposes of EC 9.8320(5), the criteria for approval of a tentative PUD application, the standards in EC 9.6870 that apply in this instance are those that regulate the required width of dedicated right-of-ways.” Page 13 of the City’s LUBA brief.

All that’s required to see the absurdity of the Planning Commission’s prior interpretation is to recall the wastewater system analogy and imagine the disastrous results that would occur if the Planning Commission’s principle were applied consistently. This interpretation would approve a PUD that has a 20-inch wastewater pipe dump its contents into an open ditch that was not adjacent to the PUD property.

The proper way to understand and interpret EC 9.8320(5)

My attorney, William Kabeiseman, provided the Court of Appeals with a more sensible and legally defensible interpretation of EC 9.8320(5) than the contorted versions in the Hearings Official and Planning Division’s decisions. The following discussion is based on my attorney’s testimony and provides a broader foundation for other issues that arise regarding whether or not the application meets the requirements of EC 9.8320(5) and EC 9.8320(6).

The Tentative PUD approval criteria related to a safe and adequate transportation system is found in the following section¹⁶:

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

¹⁶ Another section, discussed below, also addresses the safety of the transportation system serving the PUD:

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.

demonstrate consistency with constitutional requirements. "Nearby" means uses within 1/4 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 opening portion of EC 9.8320(5) is a simple, straightforward *and explicit* requirement that a proposed PUD must provide safe and adequate transportation systems. This text is the overarching statement of the criterion that a PUD must meet, not mere boilerplate as the Hearings Official decision would have it.

The Hearings Official claimed that EC 9.8320(5) can be properly applied solely by evaluating the three subsections, *independently of the opening statement or one-another*¹⁷; and, if proposed PUD satisfies each provision in turn, then the proposed PUD must be deemed to meet the requirement that it will provide safe and adequate transportation systems. The Hearings Official's interpretation implies that the approval criterion would be virtually the same if the opening portion simply said: "The PUD must comply with the following, wholly independent requirements."

It inevitably follows, according to the Hearings Official's interpretation, that the opening portion might even go so far as to state: "The PUD must comply with the following, wholly independent requirements – even if the result would demonstrably not ensure a safe and adequate transportation system." (Ridiculous, I know, but exactly the line in the sand that the Hearings Official attempted to draw in the Oakleigh Meadows PUD decision.)

The Hearings Official's decision eviscerates the EC 9.8320(5)(a) requirements for adequate right-of-way and paving widths, as specified in EC 9.6870, with the result that the City's adopted street design standards are effectively eliminated from any role at all in ensuring a PUD provides a "safe and adequate transportation system." This interpretation omits what is explicit in the code and impermissibly leads to absurd results.

Such an interpretation would leave out several critical aspects of this approval criterion.

First, nowhere in any of the three subsections is there a specific requirement that the PUD actually provide a "transportation system" – which is the heart of this criterion. Ignoring the actual text of EC 9.8320(5) impermissibly omits what is in the code.

And, knowing that the PUD must provide a "transportation system," the immediate question is: For whom? Obviously, for the PUD residents, at the very least.

The next step in a reasonable interpretation is: What is required to provide the PUD residents a transportation *system*? Certainly a transportation system might include some

¹⁷ "The very structure of EC9.8320(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." HO Decision at 24. Having no legitimate legal theory for his interpretation of EC 9.8320(s), the Hearings Official resorted to erecting a ridiculous straw man that has no basis in appellants' arguments or the code. Simply put, the code requires what it says: That the PUD must provide a safe and effective transportation system. And it is the City's own analysis and adopted standards that appellants rely on, not some arbitrary protection from "imagined" safety threats.

driveways and private streets, but the requirement is for a “system,” not just on-site circulation. Thus, an “adequate transportation system” must reasonably include at least some *vehicular connection* to the City street network.

And because the *system* must be “safe and adequate,” all of the private and at least some of the public streets that are *essential components* of that system must themselves be safe and adequate – both for the proposed PUD residents and for other members of the public who use these streets.¹⁸

The present case is as simple as it gets – there’s only a single, dead-end public street that provides the PUD with its essential connection to the City street network – Oakleigh Lane.

The three subsections then provide the scope and standards by which to determine what is safe and adequate. The first subsection provides standards for the minimum rights-of-way, paving widths and other improvements. It’s that simple. To say that compliance with the standards under EC 9.8320(5)(a), such as minimum right-of-way widths, can be ignored for most of the one public street that is essential to the “transportation system” for PUD residents would be contrary to what EC 9.8320(5) explicitly requires, and an impermissible omission of what’s in the code. Similarly, to say that compliance with required paving widths and other improvements for this essential public street can be deferred to some indefinite date would also negate the explicit intent and language of EC 9.8320(5).¹⁹

A correct interpretation of EC 9.8320(5) also requires that all of its subsections be read in concert with each other and harmonized. Each of the subsections has the same grammatical construction – the subsections contain no verb or subject; instead they consist solely of a predicate that contains a portion of the entire requirement.

As already observed, subsection (a) identifies the standards that apply to the essential components of a safe and adequate transportation system. However, that subsection alone doesn’t identify exactly *what* must meet the standards in EC 9.6800 – 9.6875, so the subsection cannot sensibly be applied in isolation. Instead, these standards obviously apply to the object identified in the opening portion, i.e., the transportation system that would serve the PUD residents.

Subsection (b) uses the same grammatical structure as subsection (a) and identifies three additional modes of transportation system facilities – those that enable circulation of pedestrians, bicyclists and transit around the site and to and from nearby areas. EC 9.8320(5) obviously assumes that an “adequate” transportation system would include facilities for vehicular circulation, and the purpose of subsection (b) is to ensure that these additional modes are also supported by the transportation system. Section (b) also requires that the explicit scope of connectivity for the three modes must extend beyond the development site; in this case, even

¹⁸ This doesn’t mean, as the Hearings Official tried to imply that “all nearby streets had to meet City standards.” The Hearings Official set up a ridiculous straw man that avoided the more limited, but essential requirement in this case.

¹⁹ Of course, specific provisions of the standards found in EC 9.6800 through EC 9.6875 may allow exceptions or deferrals, but allowing an applicant to exercise such provisions isn’t the same as allowing noncompliance with EC 9.6800 through EC 9.6875. Similarly, possible modifications to the standards, as set forth in subsection EC 9.8320(11), are explicitly allowed; but these were not the basis of the Hearings Official’s findings.

as far out as River Road. Again, EC 9.8320(5) assumes an “adequate” transportation *system* would also include off-site facilities to allow PUD residents to safely connect by car or other vehicle with the City’s street system, which is found at the intersection with River Road. It would be inconsistent and unreasonable to interpret EC 9.8320(5) as requiring an “adequate transportation” system to provide connectivity beyond the site for pedestrians and bicyclists and yet not require adequate and safe connectivity for vehicle use.

Consistent with the broad opening portion of EC 9.8320(5), subsection (b) relies on compliance with the standards referenced in subsection (a). More specifically, standards for pedestrian and bicycle facilities are found in EC 9.6835 Public Accessways, and transit facilities are covered in several of the sections referenced by EC 9.8320(5)(a). There is no need to repeat the reference to these code sections when the three subsections are interpreted as working together to ensure the requirement in the opening portion of EC 9.8320(5).

Finally, subsection (c) adds the additional requirement for a detailed Traffic Impact Analysis (TIA) where traffic volume or special conditions justify a more extensive analysis and potential mitigations to ensure the transportation system is safe and adequate. Importantly, when a TIA is triggered, subsection (b) ensures that the TIA addresses pedestrian, bicycle and transit levels of service (LOS) and safety, as well as vehicular LOS and safety. Again, it would be unreasonable to interpret subsection (c) as allowing a TIA that didn’t fully evaluate pedestrian, bicycle and transit levels of service and safety – but that is exactly what the Hearings Official’s interpretation would do by treating the subsections of EC 9.8320(5) in isolation.

The only way to read EC 9.8320(5) and give effect to all portions of this approval criterion is to find that, overall, this criterion requires safe and adequate transportation systems. Subsection (a) states the specific applicable standards, subsection (b) enumerates several transportation modes in addition to vehicular use where those standards apply, and subsection (c) applies an additional level of analysis to all four modes (vehicular, pedestrian, bicycle and transit).

There’s explicit context in Eugene Code that supports the plain language interpretation of EC 9.8320(5), subsection EC 9.8320(5)(a) and the referenced street standards in EC 9.6870. The purpose of EC 9.6870 is 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 referenced code at EC 9.0020 Purpose states:

“The purpose of the land use code is to protect and promote the health, safety, and general welfare of the public * * *” (Emphasis added)

By the reference to EC 9.0020 Purpose, EC 9.6800 establishes that the purpose of EC 9.6800 through EC 9.6875 is to “establish standards for the dedication, design and location of public ways to” “protect and promote the health, safety, and general welfare of the public.”

The language of EC 9.8320(5) echoes this purpose and is precisely why EC 9.8320(5) relies on the standards in EC 9.6800 through 9.6875 being applied to, in this case, the only street that provides access to the PUD. All of these sections work together harmoniously to ensure a safe and adequate, multi-modal transportation system for PUD residents.

In the present case, the only way to correctly apply EC 9.8320(5) is to require Oakleigh Lane to meet the standards in EC 9.6800 through 9.6875, which the Hearings Official failed to do. Any other interpretation fails to meet statutory requirements for construction.

The Hearings Official erred in failing to require a sufficient paving width for Oakleigh Lane from River Road to the subject property in order to comply with EC 9.8320(5) and EC 9.8320(5)(a) and EC 9.8320(11)(b).²⁰

The previous section dealt with the proper application of the standards under EC 9.8320(5) with respect to right-of-way. By the same rationale, Oakleigh Lane is also required to meet the standards for paving, as set forth in EC Table 9.6870 Right-of-Way and Paving Widths. (The arguments in the previous section are included in this section by reference.)

In the present case, Oakleigh Lane would require a paving width of at least 20 feet, which is feasible on Oakleigh Lane because it has a right-of-way of at least 20 feet for its entire length. As noted above, however, the Hearings Official's findings are that Oakleigh Lane has 19-foot wide paving, which is inadequate to comply. In addition, the paving that's within the right-of-way is approximately 13 feet wide for 250 feet, and the Hearings Official's findings did not address this deficiency at all.

Because the Hearings Official relies on the inaccurate analysis of paving width by the Public Works Report, as described above, the finding of compliance with EC 9.8320(11)(b) was not supported by correct and reliable evidence and must be rejected by the Planning Commission.

With respect to compliance with EC 9.8320(5), EC 9.8320(5)(a) and EC 9.8320(11)(b), in order to approve the application, the Planning Commission must add a condition of approval that Oakleigh Lane be paved to at least 20 feet wide, within the right-of-way for its entire length before final approval of the proposed PUD.

The Hearings Official erred in finding that the application complied with EC 9.8320(6).²¹

EC 9.8320(6) requires that:

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.

²⁰ These errors were raised under the Appeal Statement's Second and Fourth Assignments of Error.

²¹ This error was raised under the Appeal Statement's Third Assignment of Error.

The Hearings Official relied upon his findings for EC 9.8320(5) and EC 9.8320(11)(b) without any further explanation. The Hearings Official also relied upon his erroneous statement that the city street standards didn't apply. Netted out then, the Hearings Official relied on the Public Works Report findings regarding a 19-foot paving width that "the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles."

As demonstrated above, Oakleigh Lane doesn't have a 19-foot paving width within the right-of-way and cannot be ensured to be free of obstruction by parked vehicles.

Consequently, the Hearings Official's conclusion was not supported by reliable evidence and must be rejected. There is no evidence in the record that thirteen feet of paving is wide enough for an emergency vehicle and oncoming car or truck to pass by safely. The city's own street width standards in Eugene Code Table 8.6870 require even an alley to have paving at least twelve feet for restricted, *one-way* travel and twenty feet wide for *two-way* travel. There is no reasonable basis for a finding that 13-foot wide paving for 250 feet would not be an impediment to emergency response.

LUBA agreed with the applicant's argument that EC 9.8320(6) required only that the PUD itself, i.e., the land, structures, on-site improvements, etc., not create the impediment to emergency response. This is an unreasonably narrow interpretation and is inconsistent with the definition of "impediment":

"something that makes it difficult to do or complete something ... something that interferes with movement or progress." – Merriam-Webster on-line

If the resulting off-site impacts that arise solely from activities by PUD residents or other sources on the PUD may potentially interfere with the movement of emergency response vehicles, the City is required to analyze the potential impediment and explain their findings. In this case, if the additional traffic on Oakleigh Lane that arises from the PUD would potentially impede emergency vehicles rushing to or from the PUD or other residences on Oakleigh Lane, particularly in the 250-foot segment of Oakleigh Lane that has only 13-foot wide paving in the public right-of-way. The Public Works report was clear on the potential conflicts when it stated:

"Oakleigh Street will continue to adequately provide for ... emergency vehicles ..., provided the paved surface is not blocked by parked vehicles." PH-30 at 14 (Emphasis added)

As discussed above, the Hearings Official decision provides no analysis or findings that ensure the public is allowed to drive on the six feet of pavement that's on private property and that Oakleigh Lane will not be blocked by parked vehicles.

Furthermore, the overarching requirement is that "[t]he PUD will not be a significant risk to public health and safety." What follows in the text are clearly just some examples: "including but not limited to ..." As explained above, the potential impacts of "[t]he PUD" cannot be limited to just its physical properties, but must also include its operational impacts, including the additional traffic that's generated and that traffic's potential impact on the safety

of the public using the same street. This includes the safety of normal use by vehicles, pedestrians and bicyclists, in addition to impeding emergency vehicles.

As demonstrated above, there was no valid analysis of the PUD's impacts on the safety of the public using Oakleigh Lane, other than the deficient analysis of the Public Works Report under EC 9.8320(11)(b).

With a proper interpretation of EC 9.8320(5), as explained above, a finding that the PUD provided a safe and adequate transportation system would be a reasonable basis in most cases for a finding that the PUD would not be a significant risk to public safety from its traffic impacts. However, under the Hearings Official and LUBA's restrictive interpretation of EC 9.8320(5), this would not be the case because there would be no requirement to comply with the city's street standards for right-of-way and paving, and there would be no requirement to evaluate whether the PUD actually provided a "safe and adequate transportation system" for the PUD residents and emergency vehicles using Oakleigh Lane.

Thus, the Planning Commission cannot justifiably ignore the EC 9.8320(6) (as well as EC 9.8320(5)) requirements to evaluate and ensure the public's safety. Lacking valid evidence upon which to find that the PUD's traffic impacts won't jeopardize the safety of the public using Oakleigh Lane, the Planning Commission must find that the applicant has not demonstrated that the PUD meets the approval criterion in EC 9.8320(6).

Precautionary procedural objections

In order to preserve my appeal rights on a potential procedural error, I am objecting to the Eugene Planning Commission allowing the introduction of new evidence into the record by the applicant, City, a commissioner or any other party without re-opening the hearing to me and all other persons who testified in the original proceedings.

Further, I am objecting to the Eugene Planning Commission allowing the applicant to introduce any testimony into the record, other than argument in direct response to my testimony, without re-opening the hearing to me and all other persons who testified in the original proceedings.

Conclusion

Based on the noncompliance with EC 9.8320(6), the Planning Commission must deny this application.

Notwithstanding that the application must also be denied for failure to comply with EC 9.8320(5) and EC 9.8320(11)(b), any approval of the application must include at least the following conditions:

- 1) A condition that, prior to final PUD approval, the applicant must show on final plat documents a 45-foot wide right-of-way along the 50-foot segment of Oakleigh Lane adjacent to the subject property, dedicated to the City of Eugene or Lane County.²²
- 2) A condition that, prior to final PUD approval, the applicant must provide:

²² On page 3 of *Butte Conservancy v. City of Gresham*, in Attachment C, you can read the virtually identical condition of approval that LUBA approved when the City of Gresham dealt with a similar right-of-way situation.

- a) Construction plans for road improvements to meet the required standards of the City of Eugene’s adopted Arterial and Collector Street Plan , and
- b) The necessary street construction permits to implement the construction plans.”

Respectfully,



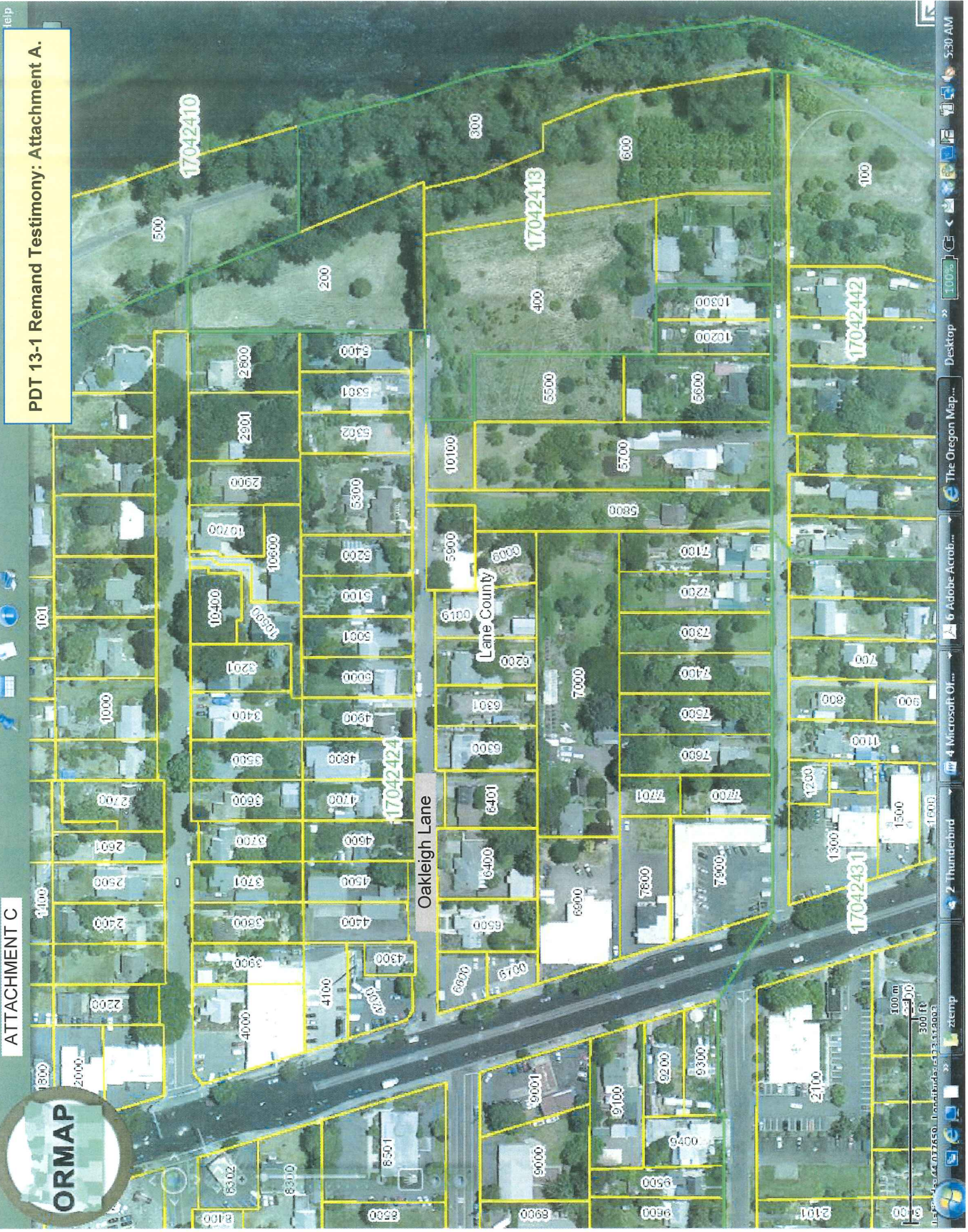
Simon Trautman

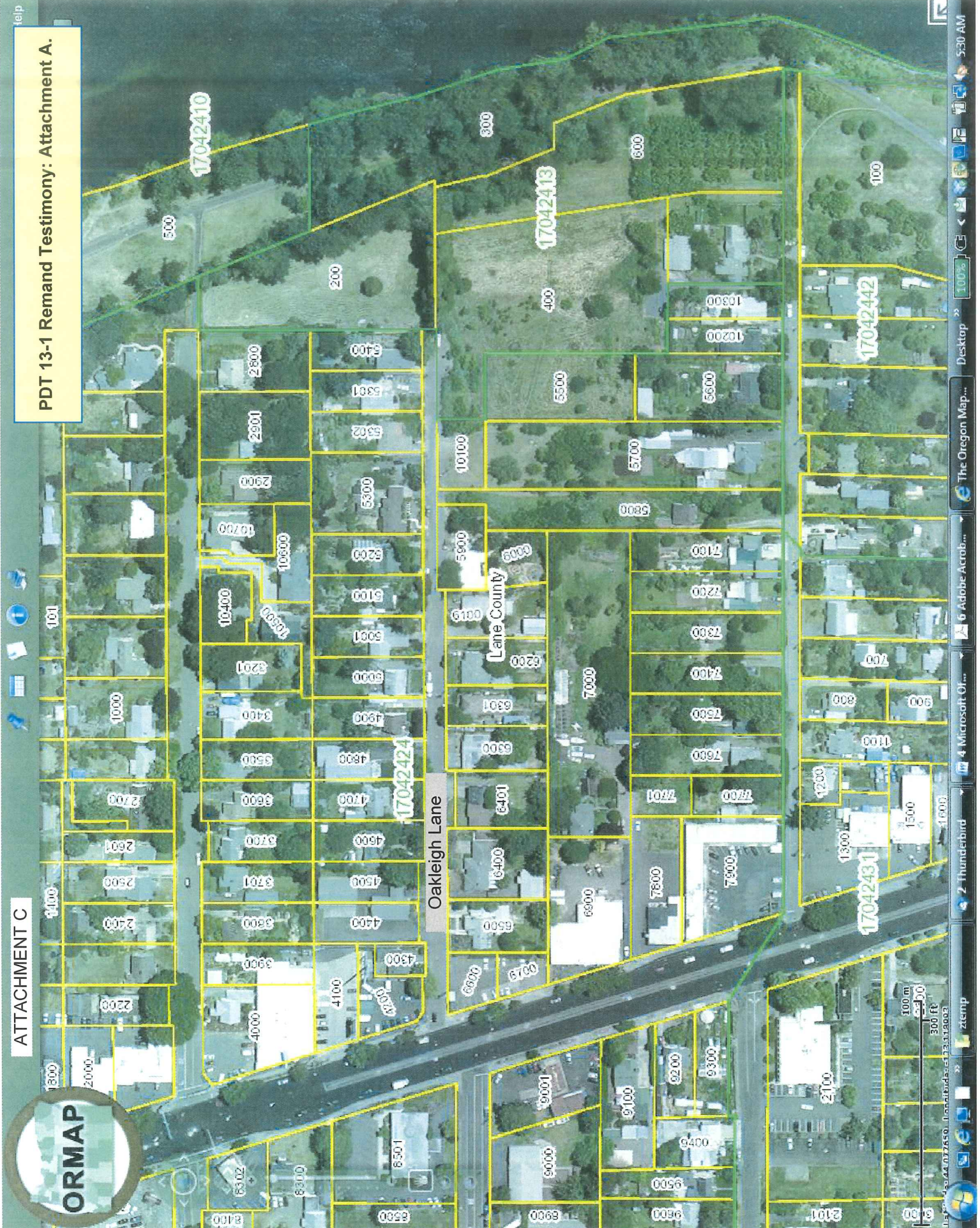
Attachments

All attachments are included herein by reference

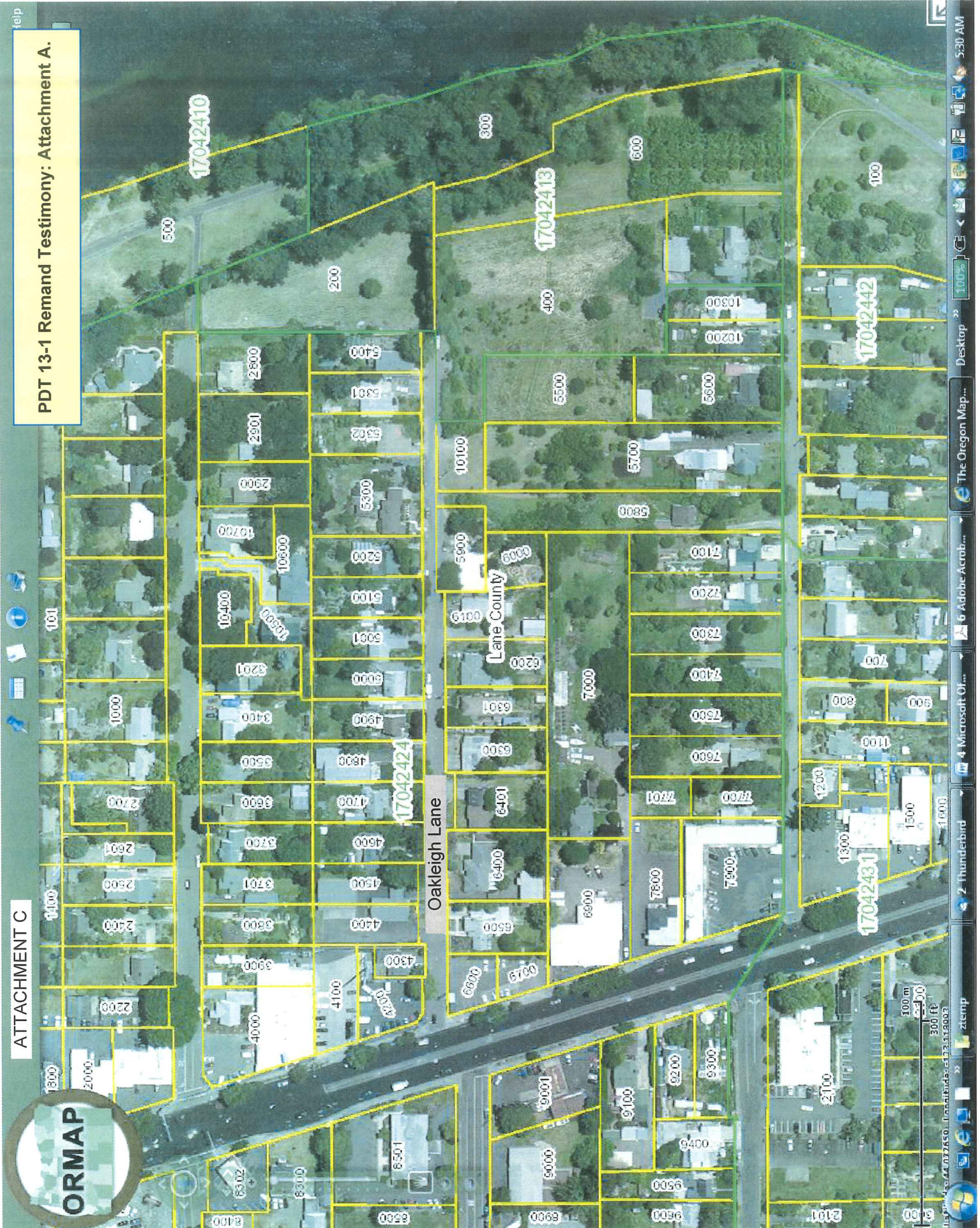
- A. Oregon Maps
- B. Drawing of Oakleigh Lane ROW
- C. *Butte v Gresham* LUBA decision
- D. CD containing:
 - a. LUBA record and supplemental record
 - b. LUBA oral arguments audio recording
 - c. LUBA briefs
 - d. Court of Appeal briefs

Name	Date modified	Type	Size
Files Currently on the Disc (12)			
PDT13-1CityOfEugeneCoAbrief.pdf	7/26/2015 7:09 AM	Adobe Acrobat Document	3,053 KB
PDT13-1CityOfEugeneLUBAbrief.pdf	7/26/2015 6:54 AM	Adobe Acrobat Document	4,335 KB
PDT13-1ConteLUBAbrief.pdf	7/26/2015 7:06 AM	Adobe Acrobat Document	451 KB
PDT13-1LUBAAppeal2014-001Vol1.pdf	6/9/2014 10:54 AM	Adobe Acrobat Document	9,533 KB
PDT13-1LUBAAppeal2014-001Vol2.pdf	6/15/2014 8:23 AM	Adobe Acrobat Document	32,604 KB
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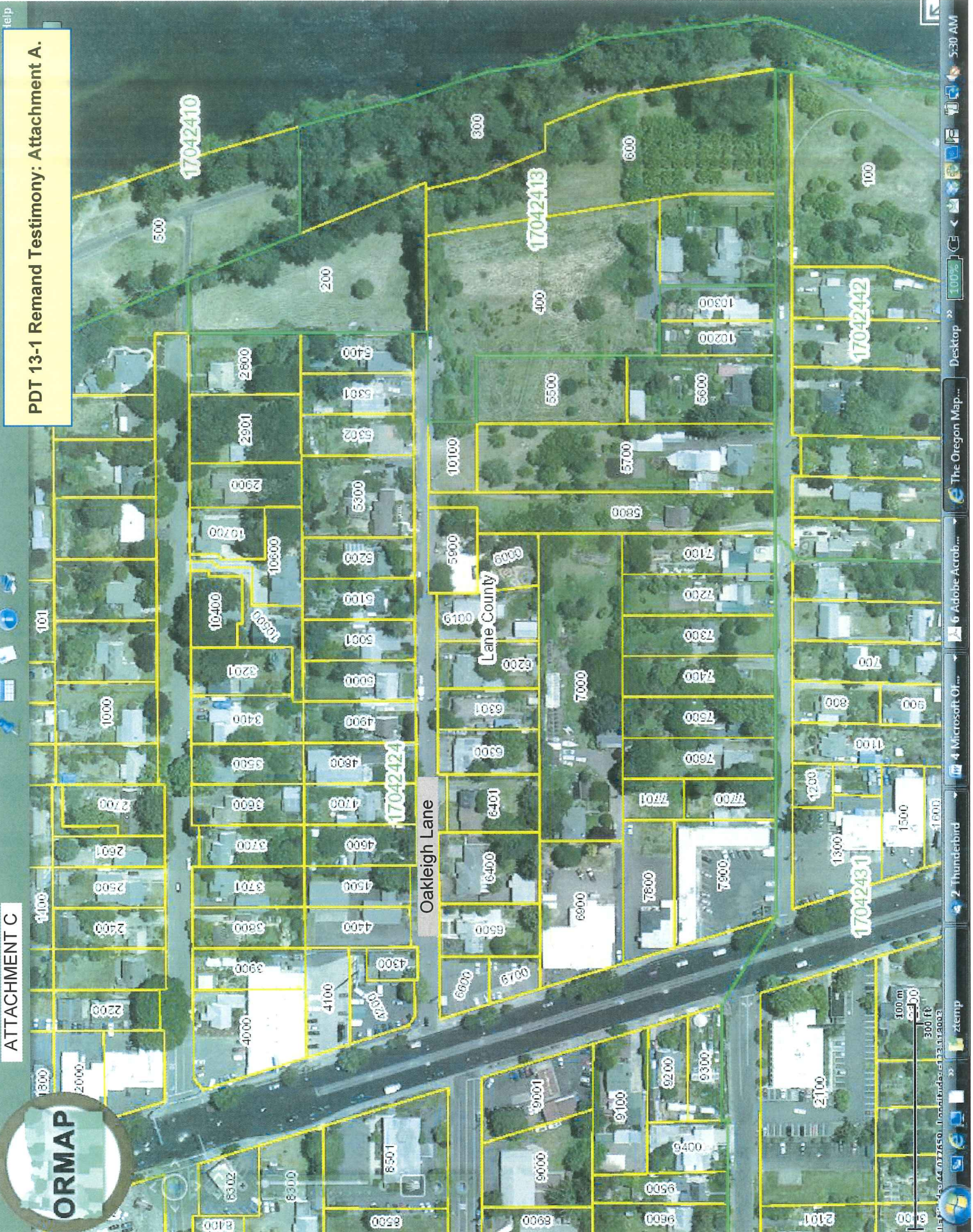


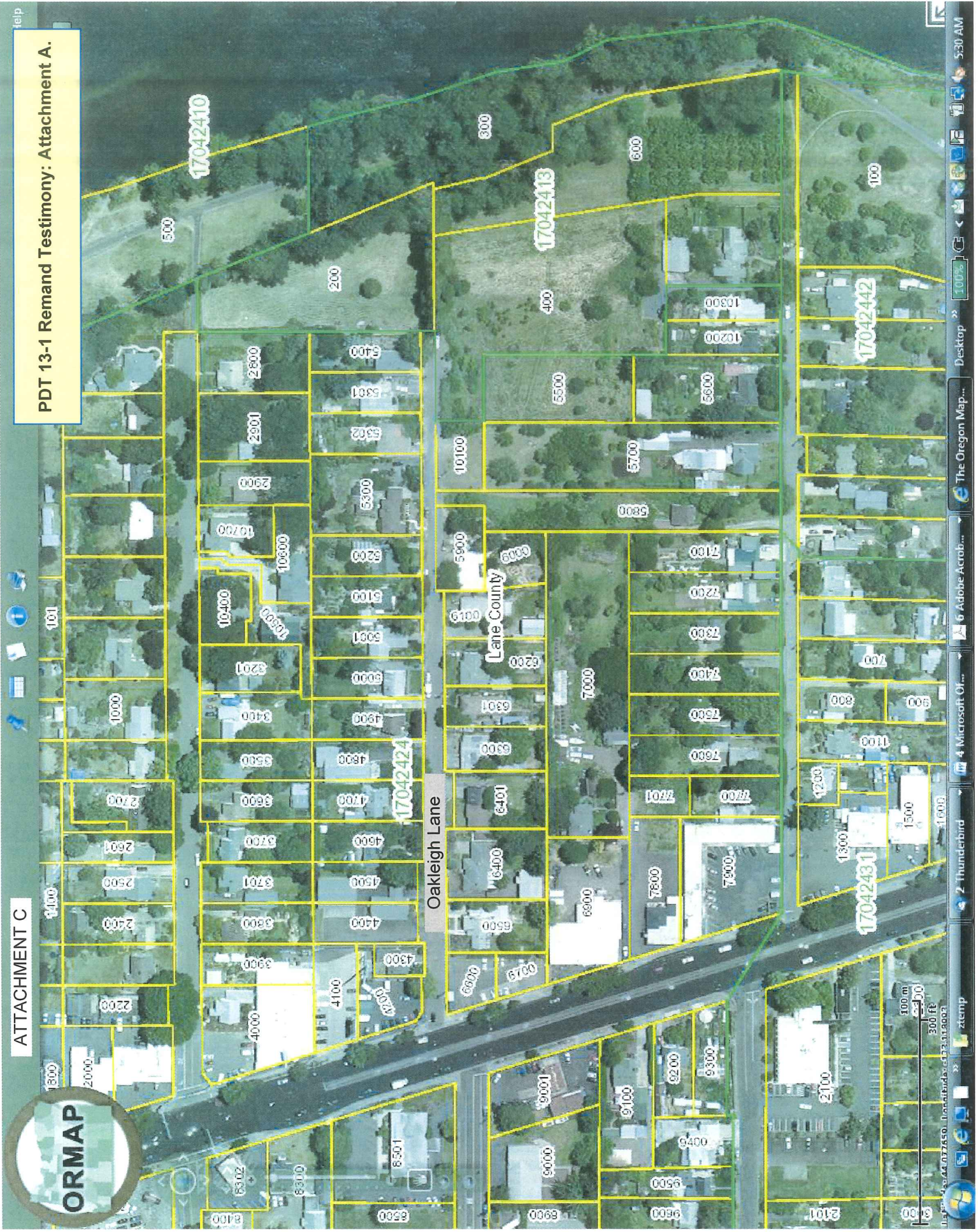


PDT 13-1 Remand Testimony: Attachment A.

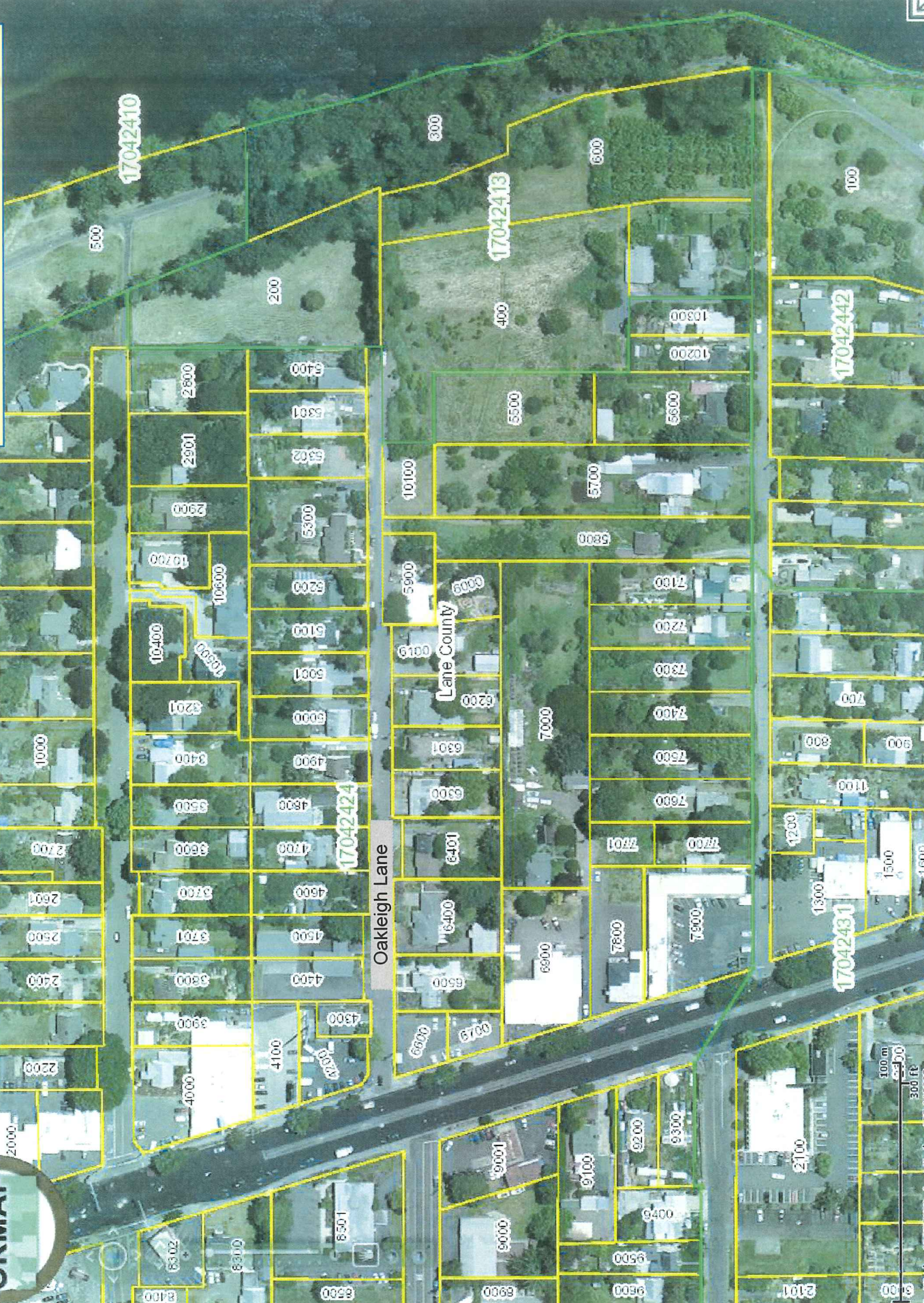
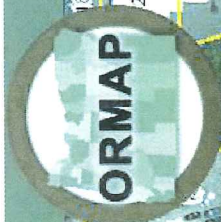


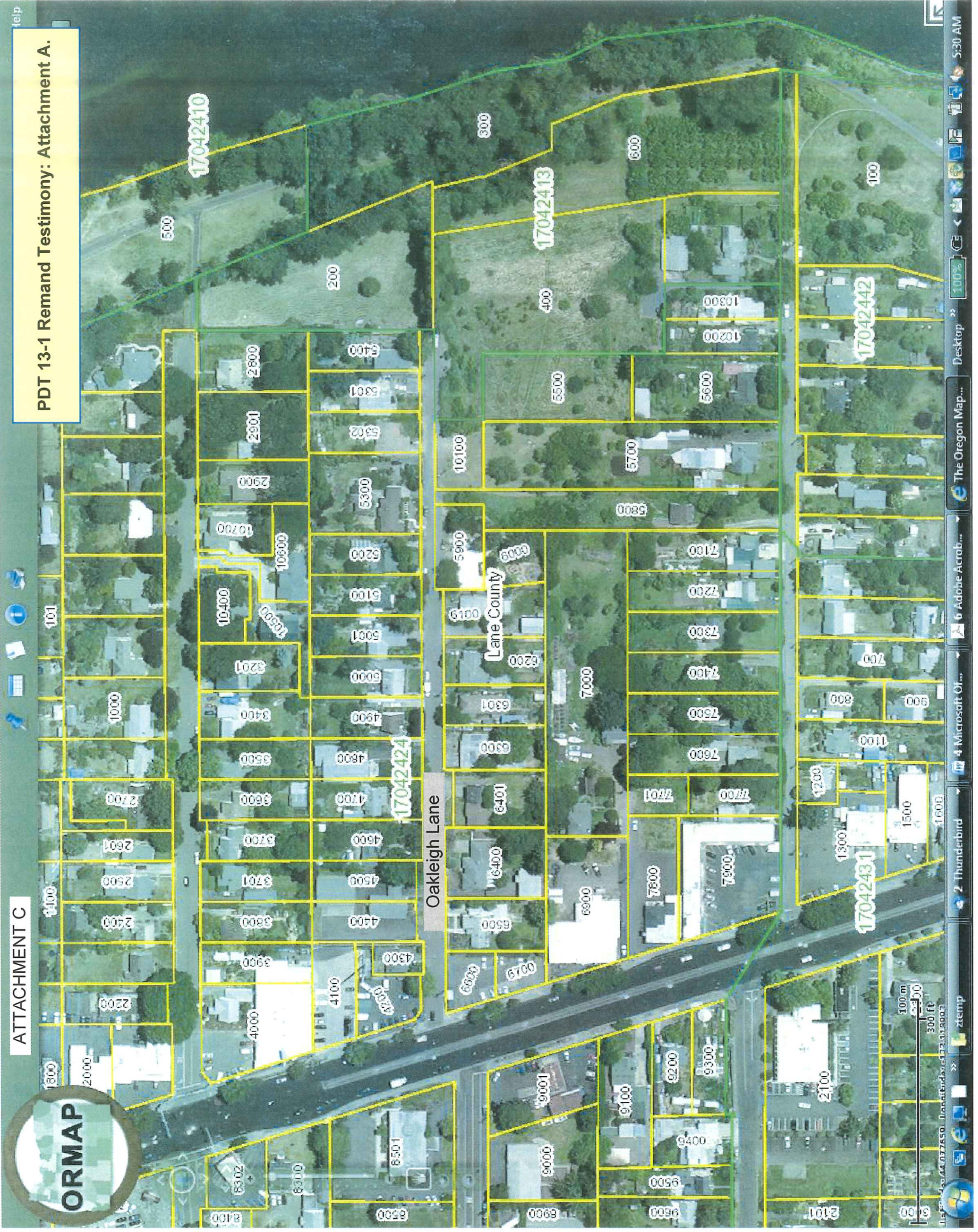
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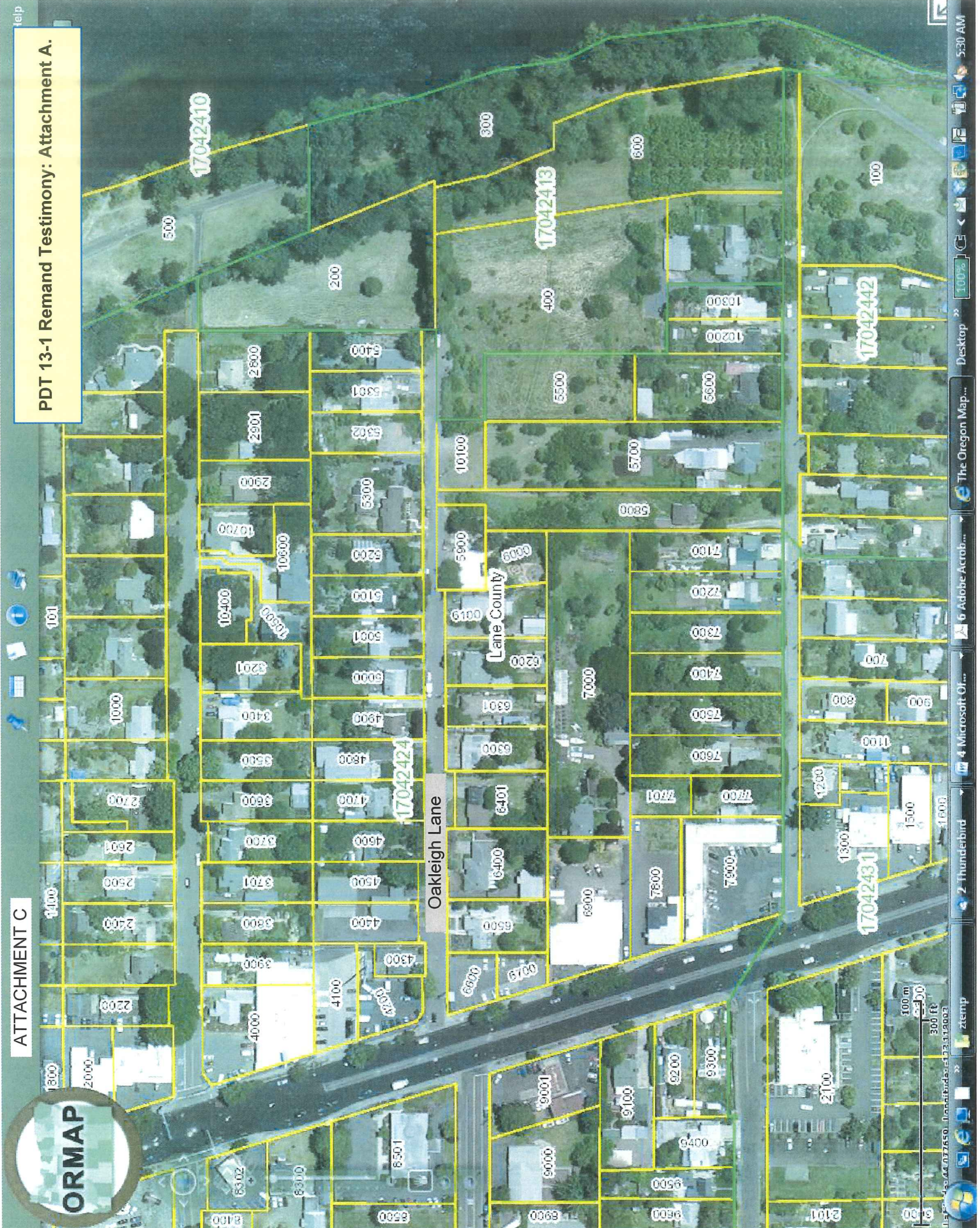




PDT 13-1 Remand Testimony: Attachment A.







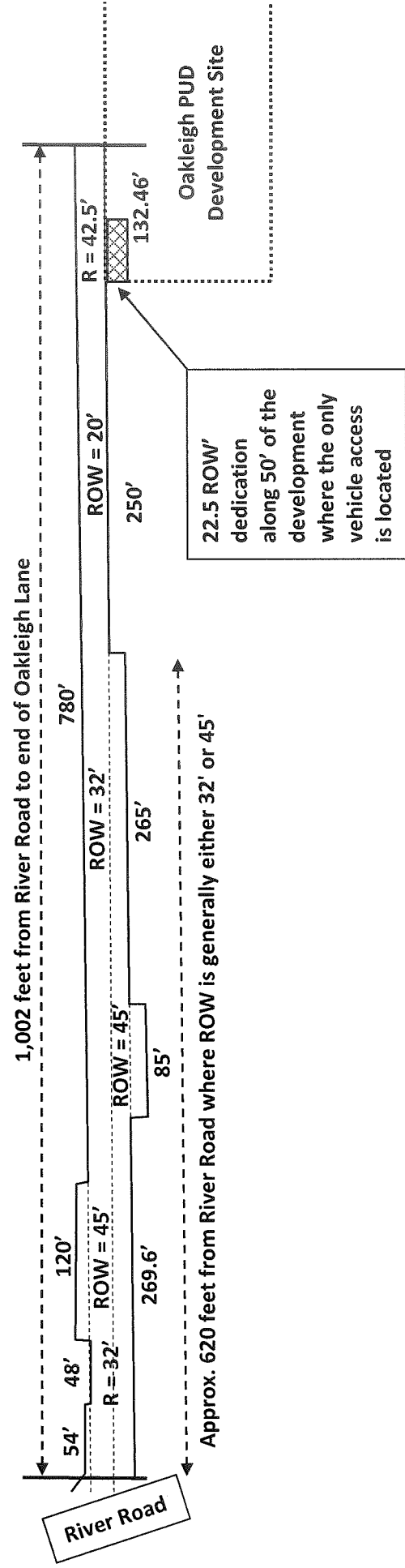
PDT 13-1 Remand Testimony: Attachment B.

PT-R.4 (LUBA Rec at 460-573) Deeds and property records for properties on Oakleigh Lane

PH-53 (LUBA Rec at 1314) City Notice of Land Use Change Being Proposed map of notice signs shows the outline of the ROW.

PH-1.B (LUBA Rec at 1197 and LUBA #2 at 4) – ROW dedications

Right-Of-Way Width	Total Length	Comment
20 feet	227.73'	
32 feet	360.60'	
37 feet	54.00'	
42.5 feet	50.00'	After dedication of 22.5' ROW from PUD
45 feet	205.00'	
Beyond PUD entry	104.67'	
TOTAL	1002.00'	



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

BUTTE CONSERVANCY and ERIK NIELSEN,
Petitioners,

vs.

CITY OF GRESHAM,
Respondent,

and

PERSIMMON DEVELOPMENT,
Intervenor-Respondent.

LUBA No. 2006-084

FINAL OPINION
AND ORDER

Appeal from City of Gresham.

Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of petitioners.

David R. Ris, Senior Assistant City Attorney, Gresham, filed a response brief and argued on behalf of respondent.

John M. Junkin, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Krista N. Hardwick and Bullivant Houser Bailey, PC.

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED

09/15/2006

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

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NATURE OF THE DECISION

Petitioners appeal a city council decision on remand from LUBA approving an 86-lot planned unit development (PUD)

MOTION TO INTERVENE

Persimmon Development (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The challenged decision approves an 86-lot PUD on a 69.5-acre parcel in the City of Gresham near unincorporated areas of Clackamas County. The subject property is steeply sloped and wooded, and within the city’s Hillside Physical Constraint Overlay District (HPCD). The proposed development required a variance to allow two cul-de-sacs over 200 feet in length, a tree removal permit to log approximately 1800 trees in areas where streets and utilities are proposed, and construction of a secondary road access for emergency vehicles through an existing residential lot in an adjoining subdivision within unincorporated Clackamas County.

The city’s initial approval was appealed to this Board, which sustained three assignments of error, and remanded the decision to the city to address, among other things, whether (1) providing the emergency vehicle access is feasible, and (2) removing 1800 trees constitutes “clear cutting” that is prohibited under city code.

On remand, the city conducted a public hearing and adopted additional findings concluding in relevant part that it is feasible to obtain the required emergency access and that the proposed tree removal did not constitute “clear-cutting” that is prohibited under city code. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 In order to gain approval of the requested variance for culs-de-sac longer than 200
3 feet, intervenor proposed and the city approved a secondary access point that would extend
4 south of the PUD through a residential lot in the adjoining Kingswood Heights subdivision,
5 which is within unincorporated Clackamas County, and connect to SE Yellowhammer Road.

6 Accordingly, the city imposed Condition of Approval 7 requiring that the applicant submit as
7 part of final plat documents: (1) a 20-foot wide right of way or easement across the
8 residential lot within the Kingswood Heights subdivision, dedicated to the county, (2)
9 construction plans for the access, and (3) a county street construction permit.

10 Before LUBA, petitioners argued that there was no evidence in the record that it was
11 “feasible” to construct the proposed secondary access, given that Covenants, Conditions, and
12 Restrictions (CC&Rs) governing the Kingswood Heights subdivision restrict all use of
13 residential lots to single-family dwellings and accessory buildings.¹ According to
14 petitioners, it is clear under the Kingswood Heights CC&Rs that use of a residential lot to
15 construct a street or other access for a neighboring subdivision is prohibited. We remanded
16 the city’s initial decision to address this issue.

17 On remand, the city adopted findings concluding in relevant part that it is “feasible”
18 to construct the access road either because (1) the CC&Rs can be reasonably interpreted to
19 allow roads that provide access to residential uses and (2) in any case, the city has the legal
20 authority to condemn the right-of-way to provide secondary access notwithstanding the
21 CC&Rs. Petitioners challenge those conclusions, arguing that the CC&Rs are unambiguous

¹ The Kingswood Heights subdivision restrictions include the following:

“No building or structure or land shall be used and no building or structure shall hereafter be erected, altered or enlarged in the subdivision except for single-family dwellings and accessory buildings consisting of garages, carports, private green houses, swimming pools or other type of home recreational facilities and temporary structures for uses incidental to construction work which shall be removed upon completion or abandonment of the construction.” Petition for Review App. 30.

1 and clearly would prohibit the proposed access road, and that the city lacks the legal
2 authority to condemn the right-of-way necessary to construct the road.

3 **A. Feasibility**

4 As an initial matter, the city argues that the legal requirement that local governments
5 address the feasibility of compliance with approval criteria should be applied differently
6 where, as here, the issue raised regarding the feasibility of compliance largely involves a
7 legal question and the courts, not the city, have jurisdiction in the final analysis to resolve
8 that question. The city recognizes that, in a line of cases based on *Meyer v. City of Portland*,
9 67 Or App 274, 678 P2d 741 (1984) and *Rhyne v. Multnomah County*, 23 Or LUBA 442
10 (1992), the Court and LUBA have held that, in a two-stage approval process such as
11 subdivision approval, where a problem is identified that raises concerns whether proposed
12 development can comply with applicable approval criteria, the local government may, among
13 other options, adopt findings demonstrating that solutions to the identified problem are
14 “feasible,” *i.e.*, “possible, likely and reasonably certain to succeed.” *Meyer*, 67 Or App at
15 280, n 5. In *Rhyne*, we explained that:

16 “Assuming a local government finds compliance, or feasibility of compliance,
17 with all approval criteria during a first stage (where statutory notice and
18 public hearing requirements are observed), it is entirely appropriate to impose
19 conditions of approval to assure those criteria are met and defer responsibility
20 for assuring compliance with those conditions to planning and engineering
21 staff as part of a second stage. * * *

22 “Where the evidence presented during the first stage approval proceedings
23 raises questions concerning whether a particular approval criterion is satisfied,
24 a local government essentially has three options potentially available. First, it
25 may find that although the evidence is conflicting, the evidence nevertheless
26 is sufficient to support a finding that the standard is satisfied or that feasible
27 solutions to identified problems exist, and impose conditions if necessary.
28 Second, if the local government determines there is insufficient evidence to
29 determine the feasibility of compliance with the standard, it could on that
30 basis deny the application. Third, * * * instead of finding that the standard is
31 not met, it may defer a determination concerning compliance with the
32 standard to the second stage. In selecting this third option, the local
33 government is not finding all applicable approval standards are complied

1 with, or that it is feasible to do so, as part of the first stage approval (as it does
2 under the first option described above). Therefore, the local government must
3 assure that the second stage approval process to which the decision making is
4 deferred provides the statutorily required notice and hearing * * *” 23 Or
5 LUBA at 447-48 (footnotes omitted).

6 Where the local government takes the first approach—finding that the approval
7 criterion is met or that feasible solutions to identified problems exist, and imposing necessary
8 conditions—those findings and conditions may be challenged as inadequate or not supported
9 by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 428-29 (1999).

10 The city argues that the above framework is typically applied when the identified
11 “problem” involves a fact-specific technical or physical issue posed by the development,
12 such as the ability to construct public facilities or avoid hazardous conditions. According to
13 the city, that framework is more problematic when the identified “problem” involves an
14 alleged *legal* impediment that is beyond the local government’s jurisdiction or authority to
15 resolve. The city argues that the meaning of the Kingswood Heights CC&Rs, specifically
16 whether the CC&Rs prohibit the proposed secondary access, is a question of law or a mixed
17 question of law and fact that is within the jurisdiction of the circuit court, and will be
18 definitively resolved only if residents of the Kingswood subdivision invoke the circuit
19 court’s jurisdiction seeking to stop the proposed secondary access.² The city argues that its
20 interpretation of the CC&Rs will have no binding legal effect in any circuit court action, and
21 that it makes little sense to require the city to interpret the CC&Rs in the first instance.

22 Rather than require the local government to engage in a non-binding legal analysis to
23 resolve a question of law that the city has no authority to determine, the city recommends
24 that the obligation to evaluate “feasibility” should proceed differently than when the city is
25 evaluating technical or physical feasibility. According to the city, the local government

² The city notes that petitioners are not residents of Kingswood Heights subdivision, and do not have the ability to enforce the terms of the CC&Rs.

1 should only be required to “determine that the legal position is warranted by existing law or
2 is a nonfrivolous argument based on existing law.” City of Gresham’s Response Brief 10-11.
3 The city argues that such a test would be similar to the test that LUBA has applied when
4 local land use standards expressly require compliance with state agency requirements or that
5 the applicant secure a state agency permit. In those cases, the city argues, LUBA has held
6 that the local government is not required to establish that the state agency requirements can
7 in fact be satisfied. Instead, the local government need only determine that the necessary
8 agency permit is “available” and that the applicant is not precluded from obtaining such
9 agency permits as a matter of law. *Wetherell v. Douglas County*, 44 Or LUBA 745, 755-56
10 (2003); *Sam Miller v. City of Joseph*, 31 Or LUBA 472, 478 (1996); *Bouman v. Jackson*
11 *County*, 23 Or LUBA 628, 646-47 (1992).

12 We generally agree with the city that the *Meyer* and *Rhyne* feasibility analysis must
13 be applied somewhat differently when the “problem” identified at the first stage of a two-step
14 approval process is an alleged legal impediment to fulfilling a condition of approval
15 requiring facilities necessary for the proposed development, rather than a technical,
16 engineering or similar issue. In such circumstances, where neither the local government nor
17 LUBA have jurisdiction to resolve the legal question, and that legal question must be
18 resolved in a particular way to allow the condition to be fulfilled so that an applicable
19 approval standard will be satisfied, neither the local government nor LUBA need engage in a
20 detailed or definitive legal analysis. In our view, it is sufficient for the local government in
21 such circumstances to (1) adopt findings that establish that fulfillment of the condition of
22 approval is not precluded as a matter of law, and (2) ensure, in imposing the condition of
23 approval, that the condition will be fulfilled prior to final development approvals or actual
24 development.

25 Although we did not couch it in those terms, we applied a similar approach in a
26 recent case with very similar facts. In *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006),

1 the city approved a residential subdivision based in relevant part on a finding that sanitary
2 sewer facilities were “available.” The petitioner argued that the proposed sewer facilities
3 required access to a sewer line on his property, and that the service provider did not own an
4 easement over petitioner’s property for that purpose. The hearings officer disagreed, finding
5 that the service provider’s easement over petitioner’s property allowed service to the
6 proposed development. In the alternative, the hearings officer found that the service provider
7 had the legal authority and ability to condemn easements necessary to serve the subject
8 property. On appeal to LUBA, the petitioner disputed both findings, arguing in relevant part
9 that the outcome of any condemnation proceeding was doubtful, because the petitioner
10 intended to challenge any such proceeding. We declined to review the merits of the parties’
11 dispute over the meaning and extent of the existing easement, because we affirmed the
12 hearings officer’s alternative disposition that even if the existing easement did not authorize
13 service, the service provider had the authority to condemn an easement:

14 “The parties argue at great length whether the existing easements and
15 applicable property law establish that the district has an easement over
16 petitioner’s property; however, that is not the issue before us. The issue is
17 whether PZC [Portland Zoning Code] 33.652.020A.1 is satisfied. It is well
18 established that, where there is conflicting evidence over whether an approval
19 criterion is satisfied or can be satisfied, a local government may either (1) find
20 that the approval criterion is satisfied, or (2) find that it is feasible to satisfy
21 the approval criterion and impose conditions necessary to ensure that the
22 criterion will be satisfied. *Rhynne v. Multnomah County*, 23 Or LUBA 442,
23 447 (1992). In this case, the hearings officer apparently did both—he found
24 that the district had an easement over petitioner’s property and also imposed a
25 condition that the district obtain an easement to provide sanitary service to the
26 subdivision. Thus, even if petitioner is correct that the existing easements do
27 not grant the district the ability to connect the proposed subdivision to the
28 existing line on petitioner’s property, the finding that the district will condemn
29 the easement if necessary is sufficient to demonstrate that it is feasible to
30 satisfy PZC 33.652.020A.1. If intervenors ultimately cannot satisfy the
31 condition of approval then they will not be able to develop the subdivision.”
32 50 Or LUBA at 565-66

33 We then distinguished our initial decision in the present appeal:

1 “It is true that, in [*Butte Conservancy*], we held that a condition of approval to
2 construct necessary access through an adjoining subdivision lot in itself did
3 not establish that such access was feasible when the legal right to construct
4 such access was disputed. However, unlike *Butte Conservancy*, the hearings
5 officer in the present case adopted findings and conditions of approval
6 sufficient to demonstrate that sanitary sewer service is feasible. Although
7 petitioner argues that he will challenge any condemnation proceeding, *Rhyme*
8 does not require absolute certainty, only a finding that compliance with
9 applicable criteria is feasible, and imposition of conditions necessary to
10 ensure compliance. The decision properly finds that PZC 33.652.020A.1 is
11 satisfied or can feasibly be satisfied through the imposition of conditions.” *Id.*
12 at 566.

13 Turning back to the present case, the city on remand took essentially the same
14 approach as the hearings officer in *Stoloff*. As in that case, we see no point in addressing the
15 parties’ arguments regarding the meaning of the Kingswood Heights CC&Rs, because for the
16 reasons set out below the city’s findings adequately demonstrate that it is feasible for the city
17 to condemn the disputed right-of-way, even if it is ultimately determined that the CC&Rs
18 prohibit use of the residential lot for that purpose.³ In other words, couched in the analysis
19 set out above, the city’s findings adequately establish that fulfillment of the condition of
20 approval is not precluded as a matter of law, and the city adequately ensured that the
21 condition will be fulfilled prior to final development approval.

³ Petitioners do not dispute the city’s finding that following a lawful condemnation the use of the property for an access road would not be subject to the CC&R restrictions. At oral argument, petitioners questioned whether condemnation is even theoretically possible, since intervenor owns the lot and presumably would dedicate (in fact is required to dedicate) the right-of-way to the local government with jurisdiction, in this case the county. We understand petitioners to suggest that condemnation is a last resort that is reached only if voluntary dedication or conveyance is not possible, and here, it is clear that intervenor is willing and indeed is required to dedicate or convey the right-of-way. We further understand petitioners to argue that if the right-of-way is dedicated or conveyed in some manner rather than via eminent domain, then the CC&R restrictions would continue to apply to dedicated property. Because condemnation will likely never occur, we understand petitioners to argue, the theoretical possibility of employing eminent domain to avoid the CC&R restriction fails to establish that it is “feasible” to fulfill the condition of approval.

Petitioners are probably correct that the city’s exercise of eminent domain is unlikely. However, the city has adequately demonstrated that it has the legal authority to condemn the disputed right-of-way and thus avoid the legal impediment identified by petitioners. That demonstration is sufficient to satisfy the feasibility requirement of *Meyer* and *Rhyme*, as construed here, even if the city is unlikely in fact to ever exercise that condemnation authority.

1 **B. Condemnation Authority**

2 Petitioners concede that ORS 223.930 grants the city the authority to condemn
3 property outside city limits to acquire a street right-of-way.⁴ However, petitioners argue that
4 the city’s authority under ORS 223.930 is subject to two express limitations. First,
5 petitioners argue that ORS 223.930(1) requires that the city, and not the land use applicant,
6 must construct the street. The city cannot rely on ORS 223.930 in the present case,
7 petitioners contend, because it is clear that intervenor and not the city will construct the
8 “roadway.”

9 Second, petitioners argue, that ORS 223.930(1) limits the city’s right to condemn
10 under that statute to “roadways” as defined by the Oregon Vehicle Code. According to
11 petitioners, the Oregon Vehicle Code definition of “roadway” and related definitions specify
12 that the right-of-way must be used or intended for use by the “general public.” See
13 ORS 801.450 (defining “roadway” as the “portion of a highway that is improved, designed or
14 ordinarily used for vehicular traffic”; and ORS 801.305 (defining “highway” in turn as a
15 public way, road, street, etc. that is “used or intended for use of the general public for
16 vehicles or vehicular traffic”). Because the emergency vehicle access can be accessed only
17 by emergency vehicles, petitioners argue, it is not open for “use of the general public” and
18 thus not a “highway” or “roadway.”

19 The city responds that it is common to require developers to construct public roads
20 necessary to serve the proposed development, and that ORS 223.930(1) does not limit the
21 city’s condemnation powers to public streets that the city directly constructs, improves,

⁴ ORS 223.930(1) provides, in relevant part:

“Any city may construct, improve, maintain and repair any street the roadway of which, as defined in the Oregon Vehicle Code, is along or along and partly without, or partly within and partly without the boundaries of the city and may acquire, within and without the boundaries of such city, such rights of way as may be required for such street by donation or purchase or by condemnation in the same manner as provided in ORS 223.005 to 223.105 * *

*.”

1 maintains or repairs. We agree. ORS 223.930(1) does not explicitly require that the city
2 itself construct, improve, maintain or repair the roadway, in order to exercise the
3 condemnation authority.

4 With respect to public use of the proposed access road, the city explains that the
5 city's Future Street Plan contemplates a public local street between the subject property and
6 SE Yellowhammer, constructed to local street standards. The city chose not to require that
7 the access street be constructed to local street standards in this decision and opened to
8 general traffic, because it determined that streets within the Kingswood Heights subdivision
9 cannot handle the additional traffic from development on the subject property, and the
10 number of trips generated from the subject development could not justify requiring
11 intervenor to upgrade the Kingswood Heights streets. Consequently, the city argues, the city
12 required dedication of right-of-way necessary to construct code-required access for
13 emergency vehicles, with a condition requiring dedication of additional right-of-way upon
14 improvement to the streets within the Kingswood Heights subdivision.

15 According to the city, requiring such limited access does not mean that the access
16 street is not a "roadway" or "highway" as those terms are defined in the Oregon Vehicle
17 Code. The city contends that nothing in the relevant statutes or the Oregon Vehicle Code
18 requires unrestricted public access in order for the street to constitute a "roadway" as that
19 term is used in ORS 223.930(1). Once a right-of-way is acquired by a public entity with
20 road jurisdiction, the city argues, that entity has the broad authority to impose restrictions on
21 its use to protect the interests and safety of general public, including closing a public street to
22 travel except as needed for emergency access. The city argues that such a restricted public
23 street is as much a "roadway" for purposes of the relevant statutes as are unrestricted public
24 streets.

25 Finally, the city argues that even if ORS 223.930(1) does not authorize condemnation
26 in the present case, other statutes may. The city first cites to ORS 225.320 and 225.330,

1 which authorize condemnation of property within or without the city for “fire protection”
2 facilities. According to the city, the access road is intended to provide access for fire trucks
3 and alternative public evacuation routes in case of wildland fires, and thus would qualify as a
4 “fire protection” facility. Finally, the city cites to ORS 223.005, which grants the city broad
5 authority to appropriate any private real estate within or without city limits for “any public or
6 municipal use or for the general benefit and use of the people of the city[.]”

7 We agree with the city that under one statute or another the city likely has the
8 authority to condemn the disputed right-of-way, if that becomes necessary. Certainly,
9 petitioners have not demonstrated that any uncertainty with respect to the city’s
10 condemnation authority is such that it can be said that fulfillment of the condition of
11 approval requiring dedication and construction of the access road is precluded as a matter of
12 law. The city appropriately drafted that condition in a manner that is sufficient to ensure that
13 fulfillment of the condition will occur prior to final development approval. If for one reason
14 or another the condition is unsatisfied, intervenor will not be able to obtain final subdivision
15 approval. We do not understand *Meyer*, *Rhyne* or *Stoloff* to require more, under the present
16 circumstances.

17 The first assignment of error is denied.

18 **SECOND ASSIGNMENT OF ERROR**

19 City of Gresham Community Development Code (CDC) 5.0232 provides that “[a]ny
20 removal of trees which would result in clear cutting is prohibited on land within the
21 [HPCD].”⁵ Similarly, CDC 9.1010(F) provides that “[a]ll tree removal that would result in
22 clear cutting on slopes in excess of 15% is prohibited.” CDC 3.0010 defines “clear cutting”
23 as:

24 “Any tree removal which leaves fewer than an average of one tree per 1,000 square
25 feet of lot area, well-distributed throughout the entirety of the site. * * *”

⁵ CDC 5.0232 has since been amended or deleted.

1 CDC 9.1011 requires the applicant for tree removal to submit a tree survey of regulated
2 and/or significant trees on site. Further, the code defines “tree survey” as a “drawing that
3 provides the location of all trees” of a prescribed diameter. Intervenor initially presented a
4 tree survey based on a one-acre sample of the subject property, and the city accepted that
5 survey. We remanded the city’s initial decision, however, concluding that under the above
6 code definitions and provisions the county erred in determining that proposed development
7 did not involve “clear-cutting” based on a one-acre sample rather than a survey of all trees on
8 the property.

9 On remand, intervenor submitted a survey depicting all trees on the subject property,
10 and an analysis indicating that removal of the proposed 1800 trees for roads and utilities
11 would leave approximately 1.07 trees per 1,000 square feet of gross site area. The city
12 accepted that survey and analysis. Petitioners argued below, and argue on appeal, that
13 intervenor’s analysis erroneously considers only trees removed for roads and utilities, and
14 fails to consider trees that will be removed in the buildable area of individual lots for
15 dwellings. The city adopted findings responding that (1) petitioners could have but failed to
16 raise this issue in the previous appeal, and therefore the issue is waived, and (2), in any case,
17 the CDC requires consideration only of trees that must be removed for the development
18 proposed, not subsequent development authorized under individual building permits, which
19 are separately governed by CDC 9.1010(B).⁶ Petitioners challenge both findings.

⁶ The city’s findings state, in relevant part:

“* * * The removal of any trees for purposes of building specific homes within the proposed subdivision is not to be included in determining whether the Applicant’s development will result in a ‘clear cutting.’ The removal of any trees for a home is not authorized by approval of this Application and is subject to CDC 9.1010(B) when a building permit is sought. * * *

“* * * The Appellants did not raise the issue of including tree removal from individual homes sites at LUBA. The LUBA remand required a tree survey of the entire site. The tree survey of the entire site establishes that more trees will remain after the tree removal than was estimated by the original sample tree survey. The tree survey of the entire site supports the original decision that approval of this Application does not result in clear cutting. Not having

1 We need not resolve the issue of waiver, because we agree with the city and
2 intervenor that the CDC does not require intervenor to consider trees that will not be
3 removed under the proposed development—the PUD—but may be removed under
4 subsequent individual building permits for lots created by that PUD.

5 As the city and intervenor point out, nothing in the CDC requires a PUD applicant to
6 identify specific building pads or envelopes for lots created by the PUD approval. Under
7 petitioners’ reading of the code, the PUD applicant and city would be required to guess
8 where building pads and envelopes would be proposed on individual lots, in order to
9 determine which and how many trees are likely to be removed pursuant to future, individual
10 building permits. Instead, CDC 9.1010(B)(2) appears to contemplate that such tree removals
11 are evaluated at or following the time when individual building permits are applied for.⁷

12 Petitioners argue that the city misconstrues CDC 9.1010(B)(2) to allow tree removal
13 for individual building sites to be evaluated at the time a building permit is sought. While
14 that construction of CDC 9.1010(B)(2) may be the rule outside the HPCD, petitioners argue
15 that CDC 9.1010(E) clarifies that where the HPCD applies, removal of regulated trees
16 requires a Type II development permit, and cannot be approved as part of a mere building

raised the issue of tree removal from individual home sites at LUBA, Appellants have waived any opportunity to raise the issue now.” Record 15 (underline in original; footnote omitted).

⁷ CDC 9.1010(B) provides, in relevant part:

“Removal of Regulated Trees: Removal of Regulated Trees as defined in Section 3.0010 shall be reviewed under Type II procedures for compliance with the standards of Sections 9.1010-9.1012,

“* * * * *

“(2) Regulated trees located within 10 feet of the outer edge of the outline of a proposed single family residence or related site improvements may be removed without a separate or additional development permit after issuance of the building permit for the proposed residence. When additional trees are to be protected on the site outside the building envelope, a tree protection plan as approved by the City shall accompany the building plans and shall be enforced during all construction activities on the site. Mitigation in accordance with an approved mitigation plan for lost perimeter trees shall be completed or guaranteed prior to Final Inspection.”

1 permit.⁸ Thus, petitioners argue, outside HPCD zones tree removal may be authorized under
2 CDC 9.1010(B)(2) at the time of building permit approval, without obtaining a Type II
3 development permit, but within HPCD zones such tree removal requires a Type II
4 development permit.⁹

5 Petitioners may be correct that CDC 9.1010(E) would require a Type II development
6 permit for tree removal to site dwellings on individual lots within the HPCD zone, but
7 petitioners do not explain why CDC 9.1010(E) or any other code provision compels that such
8 future tree removals be evaluated as part of a PUD application seeking a tree removal permit
9 that does not propose removing any trees to site dwellings on individual lots. Petitioners
10 may also be correct that the city's interpretation of CDC 9.1010 to effectively allow
11 piecemeal cutting of regulated trees over a series of applications may undercut the
12 prohibition on "clear cutting."¹⁰ However, that there may be loopholes that undercut the
13 "clear-cutting" prohibition does not mean that the city's interpretation is subject to reversal

⁸ CDC 9.1010(E) provides:

"Tree Removal in Overlay Districts: Except as provided below, no removal of regulated trees shall be permitted within a Hillside Physical Constraint, Flood Plain, or Natural Resource Overlay District without a Type II Development Permit."

⁹ The city points out that CDC 9.1010(E) has since been amended to provide an exception for removal of regulated trees within 10 feet of the outer edge of the outline of a proposed single family residence or related site improvements, so that such tree removals no longer require a Type II Development Permit. The city argues that any building permit/tree removal applications for individual lots within the subdivision will be governed by the amended CDC 9.1010(E), and therefore petitioners' arguments under former CDC 9.1010(E) are essentially moot. It seems unlikely to us that if the CDC in effect at the time of the challenged PUD/tree removal permit required evaluation of trees to be removed for dwellings, subsequent amendments to the CDC would moot a challenge that the city failed to conduct that required evaluation. However, we need not address that argument, because we agree with the city that nothing in CDC 9.1010 or elsewhere cited to us requires that the city determine *in this decision* which and how many trees will be removed for dwellings.

¹⁰ The city also points out that Condition of Approval 6(c), a condition imposed in the city's initial decision and not challenged by petitioners, requires that the CC&Rs for the subdivision include a restriction against removing regulated trees on individual lots where the result would leave fewer than one tree per 1,000 square foot of lot area. We understand the city to argue that that condition effectively ensures that development of individual lots will not run afoul the prohibition on "clear-cutting," as that prohibition is applied to applications to develop individual residential lots in the PUD.

1 under the deferential scope of review we must apply to a governing body's code
2 interpretation under ORS 197.829(1).¹¹

3 The fact remains that nothing in CDC 9.1010 compels the applicant for a tree removal
4 permit necessary to site roads and utilities for a proposed PUD or subdivision to take into
5 account trees that may have to be removed in subsequent development applications to site
6 and build houses on individual lots on that same property. Because it is difficult if not
7 impossible in the context of PUD approval to determine which trees and how many trees will
8 be removed when individual PUD lots are developed, such a requirement would be
9 unworkable, even if there were a basis in the code for an implicit requirement to that effect.
10 The city's code interpretation declining to infer such a code requirement is well within the
11 city's interpretative discretion under ORS 197.829(1).

12 The second assignment of error is denied.

13 The city's decision is affirmed.

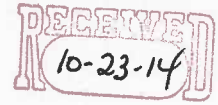
¹¹ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”



Eugene City Attorney's Office



October 22, 2014

SENT BY FEDERAL EXPRESS STANDARD OVERNIGHT

Appellate Court Administrator
Appellate Court Records Section
1163 State Street
Salem, OR 97301-2563

Re: *Oakleigh-McClure Neighbors, et al v. City of Eugene*
CA A157756/LUBA No. 2014-001

Dear Appellate Court Administrator:

Enclosed please find the original of Respondent City of Eugene's Answering Brief for filing in the above-referenced matter.

Sincerely,

A handwritten signature in black ink that reads "Anne C. Davies".

Anne C. Davies
Assistant City Attorney

ACD:abm
Enclosure

cc: William K. Kabeiseman (w/enc.)
Zack P. Mittge (w/enc.)

IN THE COURT OF APPEALS FOR 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
LUBA No. 2014-001

CA A157756

EXPEDITED PROCEEDING
UNDER ORS 197.850

RESPONDENT CITY OF EUGENE'S ANSWERING BRIEF

Appeal from the Final Opinion and Order of the Land Use Board of Appeals;
Board Chair Ryan.

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I. STATEMENT OF THE CASE

Respondent (“the City”) accepts Petitioners’ Paul Conte and Simon Trautman’s (“Petitioners”) Statement of the Case, except as set forth below.

A. Questions Presented on Appeal

1. Did LUBA err in affirming the City’s interpretation of Eugene Code (EC) 9.8320(5) or (6)?

2. Did LUBA misunderstand and/or misapply its standard of review when it concluded that the City’s determination that Oakleigh Lane would be safe was supported by substantial evidence?

B. Summary of Arguments

Petitioners’ main contention is that the increase in traffic to be generated by the proposed development will cause Oakleigh Lane, the sole access to and from the development, to be unsafe. They rely upon that assertion to support their theory that Oakleigh Lane must be fully improved to city standards *prior* to approving the construction of the PUD. LUBA, however, concluded that the City’s determination that Oakleigh Lane would be safe was supported by substantial evidence. This Court can only disturb that conclusion if it determines that LUBA misapplied or misunderstood its standard of review.

C. Statement of Material Facts

The City accepts Petitioners’ Statement of Material Facts as set forth at Petitioners’ Opening Brief, 4-6. The City takes no position with regard to

Petitioners' first assignment of error, but provides the following additional facts in the event they might be helpful to assist the Court in its resolution of that issue.

On February 16, 2013, the applicant held a neighborhood meeting, as required by the Eugene Code – EC 9.7007(2). Local Rec. 1492.¹ Notice of that neighborhood meeting was sent to owners and residents of property within 500 feet of the subject property. Local Rec. 1493-96. Notice of the initial hearings official hearing was also mailed to owners and occupants of property located within 500 feet of the perimeter of the subject property, as required by EC 9.7315(2)(c). Local Rec. 1317-19. Petitioner Trautman did not receive either of those notices. Petitioner Trautman's mother-in-law owns the property located at 109 Oakleigh Lane, LUBA Rec. 689, and that property is located approximately 275 yards from the subject property. Petitioners' Opening Brief 8.

Petitioner Trautman, Laurie Trautman and Jean Darian submitted a letter dated September 1, 2013, prior to the hearings official public hearing. Local Rec. 1308. The hearings official public hearing was held October 2, 2013. LUBA Rec. 711. Notice of the hearings official decision was not mailed to Petitioner Trautman. *See* Local Rec. 342-46.

¹ Citations in this brief to the record compiled before the local government will be referred to as "Local Rec." Citations to the record compiled before LUBA are referred to as "LUBA Rec."

II. RESPONSE TO SECOND ASSIGNMENT OF ERROR

LUBA did not err in affirming the City's determination that the proposed PUD complied with EC 9.8320(5) and (6) and would provide a safe and adequate transportation system

A. Standard of Review

This Court's review of LUBA decisions is governed by ORS 197.850(9), which provides in relevant part:

"The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:

"(a) The order to be unlawful in substance or procedure, but error in procedure is not cause for reversal or remand unless the court finds that substantial rights of the petitioner were prejudiced thereby;

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record as to facts found by the board under ORS 197.835(2)."

Further, ORS 197.850(8) provides, in part: "The court shall not substitute its judgment for that of the board as to any issue of fact."

Petitioners' summary of this Court's standard of review under this Second Assignment of Error is incorrect and misleading. First of all, while the assignment of error is framed as a legal challenge to LUBA's construction of EC 9.8320(5) and (6), the argument includes a substantial evidence challenge. The gist of Petitioners' second assignment of error is that the City and LUBA got it wrong in determining that the traffic to be generated by the proposed

PUD is not enough to pose a safety risk to travelers on Oakleigh Lane. As discussed in more detail below, that is an evidentiary challenge, and Petitioners have an uphill battle in demonstrating that LUBA misunderstood its scope of review in affirming the City's determination that the transportation system would be safe.

1. Interpretation of Local Ordinance

Petitioners misstate the correct standard of review applicable to their challenge of LUBA's affirmance of the City's interpretation of the relevant code provisions. This Court does not review the interpretation of a local ordinance "to determine if LUBA correctly interpreted the ordinance."

Petitioners' Opening Brief 18. Neither is the Court to decide how it would interpret that local code provision in the first instance. Rather, this Court may only review LUBA's decision, which was a review of the *City's* interpretation, and determine whether LUBA's order is unlawful in substance. *I.e.*, did LUBA err in affirming the City's interpretation of its local ordinance?

2. Substantial Evidence

With regard to evidentiary challenges, this Court's review authority is significantly more limited. This Court has explained that in reviewing LUBA's determination of substantial evidence:

"our task is not to assess whether the local government erred in making a finding, but to determine whether LUBA properly exercised its review authority. Thus, we do not substitute our judgment for LUBA's on whether a reasonable person could make

a finding of fact based upon the entire local government record. Instead, we evaluate whether LUBA properly stated and applied its own standard of review. If LUBA does not err in the articulation of its substantial evidence standard of review under ORS 197.835(9)(a)(C), we would reverse LUBA's decision only when there is no evidence to support the finding or if the evidence in the case is 'so at odds with LUBA's evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review.' *Younger v. City of Portland*, 305 Or 346, 359, 752 P2d 262 (1988)."

Citizens for Responsibility v. Lane County, 218 Or App 339, 345, 180 P3d 35 (2008).

B. Introduction

While Petitioners' main contention is that Oakleigh Lane is inadequate to safely serve the anticipated increase in traffic to be generated by the proposed PUD, this appeal also implicates how the City deals with incremental development. The issue of what improvements (public or privately funded) (on or off the subject property) must be completed prior to final approval of a private development is an ongoing issue everywhere. The constitutional restrictions placed on local government limit the improvements that can be required of a private developer, and the increasing scarcity of public resources require local governments to find innovative ways to plan for and fund public infrastructure, including street improvements.

For purposes of improving streets to city standards, the City requires dedications from developers of land for future road improvements when and where it can. Not all roads serving a development will need to be fully

improved to city standards at the time of land use application approval. However, the City attempts to impose conditions of approval as a means of acquiring dedications of land that satisfy the minimum right-of-way requirements to facilitate possible future improvements to those streets. Where streets need not be fully improved at the time a land use application is approved, the City will also require the applicant to execute an irrevocable petition that will ensure that the applicant pays its fair share of the costs of any future street improvements.

In this case, the City determined that, based on the anticipated increase in traffic generated from the proposed PUD, Oakleigh Lane did not have to be widened at this time. However, the City did require the applicant to dedicate land that was sufficient to provide one-half of the width of the minimum right-of-way necessary for future improvement of a portion of the street. Condition #3; Local Rec. 83. The City also imposed a condition requiring the applicant to execute an irrevocable petition for public improvements to Oakleigh Lane. Condition #7; Local Rec. 83. LUBA affirmed this approach. It is important to keep these considerations in mind while analyzing the specific arguments regarding, and interpretations of, the relevant code provisions.

C. Argument

The code provisions that are relevant to this assignment of error provide:

“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 (10) 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 1/4 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.” EC 9.8320(5).

EC 9.8320(6) provides: “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.”

Petitioners’ second assignment of error can be boiled down to three separate challenges: (1) LUBA’s decision affirming the City’s interpretation of EC 9.8320(5); (2) LUBA’s decision concluding that the City’s determination that subsection (5) was complied with was supported by substantial evidence; and (3) LUBA’s decision affirming the City’s interpretation of EC 9.8320(6).

1. Interpretation of EC 9.8320(5)²

The City initially concluded that compliance with subsection (5) is demonstrated by showing compliance with its individual components – subsections (a), (b) and (c). LUBA Rec. 698.³ LUBA agreed. Slip op. 31 (LUBA Rec. 33). Petitioners do not really argue that LUBA erred in affirming this particular interpretation. Rather, Petitioners attempt to provide their own interpretation of how subsection (5) works, an interpretation that they prefer over the City’s interpretation and LUBA’s decision.

Petitioners start out by explaining the grammatical structure of subsection (5). They assert that subsection (5) is aimed at ensuring that the “PUD provides safe and adequate transportation systems.” Although not stated very clearly, Petitioners seem to be arguing that subsections (a), (b) and (c) are not stand-alone, independent standards or criteria. As Petitioners correctly point out, subsection (b) does not identify any standards. Subsection (a), on the other hand, does explicitly provide standards – those found at EC 9.6800-6875. According to Petitioners, subsections (a) and (b) must be read together. They argue that subsection (b) identifies elements of the transportation system, *i.e.*,

² The standard of review applicable here is outlined above at Section II.A.1.

³ The planning commission decision provides: “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.” LUBA Rec. 698.

pedestrian, bicycle and transit elements, that must be evaluated for consistency with the standards found in subsection (a) – the standards for streets, alleys and other ways located in EC 9.6800 – 9.6875.

There are several problems with Petitioners' argument. First, this is a novel interpretation that appears for the first time in Petitioners' brief before this Court.⁴ As explained above, this Court's review function is to determine whether LUBA erred in affirming the City's interpretation; the Court is not reviewing Petitioners' desired interpretation of the relevant code provisions.

Second, that said, Petitioners' proposed interpretation might make more sense if subsection (c) did not exist. Even Petitioners concede that the City's interpretation is supported by the language of the provision. Petitioners' Opening Brief 27. EC 9.8320(5) starts with a statement of the overarching standard, "provision of safe and adequate transportation systems." That standard is to be shown "through compliance with the following." Subsections (a), (b) and (c) then provide three separate provisions that must be addressed in order to demonstrate that EC 9.8320(5) is complied with. Petitioners' asserted interpretation is just not supported by the structure of the code provision. The City's interpretation is.

⁴ This Court is increasingly reluctant to address theories that are presented for the first time on appeal. *See Regency Centers, L.P. v. Washington County*, 265 Or App 49, 60-61, ____ P3d ____ (2014).

The City and LUBA read subsection (b) to “require safe and adequate pedestrian, bicycle and transit circulation both within the PUD” and ‘as well as to adjacent and nearby residential areas, transit stops * * *.’” Slip op. 32 (LUBA Rec. 34). It is the “safe and adequate” standard in the introductory language of EC 9.8320(5) that gives meaning to subsection (b), not, as Petitioners suggest, the standards found in subsection (a). That is the interpretation that the City adopted, and LUBA did not err in affirming it.

Petitioners also complain that LUBA dismissed Petitioners’ safety concerns by noting that the street width standard in EC 9.6870 (incorporated by reference by EC 9.8320(5)(a)) applies only to dedicated streets.⁵ Petitioners’ Opening Brief 34. They seem to think that LUBA was confusing or conflating the dedication issue with the safety issue, and that by concluding that only dedicated right-of-ways had to comply with the street width standards, the City was entirely avoiding addressing safety. Petitioners’ Opening Brief 34-35.

LUBA’s determination that the standard in EC 9.6870 only applied to dedicated streets was based entirely on the language of the provision, EC 9.6870, which provides:

“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

⁵ LUBA held: “In addition, the EC 9.6870 requirements for right of way widths apply to ‘dedicated’ streets. It does not require Meadows to dedicate right of way on land that it does not own or to improve land it does not own.” Slip op. 31 (LUBA Rec. 33).

the adopted Street Right-of-Way map. When a street segment right-of-way width is not designated on the Street Right-of-Way map, the required street width shall be the minimum width shown for its type in Table 9.6870 Right-of-Way and Paving Widths.” (Emphasis added).

Based on that language, LUBA clarified that the standards only apply to dedicated rights-of-way and thus concluded that the street standards do not apply to the entirety of Oakleigh Lane. LUBA did not conflate the safety issue and the dedication issue, as Petitioners suggest. LUBA merely agreed with the City that Oakleigh Lane, as it exists, is adequate to serve the increased traffic to be generated by the proposed PUD. Based on that conclusion, LUBA agreed with the City that Oakleigh Lane did not have to be improved or widened at this time. The City also required some dedications of land from the applicant for possible improvements to the street in the future. Petitioners do not explain how this is error.

2. Finding of Compliance with EC 9.8320(5) Supported by Substantial Evidence⁶

The gist of Petitioners’ substantial evidence argument is that Oakleigh Lane is unsafe and that an apparent conflict in the evidence found in Public Works staff comments was never resolved. Petitioners’ Opening Brief 34. Contrary to Petitioners’ assertion, the City explicitly addressed the alleged conflict and resolved it, concluding that there were no safety issues with the anticipated traffic generated from the proposed PUD.

⁶ Standard of review applicable here is outlined above at Section II.A.2.

There are currently 25 residential tax lots along Oakleigh Lane between River Road and the proposed PUD. Local Rec. 999. The proposal would add an additional 29 dwelling units, which would result in over 500 trips per day on Oakleigh Lane. *Id.* This number falls within the range expected for low-volume streets. *Id.* The Hearings Official considered this expected increase in traffic from the proposed development, and confirmed that the Average Daily Traffic (ADT) would not be expected to exceed the ADT range for low volume residential streets. Local Rec. 39. For low volume residential public streets, the required dedicated right-of-way width ranges from 45 feet to 55 feet.⁷

Public Works staff recommended a condition of approval that would require dedication of half of that width, “22.5’ 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’ east of the westerly boundary.”

⁷ The Public Works referral comments provide:

“Pursuant to EC 9.6870, when a street segment right-of-way width is not designated on the adopted Street Right-of-Way map, the required street width shall be the minimum width shown for its type in Table 9.6870 Right-of-Way and Paving Widths * * *.

“Oakleigh Lane, which is not identified on the adopted Street Classification Map or the adopted Right-of Way Map * * * is a local street. Staff concurs with the applicant’s assessment on page 43 of the written statement that Oakleigh Lane is a low-volume local street. * * *

“Per Table 9.6870 the minimum right-of-way width for low-volume streets is 45’.” Local Rec. 1263-64.

Local Rec. 1256. The Hearings Official imposed the conditions recommended by the Public Works staff.

In order to impose the dedication requirements, the City was required to adopt *Dolan* findings justifying the exaction. Local Rec. 1256-1257. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). Public Works staff referral comments included those *Dolan* findings, which demonstrate 1) that there is a legitimate state interest justifying the imposition of the exaction, 2) that there is a nexus between the permit condition and the legitimate state interest, and 3) that the exaction and the anticipated impact of the proposed development are “roughly proportionate.” *See* Local Rec. 19-20. The findings were incorporated *verbatim* into the Hearings Official’s decision. Local Rec. 41-43.

At LUBA and before this Court, Petitioners rely on these *Dolan* findings to support their theory that approving the proposed PUD without first improving Oakleigh Lane will create an unsafe transportation system. The findings Petitioners point to provide:

“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. * * * 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, * * * 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.

“* * *

“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.”
Local Rec. 41-42.

Petitioners read this language as a requirement that Oakleigh Lane must be “improved” to the minimum width prior to approval of the proposed PUD in order to ensure a safe road system.

The Planning Commission made clear, however, that the findings support no such requirement:

“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.” Local Rec. 9.

The Planning Commission explicitly found that immediate improvements are not necessary. That finding was based on the expert opinion of city traffic engineering staff:

“With the exception of street lights, Oakleigh Lane has an approximate 19 foot wide paved surface, but has not been improved to city standards, lacking curbs and gutters, storm drainage, sidewalks, and street trees. As is typical for unimproved local streets in the River Road area, i.e., those streets which do not have paving, curb & gutter and sidewalks or which 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, for motorists to travel at slower, more cautious speeds, because of the perceived narrowness of the street. Until such time that property owners elect to improve Oakleigh Lane to full City standards, including sidewalks, the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles. Since the existing paved surface provides safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles, and since there is nothing to suggest that the impacts of the proposed development will result in unsafe conditions in Oakleigh Lane, it is appropriate to defer public improvements via an irrevocable petition.” Local Rec. 1268-69.

The Hearings Official and Planning Commission considered all of the evidence before it, weighed that evidence, and determined that there was no safety concern with the anticipated increased traffic generated from the proposed development. Both the Hearings Official and the Planning

Commission determined that the safety concerns voiced by the neighbors were simply not supported by the record. Local Rec. 48⁸; Local Rec. 49.

LUBA understood this issue as presented to it as a substantial evidence challenge and analyzed it as such. LUBA considered Petitioners' arguments and the evidence in the record regarding safety issues, and concluded that the City got it right:

“In a portion of his first assignment of error, we also understand Conte to argue that the planning commission's conclusion that Oakleigh Lane is presently safe and will be safe after the PUD is built is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). * * * The planning commission understood the public works staff comments regarding the need for a 45-foot right of way for Oakleigh Lane to be limited to the portion of Oakleigh Lane within the proposed PUD and to address constitutional requirements for exacting a portion of Meadows' property for widening of Oakleigh Lane on the subject property, and found that the comments do not provide evidence that Oakleigh Lane in its entirety is unsafe. Record 9-10, 15.

“* * *

“We have reviewed the public works staff comments on the proposed PUD at Record 1255-76 and 1268-69 and we think the

⁸ The Hearings Official found:

“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.” Local Rec. 48 (emphasis in original).

planning commission and respondents' description and understanding of the comments and the evidence provided in them regarding whether the PUD satisfies the applicable criteria is the accurate one. It is also evidence that a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 119, 690 P2d 475 (1984)." LUBA Rec. 35-36; Slip op. 33-34 (footnote omitted).

As explained above, this Court may only remand LUBA's substantial evidence determination if it concludes that LUBA misunderstood or misapplied the substantial evidence standard. *Younger v. City of Portland, supra*; *Citizens for Responsibility v. Lane County, supra*; see also *Root v. Klamath County*, 260 Or App 665, 320 P3d 631 (2014); *Gould v. Deschutes County*, 233 Or App 623, 227 P3d 758 (2010). Petitioners have presented no argument that would support such a conclusion. Neither have Petitioners even attempted to demonstrate that this is a case where (1) "no evidence" supports the City's findings or (2) the evidence is "so at odds" with the City's findings that the Court can infer that LUBA misunderstood or misapplied its standard of review. LUBA correctly explained its understanding that its task was to assess whether the evidence in the record was "evidence that a reasonable person would rely on in reaching a decision." LUBA understood the substantial evidence standard, correctly applied its standard of review, and its determination cannot be disturbed by this Court.

3. EC 9.8320(6)

Once again, subsection (6) provides: “[t]he 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.” LUBA concluded that this criterion addresses potential impacts to health and safety, including impediments to emergency response, caused by the PUD itself. Accordingly, it does not require consideration whether the configuration of Oakleigh Lane off-site will be an impediment to emergency response or otherwise create risk to public health and safety. Slip op. 35 (LUBA Rec. 37). Based on that reading, LUBA affirmed the City’s determination that subsection (6) was complied with. That said, even if subsection (6) required the City to analyze the safety of the entirety of Oakleigh Lane, the City did so and concluded that Oakleigh Lane is safe. LUBA affirmed.

Petitioners argue that the City’s findings conclude that Oakleigh Lane will only be safe if residents of Oakleigh Lane do not park their cars along the street. They allege that LUBA erred in concluding subsection (6) was complied with because the challenged decision did not ensure that residents will not park along Oakleigh Lane.

The residents of Oakleigh Lane are presumed to follow the law,⁹ which prohibits parking vehicles along Oakleigh Lane in a manner that will constitute

⁹ ORS 40.135(1)(x) identifies the following as a legal presumption: “the

a hazard to public safety.¹⁰ Petitioners cannot rely on an assumed violation of the law to justify its unsupported theory that Oakleigh Lane will be unsafe.¹¹

III. CONCLUSION

LUBA correctly upheld the City's decision, and this Court should affirm LUBA's decision.

Dated this 22nd day of October, 2014.

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law has been obeyed." OEC Rule 311(1)(x).

¹⁰ EC 5.255(1) provides: "Prohibited Stopping, Standing and Parking. Except as authorized by a parking space rental permit issued in accordance with section 5.350, no person shall stop, stand or park a vehicle in such a manner or location that it constitutes a hazard to public safety or obstruction to vehicle, bicycle or pedestrian traffic on the street."

¹¹ Petitioners' Third Assignment of Error is premised on the false assumption that all of Oakleigh Lane must be improved to full city standards in order to make Oakleigh Lane safe. As explained in the foregoing discussion, LUBA correctly affirmed the City's determination that no improvements to Oakleigh Lane are currently required in order to make Oakleigh safe. The City supports the applicant's arguments on this issue but does not address it separately.

**CERTIFICATE OF COMPLIANCE WITH BRIEF
LENGTH AND TYPE SIZE REQUIREMENTS**

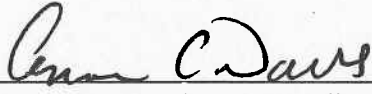
Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 4,691 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING

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

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

LUBA Nos. 2014-001

Petitioners,

and

BRIEF OF RESPONDENT

PAUL CONTE and SIMON TRAUTMAN,

Intervenor-Petitioners,

v.

CITY OF EUGENE,

Respondent,

and

OAKLEIGH MEADOWS CO-HOUSING,
LLC,

Intervenor-Respondent.

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APPENDIX

Site Plan
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Traffic Study

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I. PETITIONERS' STANDING

Respondent City of Eugene ("the City") accepts that 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 ("Intervenor-Petitioners") have standing to appear before the Board.

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision

The City accepts Petitioners' summary of the Nature of the Decision and Relief Sought.

B. Summary of Arguments

Under the City's land use code and common practice, a roadway serving a proposed development need not be fully improved to full city standards prior to final land use approval, unless there is a documented concern regarding safety. In this case, the Hearings Official and Planning Commission determined that Oakleigh Lane in its current condition is adequate to serve the increased traffic to be generated from the proposed PUD. Conditions of approval imposed by the City, including conditions requiring dedication of land for right-of-way that will facilitate future roadway improvements, are adequate to demonstrate compliance with relevant approval criteria regarding safety of transportation systems.

The City did not err in including easements in the acreage of land considered part of the residential use for purposes of calculating net density.

C. Summary of Material Facts

Respondent City of Eugene provides the following summary of material facts:

1 Applicant sought approval of a 29-dwelling unit (including a
2 community building) PUD on land zoned low density residential (R-1). The
3 currently vacant development site is approximately 2.3 acres and lies at the
4 east end of a dead-end road, Oakleigh Lane. Oakleigh Lane terminates on
5 its west end where it intersects with River Road, a north-south running major
6 arterial. To the east of the subject property is a city park, which is, in turn,
7 bordered by the Willamette River on its eastern boundary. Otherwise, the
8 property is generally surrounded by single-family dwellings on individual
9 lots and undeveloped lots that have potential for future residential
10 development.

11 The Hearings Official conducted a hearing and approved the
12 application with fifteen conditions of approval. Neighbor opponents
13 appealed that approval to the City's Planning Commission, which conducted
14 an on-the-record hearing. A main focus of the issues raised in the local
15 appeal concerned the sole access to the property via Oakleigh Lane. The
16 Planning Commission, for the most part, agreed with the decision of the
17 Hearings Official and affirmed.

18 This appeal followed.

19 III. JURISDICTION

20 The City accepts the Petitioners' and Intervenor-Petitioners'
21 statements of jurisdiction.

22 IV. RESPONSE TO ASSIGNMENTS OF ERROR

23 A. Introduction

24 The main objections Intervenor¹ and Petitioners raise relate to the

25
26 ¹ There are two intervenor-petitioners in this appeal, Simon Trautman and Paul Conte. In this Brief of Respondent, the City only responds to arguments raised in the opening brief of Intervenor-Petitioner Conte.

1 criteria addressing safety of the transportation system. As explained above,
2 there is one road, Oakleigh Lane, providing access to the proposed PUD
3 from River Road, the area's major arterial, which runs generally north/south.
4 See Rec. 571; App-2. Oakleigh Lane, which runs east/west, intersects with
5 River Road at its western terminus. Intervenor describes Oakleigh Lane as
6 "a narrow, substandard, dead-end lane." Intervenor's Brief 3. The City
7 agrees that Oakleigh Lane is a dead-end roadway and that it is not improved
8 to full city standards. However, the City does not agree that Oakleigh Lane
9 is otherwise inadequate to serve the needs of the proposed PUD, as
10 Petitioners have asserted throughout the local proceedings, and continue to
11 assert here. As discussed in more detail below, both the Hearings Official
12 and the Planning Commission determined that Oakleigh Lane was in fact
13 adequate to serve the residents of the PUD and did not pose a safety risk
14 based on the anticipated increase in traffic resulting from the PUD.

15 A second theme presented in this appeal is the proper means of
16 dealing with incremental development. The issue of what improvements
17 (public or privately funded) must be completed prior to final approval of a
18 private development is an ongoing issue everywhere. The constitutional
19 restrictions placed on local government limiting the improvements that can
20 be required of a private developer, and the increasingly limited resources
21 available to local governments, require local governments to find innovative
22 ways to plan for and fund public infrastructure, including street
23 improvements.

24 For purposes of improving streets to city standards, the City requires
25

26 Accordingly, for purposes of this brief, the term "Intervenor" shall refer to
Intervenor-Petitioner Conte.

1 dedications from developers of land for future road improvements when and
2 where it can. All roads serving a development cannot and need not always
3 be fully improved to city standards at the time of land use application
4 approval. However, the City attempts to impose conditions of approval as a
5 means of acquiring dedications of land that satisfy the minimum right-of-
6 way requirements to facilitate possible future improvements to those streets.
7 Where streets need not be fully improved at the time a land use application
8 is approved, the City will also require the applicant to execute an irrevocable
9 petition that will ensure that the applicant pays its fair share of the costs of
10 any future street improvements.

11 In this case, the City determined that, based on the anticipated
12 increase in traffic generated from the proposed PUD, Oakleigh Lane did not
13 have to be widened at this time. However, the City did require the applicant
14 to dedicate land that was sufficient to provide one half of the width of the
15 minimum right-of-way necessary for future improvement of a portion of the
16 street. Condition #3; Rec. 83. The City also imposed a condition requiring
17 the applicant to execute an irrevocable petition for public improvements to
18 Oakleigh Lane. Condition #7; Rec. 83.

19 **B. Response to First Assignment of Error (Conte)**

20 **The City did not err in concluding that the proposed PUD**
21 **complied with EC 9.8320(5), (6) and (11)(b) and would provide a**
22 **safe and adequate transportation systems**

23 **1. Combined Response to First, Second and Third**
24 **Subassignments of Error (1.A., 1.B., and 1.C.)**

25 **The City was not required to impose a condition requiring**
26 **improvement of a 45-foot wide strip of Oakleigh Lane (1.A.)**

1 **The City did not err in failing to apply adopted street standards to**
2 **Oakleigh Lane (1.B.)**

3 **The City did not err in determining compliance with EC**
4 **9.8320(5)(b) (1.C.)**

5 The applicable criteria for tentative PUD approval are found at EC
6 9.8320. With regard to these first three subassignments of error, EC
7 9.8320(5) provides:

8 “The PUD provides safe and adequate transportation systems through
9 compliance with the following:

10 “(a) EC 9.6800 through EC 9.6875 Standards for Streets,
11 Alleys, and Other Public Ways (not subject to
12 modifications set forth in subsection (10) below).

13 “(b) Pedestrian, bicycle and transit circulation, including
14 related facilities, as needed among buildings and related
15 uses on the development site, as well as to adjacent and
16 nearby residential areas, transit stops, neighborhood
17 activity centers, office parks, and industrial parks,
18 provided the city makes findings to demonstrate
19 consistency with constitutional requirements. “Nearby”
20 means uses within 1/4 mile that can reasonably be
21 expected to be used by pedestrians, and uses within 2
22 miles that can reasonably be expected to be used by
23 bicyclists.

24 “(c) The provisions of the Traffic Impact Analysis Review
25 of EC 9.8650 through 9.8680 where applicable.”

26 The City found that compliance with subsection (5) is demonstrated by
27 compliance with its individual parts – subsections (a), (b) and (c).² In other

² The Hearings Official found:

1 words, the City need not independently determine whether the proposal
2 provides a safe and adequate transportation system. If subsection (a), (b)
3 and (c) are complied with, then subsection (5) is satisfied. That said, much,
4 if not all, of Intervenor Conte's arguments under his first assignment of error
5 rely upon undocumented assertions of safety concerns.

6 a. **Motion to Strike**

7 LUBA's review of the challenged decision is limited to the record.
8 ORS 197.835(2). Intervenor has included in an appendix to his brief a
9 document that appears not to be part of the record. *See* Intervenor-Petitioner
10 Conte's Amended Petition for Review, Exhibit A. Intervenor asserts that the
11 document is "based solely on evidence in the record." *Id.* at 4. However, he
12 does not indicate how that fact justifies including it in the brief, despite the
13 fact that it was not included in the record. LUBA's ability to accept
14 demonstrative exhibits, even where allegedly based on evidence in the
15 record, is extremely limited. *NWDA v. City of Portland*, 47 Or LUBA 533,
16 537 (2004). In any event, neither the exhibit nor the brief identifies where in
17 the record the information that informs the graphic can be found, so it is
18 impossible (or at least extremely difficult) to determine the accuracy of the
19 information. Accordingly, the City moves to strike Appendix A and any

20
21 "The very structure of EC 9.8320(5) does not require an applicant to
22 prove that a proposed development will be safe from any and all
23 asserted and or imagined traffic safety threats. The language of EC
24 9.8320(5) states: "[t]he PUD provides safe and adequate
25 transportation systems through compliance with the following:" The
26 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."
Rec. 44 (emphasis in original).

1 argument that relies on it.

2 **b. Undocumented Safety Issues**

3 Although, as explained above, EC 9.8320(5) is satisfied where
4 subsections (a), (b) and (c) are complied with, the City did explicitly
5 conclude that there were no safety issues with the anticipated traffic
6 generated from the proposed PUD.

7 There are currently 25 residential tax lots along Oakleigh Lane
8 between River Road and the proposed PUD. Rec. 999. The proposal would
9 add an additional 29 dwelling units, which would result in over 500 trips per
10 day on Oakleigh Lane. *Id.* This number falls within the range expected for
11 low-volume streets. *Id.* The Hearings Official considered this expected
12 increase in traffic from the proposed development, and confirmed that the
13 Average Daily Traffic (ADT) would not be expected to exceed the ADT
14 range for low volume residential streets. Rec. 39. For low volume
15 residential public streets, the required dedicated right-of-way width ranges
16 from 45 feet to 55 feet.³

17 Public Works staff recommended a condition of approval that would
18

19 ³ The Public Works referral comments provide:

20 "Pursuant to EC 9.6870, when a street segment right-of-way width is
21 not designated on the adopted Street Right-of-Way map, the required
22 street width shall be the minimum width shown for its type in Table
23 9.6870 Right-of-Way and Paving Widths * * *.

23 "Oakleigh Lane, which is not identified on the adopted Street
24 Classification Map or the adopted Right-of Way Map * * * is a local
25 street. Staff concurs with the applicant's assessment on page 43 of the
26 written statement that Oakleigh Lane is a low-volume local street.
* * *

"Per Table 9.6870 the minimum right-of-way width for low-volume
streets is 45'." Rec. 1263-64.

1 require dedication of half of that width, "22.5' of right-of-way along the
2 northerly boundary of the development between the westerly boundary of
3 the proposed development and a line that is 50' east of the westerly
4 boundary." Rec. 1256. Public Works staff also recommended imposing a
5 condition that would require dedication of land that could eventually
6 accommodate an emergency vehicle turnaround at the end of Oakleigh Lane.
7 See Rec. 1000; 1443 (App-7). Pending further development of vacant
8 parcels to the north, when the permanent emergency turnaround would be
9 built, the City approved a temporary emergency turnaround that is entirely
10 accommodated on site.⁴ See map at Rec. 1036 (temporary emergency
11 turnaround identified on that map as "Fire Turnaround"). The Hearings
12 Official imposed the conditions recommended by the Planning Commission.

13 In order to impose the dedication requirements, the City was required
14 to adopt *Dolan* findings justifying the exaction. Rec. 1256-1257. Public
15 Works staff referral comments included those *Dolan* findings, which
16 demonstrate 1) that there is a legitimate state interest justifying the
17 imposition of the exaction, 2) that there is a nexus between the permit
18 condition and the legitimate state interest, and 3) that the exaction and the
19 anticipated impact of the proposed development are "roughly proportionate."
20 See Rec. 19-20. The findings were incorporated *verbatim* into the Hearings
21 Official's decision. Rec. 41-43.

22 Intervenor relies on these *Dolan* findings to support his theory that

23 _____
24 ⁴ The staff report provides:

25 "Construction of the hammerhead turnaround is not necessary or
26 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." Rec. 1000.

1 approving the proposed PUD without first improving Oakleigh Lane will
2 create an unsafe transportation system. The findings Intervenor points to
3 provide:

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

10 “There is a nexus between the requirement to dedicate 22.5 feet of
11 right-of-way west of the drive aisle and 13 feet east of the drive aisle
12 and the public interest at issue. The 22.5 feet of right-of-way will
13 result in one-half of the 45 feet of right-of-way which is necessary to
14 construct Oakleigh Lane to the City’s minimum street design
15 standards which have been established for a low-volume street. * * *
16 Because 45 feet of right-of way is the minimum amount of right-of-
17 way necessary to construct Oakleigh Lane in this manner as a low-
18 volume street, * * * the public interest in safe vehicular, pedestrian
19 and bicycle travel and emergency response and access will be at risk if
20 the 22.5 and 13 foot strips of right-of-way are not dedicated.

21 * * *

22 “Without the additional right-of-way, Oakleigh Lane cannot be
23 improved to the City’s minimum street design standards and the 164
24 new vehicle trips per day generated by the proposed development,
25 along with the additional pedestrian and bicycle traffic generated by
26 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.” Rec. 41-42.

Petitioners and Intervenor read this language as a requirement that Oakleigh
Lane must be “improved” to the minimum width prior to approval of the
proposed PUD in order to ensure a safe road system.

1 The Planning Commission made clear, however, that the findings
2 support no such requirement:

3 “The PC finds that the constitutional findings in the Public Works
4 referral comments are limited to justification for a proportional right-
5 of-way exaction along the frontage of the subject property that would
6 accommodate future public street improvements. The constitutional
7 findings address a future need for street improvements abutting the
8 property, rather than any immediate need, based on safety issues or
9 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.” Rec. 9.

10 The Planning Commission explicitly found that immediate improvements
11 are not necessary. That finding was based on the expert opinion of city
12 traffic engineering staff:

13 “With the exception of street lights, Oakleigh Lane has an
14 approximate 19 foot wide paved surface, but has not been improved to
15 city standards, lacking curbs and gutters, storm drainage, sidewalks,
16 and street trees. As is typical for unimproved local streets in the River
17 Road area, i.e., those streets which do not have paving, curb & gutter
18 and sidewalks or which have not been striped to identify dedicated
19 travel lanes; the expectation is that pedestrians and bicyclists will
20 share the paved surface with vehicles. Additionally, there is a
21 tendency on dead end streets such as Oakleigh, for motorists to travel
22 at slower, more cautious speeds, because of the perceived narrowness
23 of the street. Until such time that property owners elect to improve
24 Oakleigh Lane to full City standards, including sidewalks, the existing
25 paved surface in Oakleigh Street will continue to adequately provide
26 for motorized and foot traffic, as well as for emergency vehicles and
delivery services, provided the paved surface is not blocked by parked
vehicles. Since the existing paved surface provides safe passage for
two-way vehicular traffic, bicycles, pedestrians and emergency
vehicles, and since there is nothing to suggest that the impacts of the
proposed development will result in unsafe conditions in Oakleigh
Lane, it is appropriate to defer public improvements via an irrevocable

1 petition.” Rec. 1268-69.

2 The Hearings Official and Planning Commission considered all of the
3 evidence before it, weighed that evidence, and determined that there was no
4 safety concern with the anticipated increased traffic generated from the
5 proposed development. Both the Hearings Official and the Planning
6 Commission determined that the safety concerns voiced by the neighbors
7 were simply not supported by the record. Rec. 48⁵; Rec. 49, *cited infra* n 11.

8 LUBA is not at liberty to reweigh the evidence. *Younger v. City of*
9 *Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988) (In deciding whether a
10 challenged decision is supported by substantial evidence in the whole record,
11 we are required to consider whether evidence supporting the decision is
12 refuted or undermined by other evidence in the record, but we cannot
13 reweigh the evidence.); *Harwood v. Lane County*, 23 Or LUBA 191, 198
14 (1992) (Where evidence is conflicting and the contrary evidence does not so
15 undermine the evidence relied upon by the local decision maker that it is
16 unreasonable for the decision maker to rely upon it, the choice between such
17 conflicting believable evidence belongs to the local government decision
18 maker, and LUBA will not disturb that choice.). Quite simply, Intervenor’s
19 disagreement with the local government’s decision with regard to the alleged
20

21 ⁵ The Hearings Official found:

22 “Although the Hearings Official understands the neighbors’ concerns
23 about increased numbers of vehicles using Oakleigh Lane, the strong
24 assertion that an increase in ADT will result in traffic accidents or
25 actual danger to pedestrians and bicyclists is not supported by
26 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.” Rec.
48 (emphasis in original).

1 safety concerns is not sufficient to justify remand.

2 c. **EC 9.8320(5)(a) Does Not Require Improvement to**
3 **City Street Standards Prior to Final PUD Approval**

4 EC 9.8320(5)(a) requires compliance with EC 9.6800 through EC
5 9.6875 – Standards for Streets, Alleys, and Other Public Ways. The purpose
6 section, EC 9.6800, provides that sections 9.6800-9.6875 “establish
7 standards for the dedication, design and location of public ways.” There is a
8 section that addresses dedications of public ways, EC 9.6805, a section
9 addressing maximum block length, EC 9.6810, and a section addressing
10 street connectivity, EC 9.6815. EC 9.6820 addresses standards for cul-de-
11 sacs and emergency vehicle turnarounds. EC 9.6870 addresses required
12 street width and includes a table, Table 9.6870 Right-of-Way and Paving
13 Widths, which provides the required right-of-way widths and actual paving
14 widths for different types of streets and alleys.

15 The City understands Intervenor to assert that, because EC
16 9.8320(5)(a) cross-references the City’s street standards, and those street
17 standards require certain paving widths for different types of streets, EC
18 9.6870, then Oakleigh Lane must be improved to those standards prior to
19 construction of the project in order to be considered safe. The City disagrees
20 with that argument. The cross-reference in EC 9.8320(5)(a) to EC 9.6870
21 does not mean that Oakleigh Lane must be improved at this time. Nothing in
22 the code suggests that. The Planning Commission so found:

23 “That said, the PC agrees that neither EC 9.8320(5)(a) nor EC 9.6800
24 through 9.6875 require than an existing street must meet certain
25 standards in order to serve a proposed development. EC 9.6870 only
26 provides the required paving widths for certain types of streets when
and if those streets are ever fully improved to City standards.” Rec. 8.

1 The Planning Commission's interpretation is correct and supported by
2 the language of the code. The street standards in EC 9.6870 include both
3 required rights-of-way width (*i.e.*, required widths for property being
4 dedicated for future streets) and required widths for the actual construction
5 of streets (*i.e.*, how wide does the actual pavement need to be for a certain
6 type of street when that street is actually being improved). For purposes of
7 EC 9.8320(5), the criteria for approval of a tentative PUD application, the
8 standards in EC 9.6870 that apply in this instance are those that regulate the
9 required width of dedicated right-of-ways.

10 **d. The City's Determination That EC 9.8320(5)(b) is**
11 **Complied With is Supported by Substantial Evidence**

12 Intervenor's third sub assignment of error is essentially a substantial
13 evidence challenge to the City's determination that EC 9.8320(5)(b) is
14 complied with. Intervenor relies on the same arguments set out above
15 regarding the public works staff *Dolan* findings, which he alleges
16 demonstrates an unsafe situation. As explained above, the City put those
17 *Dolan* findings in context, and explicitly concluded that the proposed PUD
18 would not create an unsafe roadway on Oakleigh Lane for vehicles,
19 pedestrian, bicyclists or transit. Rec. 9. Accordingly, its determination that
20 EC 9.8320(5)(b) is satisfied is supported by substantial evidence.

21 **e. Condition Requiring Dedication of 22.5-Foot Strip is**
22 **Adequate to Demonstrate Compliance With Approval**
23 **Criteria**

24 In his first subassignment of error, Intervenor alleges that the City
25 erred in failing to adopt a condition of approval that would "ensure a 45-foot
26 right-of-way." It is unclear to the City exactly what the Intervenor is

1 complaining about.⁶ The requirement to dedicate a 22.5-foot strip of land
2 was imposed specifically to ensure the full 45-foot right-of-way would be
3 available when Oakleigh Lane was eventually improved.

4 In part of his argument, Intervenor appears to assert that the required
5 22.5-foot dedication, plus the existing 20 foot right-of-way, is insufficient to
6 provide the full 45-foot right-of-way. To the extent that is his issue,
7 Intervenor misunderstands the facts. The existing 20-foot right-of-way was
8 dedicated in 1927 and lies to the north of the centerline of Oakleigh Lane.
9 Rec. 999-1000. By imposing the condition requiring the 22.5-foot
10 dedication, the City did not anticipate that the full 45-foot right-of-way
11 would be obtained. Staff acknowledged that the additional 2.5 feet would
12 have to be obtained through some other method.⁷ However, one half of the
13 total 45-foot right-of-way (22.5 feet) was all that the City could justify
14 requiring as a condition of approval under constitutional takings limitations.

15 To the extent Intervenor is alleging that any portion of the right-of-
16 way needs to be fully improved prior to development of the PUD, again he is
17 mistaken, as explained above.

18 LUBA does not have injunctive relief powers; it is limited to
19 affirming, remanding or reversing the challenged decision. ORS 197.835(1).

20
21 ⁶ It appears as if, at least in some places, Intervenor fails to grasp the
22 distinction between the term "right-of-way," which the City's code uses to
refer to the unimproved bare dedicated strip of land, and the improved (*i.e.*,
paved) street.

23 ⁷ Public Works referral comments provide:

24 "Based on the right-of-way requirement of 45' and the existing right-
25 of-way width (which as noted, is located entirely north of centerline),
an additional 22.5' south of the centerline is required. This dedication
26 would satisfy the right-of-way requirement for the properties south of
centerline, with the remainder of the 45' right-of-way being required
from the properties on the north side of the centerline." Rec. 1264.

1 Accordingly, LUBA cannot require the City to impose a particular condition
2 of approval. The question is whether the decision, including the conditions
3 of approval that were imposed, demonstrates compliance with the applicable
4 approval criteria. The City required the applicant to dedicate half of the
5 necessary right-of-way width.⁸ It chose not to require full improvement at
6 this time because it found that the existing road was not unsafe. Intervenor
7 has failed to demonstrate how the decision falls short of satisfying the
8 applicable approval criteria.

9 **2. Response to Fourth Sub Assignment of Error (1.D)**

10 **The City did not err in concluding a TIA was not required**

11 As discussed above, the demonstration of transportation safety in EC
12 9.8320(5) is fulfilled by finding compliance with subsections (a), (b) and (c).
13 Subsection (c) requires the provision of a traffic impact analysis (TIA)
14 where one is required pursuant to EC 9.8650 through 9.8680. EC 9.8670
15 provides the trigger mechanisms for requiring a TIA.⁹ Both the Hearings
16

17 ⁸ Intervenor's second subassignment of error also challenges the City's
18 decision to grant an exception to the cul-de-sac requirements found in EC
19 9.6820. The City defers to the brief of Intervenor-Respondent on this issue.

19 ⁹ EC 9.8670 provides:

20
21 **Applicability.** Traffic Impact Analysis Review is required when one
22 of the conditions in subsections (1) – (4) of this section exist
23 unless the development is within an area (a) shown on Map
24 9.8670 Downtown Traffic Impact Analysis Exempt Area, or (b)
25 subject to a prior approved Traffic Impact Analysis and is
26 consistent with the impacts analyzed.

- (1) The development will generate 100 or more vehicle trips during any peak hour as determined by using the most recent edition of the Institute of Transportation Engineer's Trip Generation. In developments involving a land division, the

1 Official and the Planning Commission determined that none of the triggering
2 events was present. Accordingly, it could not require a TIA.

3 Intervenor asserts that EC 9.8670 requires a TIA in this instance under
4 subsection (2) because there are "identified locations where pedestrian
5 and/or bicyclist safety is a concern by the city that is documented." Under
6 subsection (2), a TIA is required where the decision maker determines that
7

8
9 peak hour trips shall be calculated based on the likely
10 development that will occur on all lots resulting from the
11 land division.

- 12 (2) The increased traffic resulting from the development will
13 contribute to traffic problems in the area based on current
14 accident rates, traffic volumes or speeds that warrant action
15 under the city's traffic calming program, and identified
16 locations where pedestrian and/or bicyclist safety is a
17 concern by the city that is documented.
- 18 (3) The city has performed or reviewed traffic engineering
19 analyses that indicate approval of the development will result
20 in levels of service of the roadway system in the vicinity of
21 the development that do not meet adopted level of service
22 standards.
- 23 (4) For development sites that abut a street in the jurisdiction of
24 Lane County, a Traffic Impact Analysis Review is required if
25 the proposed development will generate or receive traffic by
26 vehicles of heavy weight in their daily operations.

For purposes of EC 9.8650 through EC 9.8680, 'daily operations'
does not include routine services provided to the site by others,
such as mail delivery, garbage pickup, or bus service. 'Daily
operations' does include, but is not limited to, delivery (to or from
the site) of materials or products processed or sold by the business
occupying the site. For purposes of EC 9.8650 through EC
9.8680, 'heavy vehicles' are defined as a single vehicle or vehicle
combination greater than 26,000 pounds gross vehicle weight or
combined gross vehicle weight respectively."

1 the increase in traffic generated by the proposal will contribute to traffic
2 problems in the area. That determination is to be based on three things – (1)
3 current accident rates, (2) traffic volumes or speeds that warrant action under
4 the City’s traffic calming program, and (3) “identified locations where
5 pedestrian and/or bicyclist safety is a concern by the city that is
6 documented.”

7 The City, once again, determined that the increase in traffic generated
8 by the proposal would NOT contribute to traffic problems in the area. It did
9 not identify locations where pedestrian and/or bicyclist safety is a concern.¹⁰
10 In its discussion of EC 9.8320(5)(c), the Hearings Official made the
11 following findings:

12 “Moreover, EC 9.8320(5)(c) and EC 9.8670 contemplate certain types
13 of evidence concerning traffic conditions and makes implicit decisions
14 about when mitigation measures might be needed. *Those implicit*
15 *assumptions are that under EC 9.8670(1), a proposal will not*
16 *potentially create unsafe traffic conditions unless the development will*
17 *increase peak vehicle trips by more than 100 trips. Under EC*
18 *9.8670(2), it is implied that a TIA and associated mitigation measures*
19 *do not need to be considered unless there is evidence of ‘problems’*
20 *caused by accident rates, traffic volumes or speeds. The third implied*
21 *safety concern is that a TIA is needed if LOS is not sufficient in for*
22 *the roads and intersections in the immediate vicinity.” Rec. 48*
23 *(italicized emphasis added; underlined emphasis in original).*

24 ¹⁰ The Hearings Official found:

25 “Although the Hearings Official understands the neighbors’ concerns
26 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. Assertions 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. Rec. 48 (emphasis in original).

1 Intervenor takes issue with the findings italicized in the above quote.
2 He asserts that, from the requirement that a TIA be conducted where peak
3 vehicle trip will be increased by more than 100 trips, one can assume that
4 anything above the 100 trip threshold would justify a presumption of unsafe
5 conditions, thus triggering a TIA. However, Intervenor asserts that the
6 converse is not true; *i.e.*, where fewer than 100 trips are being added, one
7 cannot assume that such increase will NOT create unsafe conditions.

8 There are numerous problems with Intervenor's argument. First, all
9 the Hearings Official needed to do was find that none of the TIA triggering
10 events was present. He did that. Second, the challenged findings are not
11 necessary to his determination that EC 9.8320(5)(c) is complied with, but
12 rather are merely explanatory of the Hearings Official's understanding of
13 how EC 9.8670 works. Third, under EC 9.8670(2), a TIA is triggered where
14 the increase in traffic generated by the proposal will contribute to traffic
15 problems in the area. While Intervenor asserts that traffic problems will
16 result, the City did not agree.¹¹ The Hearings Official's interpretation is

17 _____
18 ¹¹ The Hearings Official found:

19 "The Hearings Official has not been directed to evidence in the record
20 that shows accident rates for Oakleigh Lane or at the intersection with
21 River Road are a problem. Nor have other documented 'problems'
22 with traffic volumes or speeds been submitted by any party. Contrary
23 to Mr. Conte's assertion, Staff's position that there are no traffic
24 safety concerns associated with the proposal or Oakleigh Lane is some
25 evidence that a TIA under EC 9.8670(2) is not necessary. Public
26 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." Rec. 49.

1 reasonable and correct. *See McCoy v. Linn County*, 90 Or App 271, 275-76,
2 752 P2d 323 (1988) (LUBA's review is to determine whether the decision
3 maker's interpretation of the code is correct).

4 **3. Response to Fifth Sub Assignment of Error (1.E)**

5 **The City did not err in concluding EC 9.8320(6) was complied** 6 **with**

7 EC 9.8320(6) provides: "The PUD will not be a significant risk to
8 public health and safety, including but not limited to soil erosion, slope
9 failure, stormwater and flood hazard, or an impediment to emergency
10 response." The safety issue Intervenor raises in his fifth subassignment of
11 error is an alleged impediment to emergency response, based on the
12 transportation system.

13 Yet again, Intervenor relies upon undocumented safety concerns in
14 support of his challenge to the City's determination of compliance with EC
15 9.8320(6). Referral comments from the Fire Marshal state no concerns with
16 the turnaround or cul-de-sac. Rec. 1293. The Planning Commission found:

17 "Based on the previous determination under the second assignment of
18 error [assignment addressing subsection (5)] about the limited scope
19 of the PW constitutional findings for right-of-way exaction, the PC
20 finds no basis in the record to require additional right-of-way
21 dedication or street improvements. The PC concludes that the HO's
22 conditions for right-of-way dedications and irrevocable petitions
23 address a future need for street improvements, rather than any
24 immediate need associated with the proposed PUD. The PC also
25 concludes that the HO's conditions for a temporary turnaround
26 easement within the development site adequately address the
emergency response provision of EC 9.8320(6). The HO findings on

1 page 29-31 are hereby incorporated by reference as further evidence
2 of compliance with the applicable criteria appealed under this
assignment of error.” Rec. 10.

3 The Planning Commission’s conclusion that EC 9.8320(6) is complied with
4 is supported by substantial evidence in the record.

5 **4. Response to Sixth Sub Assignment of Error (1.F)**

6 **The City did not err in concluding EC 9.8320(11)(b) was complied
7 with**

8 EC 9.8320(11)(b) requires a demonstration that the proposed PUD
9 complies with EC 9.6500 through EC 9.6505 – Public Improvement
10 Standards. The required public improvement specifications are found at EC
11 9.6505(3)(Streets and Alleys), 9.6505(4)(Sidewalks), and 9.6505(5)(Bicycle
12 Paths and Accessways). Once again, Intervenor’s argument relies upon his
13 undocumented assertions of safety issues if Oakleigh Lane is not
14 immediately improved to full city street standards. As explained above,
15 those improvements are not required at this time to insure safe passage on
16 Oakleigh Lane. The Hearings Official imposed a condition of approval
17 requiring the applicant to execute an irrevocable petition for public
18 improvements, which would insure financial contribution by the applicant if
19 and when Oakleigh Lane was ever improved to city standards.

20 **C. Response to Petitioners’ Fourth Assignment of Error**

21 **The City did not err in approving the Hammerhead**

22 As explained above, EC 9.8320(5)(a) requires compliance with EC
23 9.6800 through 9.6875 Standards for Streets, Alleys, and Other Public Ways.
24 EC 9.6815 provides connectivity standards for streets. Secondary access for
25 fire and emergency medical vehicles, consistent with EC 9.6870, is generally
26 required. EC 9.6815(2)(d). An exception to that standard may be granted,

1 pursuant to EC 9.6815(2)(g).¹²

2 In order to justify an exception to EC 9.6815(2)(d), the applicant
3 provided a local street connection study under EC 9.6815(2)(g)1. See
4 Rec. 1439-43; App-3-7. The study included a shadow plat for possible
5

6 ¹² EC 9.6815(2)(g) provides:

7
8 “In the context of a Type II or Type III land use decision, the city
9 shall grant an exception to the standards in subsections (2)(b), (c) or
10 (d) if the applicant demonstrates that any proposed exceptions are
consistent with either subsection 1. or 2. below:

11 “1. The applicant has provided to the city, at his or her expense, a
12 local street connection study that demonstrates:

13 a. That the proposed street system meets the intent of street
14 connectivity provisions of this land use code as expressed in EC
15 9.6815(1); and

16 b. How undeveloped or partially developed properties within a
17 quarter mile can be adequately served by alternative street layouts.

18 2. The applicant demonstrates that a connection cannot be made
19 because of the existence of one or more of the following conditions:

20 a. Physical conditions preclude development of the connecting
21 street. Such conditions may include, but are not limited to,
22 topography or likely impact to natural resource areas such as
23 wetlands, ponds, streams, channels, rivers, lakes or upland
wildlife habitat area, or a resource on the National Wetland
Inventory or under protection by state or federal law.

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

1 future development of tax lot 200, the only remaining undeveloped parcel on
2 the east end of Oakleigh Lane. Rec. 1443. The shadow plat included a
3 possible hammerhead at the end of Oakleigh Lane that could provide access,
4 via a shared driveway, to future development on four potential lots out of tax
5 lot 200. The City concluded that the alternate street plan would satisfy the
6 intent of the connectivity standards and demonstrate how nearby
7 undeveloped or partially developed properties could be adequately served by
8 alternative street layouts. EC 9.6815(2)(g)(1)a. and b.

9 Petitioners, two of whom are owners of tax lot 200, assert that
10 “placing the burden of constructing this hammerhead onto the Thoms
11 property [tax lot 200] is a taking of their property.” Petitioners’ Opening
12 Brief 33. What Petitioners fail to realize is that the shadow plat, which is
13 part of applicant’s street connectivity study, in no way requires or exacts any
14 property from the owners of tax lot 200 at this time. The shadow plat may
15 not even ever become a reality. It is only a schematic of how a possible
16 future development of tax lot 200 might look, and how that property’s
17 transportation needs could be accommodated. It is true that the shadow
18 hammerhead falls largely on tax lot 200. However, the challenged approval
19 in no way requires the owners of tax lot 200 to dedicate any of their land at
20 this time. If the hammerhead were ever to be built, the City would only be
21 able to require dedication of land from the Thoms that is roughly
22 proportionate to the impacts from any future development they might
23 propose. This in no way, shape or form constitutes a taking of their
24 property.

25 ///

26 ///

1 **D. Response to Petitioners' First Assignment of Error**

2 **The City did not err in concluding the proposed PUD satisfied the**
3 **minimum net density requirement**

4 1. **Motion to Strike**

5 LUBA's review of the challenged decision is limited to the record.
6 ORS 197.835(2). Petitioners have included in an appendix to the brief
7 numerous documents that appear not to be part of the record, and which
8 Petitioners rely on heavily in the substance of their arguments in their first
9 assignment of error.¹³ The City moves to strike those appendices and any
10 argument that relies on them. AP-2; all of AP-3 except copies of Rec. 1484,
11 1488-89; Petitioners' Opening Brief 13-14.

12 2. **Net Density Calculation**

13 EC 9.8320(11)(a) provides the following approval criterion: "The
14 PUD complies with EC 9.2000 through EC 9.3915 regarding lot dimensions
15 and density requirements for the subject zone." The subject property is
16 zoned R-1, and in the R-1 zone, the maximum allowable density is 14
17 dwelling units per net acre. Table 9.2750. The method of calculating density
18 is set forth in the code at EC 9.2751(1):

19 " (b) For purposes of this section, 'net density' is the number
20 of dwelling units per acre of land in actual residential
21 use and reserved for the exclusive use of the residents in
22 the development, such as common open space or
23 recreation facilities.

24 ¹³ AP-2 is similar to maps that do appear in the record, but a notation on the
25 document indicates that it includes changes made by Bryn Thoms on June 9,
26 2014. The first page of AP-3 appears to be a summary of net density
calculations that does not appear anywhere in the record. The remainder of
AP-3, except for copies of three pages from the record (Rec. 1484, 1488,
1489), includes drawings and maps that are not part of the record.

1 “(c) For purposes of calculating net density:

- 2 1. The acreage of land considered part of the
3 residential use shall exclude public and private
4 streets and alleys, public parks, and other public
5 facilities.
6 2. In calculating the minimum net density required
7 for a specific lot or development site, the planning
8 director shall round down to the previous whole
9 number.
10 3. In calculating the maximum net density allowed
11 for a specific lot or development site the planning
12 director shall round up to the next whole number
13 only for:
14 a. A lot or development site that is 13,500
15 square feet or more in area;
16 b. A lot or development site that is not abutting
17 the boundary of, or directly across an alley
18 from land zoned R-1; and
19 c. Fractions of .75 or above.
20 In all other circumstances, the planning director
21 shall round down to the previous whole number.”

22 In determining the net density, the staff report excluded from the
23 acreage of land considered part of the residential use (1) lands required to be
24 dedicated for right-of-way purposes, and (2) a sewer easement that runs
25 along the east border of the property. Rec. 1175-76. The staff did not,
26 however, exclude an EWEB water line easement from the net density
calculation. Public testimony to the Hearings Official argued that easements
cannot be built upon and therefore should not be counted as part of the
residential use in calculating net density. The Hearings Official concurred
with the applicant, and concluded that all easements are to be included. Rec.
55.¹⁴

¹⁴ The Planning Commission affirmed the Hearings Official with little discussion:

1 In their petition for review, Petitioners attempt to challenge not just
2 the City's decision to count easements in its calculation of net acreage.¹⁵
3 They also attempt to cast aspersions on the gross acreage number, which was
4 never even questioned by opponents at the local proceedings. The total
5 acreage number of 2.3 acres was used by all parties and decision makers
6 throughout the local proceedings. As mentioned above, appeals to this
7 Board are limited to the record. ORS 197.825(2). Further, the Eugene Code
8 limits the Planning Commission's review to those issues raised in the local
9 appeal statement. EC 9.7655(3). The sole issue with regard to net density
10 that was raised in the local appeal was whether the Hearings Official erred in
11 counting easements in his net density calculation.¹⁶ Accordingly, that is the
12 only issue that is before this Board.

13 The Hearings Official explained his interpretation that easements are
14 to be included for purposes of calculating net density as follows:

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

22 ¹⁵ It is not entirely clear what easement areas Petitioners allege were counted
23 that should not have been counted. Before the Hearings Official, neighbor
24 opponents included a chart that identified areas that they believed should not
25 have been counted in the net density calculation. Rec. 665.

26 ¹⁶ The appeal statement provides:

"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."
Rec. 336.

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

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

23 “Similarly, the garbage and emergency turn around does not become a
24 public facility simply because it might be used by public entities
25 periodically. Those areas do not reasonably fall into the category of
26 ‘public facilities.’” Rec. 55.¹⁷

Petitioners challenge the Hearings Official’s interpretation and offer
up what they allege is a “more reasonable” alternate interpretation.

Petitioners’ Opening Brief 16-17. They assert that, under their
interpretation, an easement area for underground piping should be

¹⁷ The Hearings Official also found the garbage and emergency turnaround is not a public facility and need not be counted. Rec. 55. Petitioners do not specifically challenge those findings. Petitioners only challenge the City’s determination with regard to the water line and sewer easements.

1 considered a public facility and not counted toward the net density
2 calculation.

3 Petitioners' interpretation is based mainly on the language in the code
4 that provides that net density is the number of dwelling units per acre of land
5 in actual residential use "and reserved for the exclusive use of the residents."
6 They seem to be arguing that public utility easements are not "reserved for
7 the exclusive use of the residents," as required under EC 9.2751(1)(b), and
8 therefore should be deducted from the acreage in residential use when
9 calculating net density. Petitioners' overly literal reading of the phrase
10 "reserved for the exclusive use of the residents," however, makes no sense
11 when viewed in context with the rest of the net density provisions.

12 First, as the Hearings Official points out, EC 9.2751(1)(c) provides
13 specific items that are to be excluded from the net density calculation.
14 Easements are not mentioned in that list of items to be excluded. If
15 easements were meant to be excluded, the Hearings Official explained, they
16 would be included in the list of exclusions from the "acreage of land
17 considered part of the residential use," in EC 9.2751(1)(c).

18 Second, the staff report found easements are specifically allowed to be
19 counted, pursuant to EC 9.8310(4)(a).¹⁸ For purposes of calculating net
20 density in a proposed PUD, EC 9.8310(4)(a) provides that easements
21 benefitting the residents of the PUD may be included in the density
22 calculations.¹⁹ The staff had determined that the EWEB water line easement
23

24 ¹⁸ This finding is found in the staff report, Rec. 1176, which the Hearings
25 Official incorporated into his decision: "The Hearings Official generally
26 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." Rec. 54.

¹⁹ EC 9.8310(4)(a) provides:

1 would benefit the residents of the PUD, as the water coursing through the
2 pipes within the easement would serve the residents of the PUD.
3 Accordingly, under EC 9.8310(4)(a), those easements were counted toward
4 the total residential acreage. Staff treated the 1954 20-foot wide sewer line
5 easement along the eastern boundary of the property differently. That
6 easement contains a 72" trunk line and does not specifically benefit the PUD
7 residents. Rec. 1267. Accordingly, staff excluded that easement from its net
8 density calculation. The Hearings Official, however, did not mention EC
9 9.8310(4)(a) (other than through his incorporation of staff findings), and did
10 not make the same distinction between easements that benefitted the PUD
11 residents and those that did not. That said, any differences between the staff
12

13 **“(4) Density.** Dwelling unit densities for PUDs shall be consistent
14 with Table 9.2750 Residential Zone Development Standards. The
15 calculation of the number of dwelling units allowed shall be
16 determined based on the following:

17 “(a) Easement Calculations. If it is demonstrated that
18 easements will benefit residents of the proposed PUD,
19 residential density calculations may include areas in
20 easements, with the exception of private streets or
21 ingress/egress easements.

22 “(b) Dedications. If it is demonstrated that lands dedicated
23 to the city will benefit residents of the proposed PUD,
24 residential density calculations may include areas
25 dedicated to the public for recreation or open space.

26 “(c) Cumulative Density. When final plans are to be
approved in phases, at no time shall the cumulative
residential density exceed the overall density per acre
established at the time of tentative plan approval.”

1 analysis (counting only easements that benefit the residents of the proposed
2 PUD) and the Hearings Official's analysis (counting all easements) are
3 immaterial. Under either approach, the proposal satisfies the net density
4 requirement. See staff calculations at Rec. 1007-08; and Hearings Official
5 calculations at 54-55.

6 Finally, the proper question to be answered by the Board is not
7 whether Petitioners have proposed a "more reasonable" interpretation. The
8 Board is to review the interpretation set forth in the challenged decision and
9 determine whether it is correct. *McCoy v. Linn County*, 90 Or App at 275-
10 76. The City's interpretation that the easements in question were to be
11 counted in the acreage of land considered part of the residential use for
12 purposes of the net density calculation is correct and LUBA must affirm it.

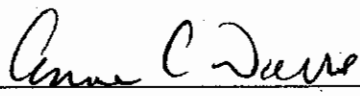
13 V. CONCLUSION

14 The City has a method of dealing with incremental development that
15 manages to balance the safety needs of the community, the financial burdens
16 placed on the public coffers, and stays within constitutional and local code
17 limitations. That method involves exacting property from developers when
18 and to the extent such exaction can be constitutionally justified in order to
19 pave the way for future street improvements. Where there is not an
20 immediate safety need to improve a street serving a proposed development,
21 the City will not, indeed cannot, require immediate improvement of that
22 street. The City's approach in this case to exact right-of-way, based on a
23 finding that the right-of-way will be needed when and if any future
24 improvements occur, and to require an irrevocable petition for those future
25 improvements, is consistent with its practice, its local code and
26 constitutional mandates.

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Accordingly, the City respectfully requests that the Board affirm the challenged decision.

DATED this 9th day of July, 2014.



Anne C. Davies, OSB # 910149
anne.c.davies@ci.eugene.or.us
Of Attorneys for Respondent City of Eugene

PRELIMINARY DRAWINGS

SITE PLAN WITH RECOMMENDED CONDITIONS

DAKLEIGH HEADROW CONDOS

CHOUCHOU

CHOUCHOU 7404

RECOMMENDED CONDITIONS

NUMBER OF UNITS

TOTAL	34,468
FLAT	955
TOWNHOUSE	1088
FLAT	1218
TOWNHOUSE	1305
TOWNHOUSE	1632

A1.1

GENERAL NOTES

1. IN

2. MCCLURE LN

TAX LOT MAP W/ GREENWAY BOUNDARY

VICINITY MAP

SITE COVERAGE

SITE COVERAGE 102,808.89 SF

BUILDINGS (includes garages & garages) 33,879.52 SF (33%)

PARKING 14,202.31 SF (14%)

OPEN SPACE (includes pathways) 54,727.06 SF (53%)

BUILDING TYPE MATRIX

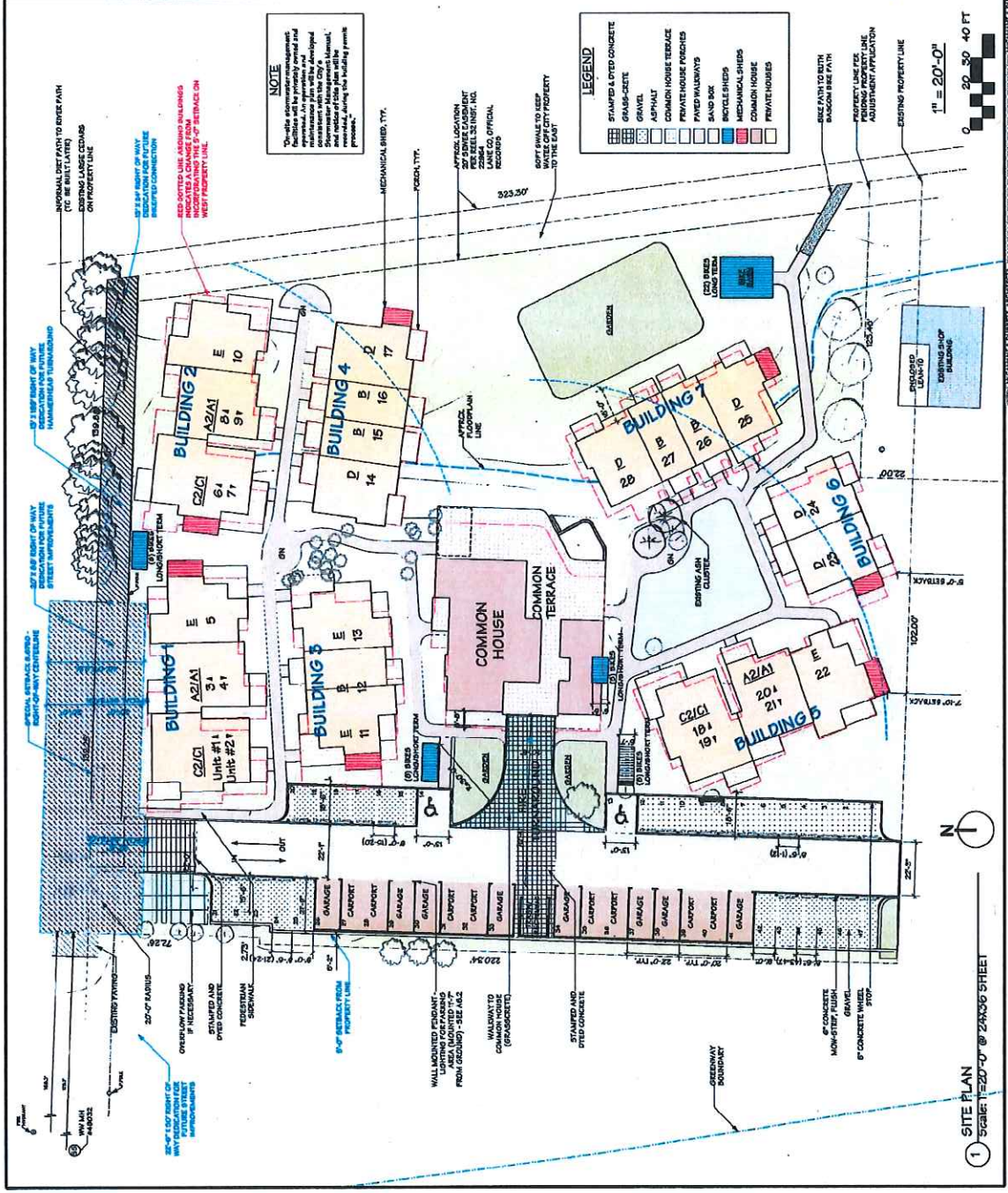
BUILDING #	BUILDING TYPES	QUANTITY
3	D-D	1
6	E-E	1
4,7	D-B-B-D	2
1, 2, 5	C-A-E	3
TOTAL		7

UNIT TYPE MATRIX

UNIT BED BATH	TYPE	QTY.	UNIT SF	UNIT TYPE SF
A1	2 1	3	955	2865
A2	2 1	3	955	2865
B	2 1.5	5	1088	5440
C1	3 2	3	1218	3654
C2	3 2	3	1218	3654
D	3 2	6	1305	7830
E	4 3	5	1632	8160
TOTALS		28		34,468

PARKING SUMMARY

TYPE	QUANTITY
GARAGES	8
CARPETS	8
OPEN PARKING	31
TOTAL CAR PARKING	47
BIKE SHED PARKING	51 (788 SF)



FOR ASSESSMENT AND TAXATION ONLY

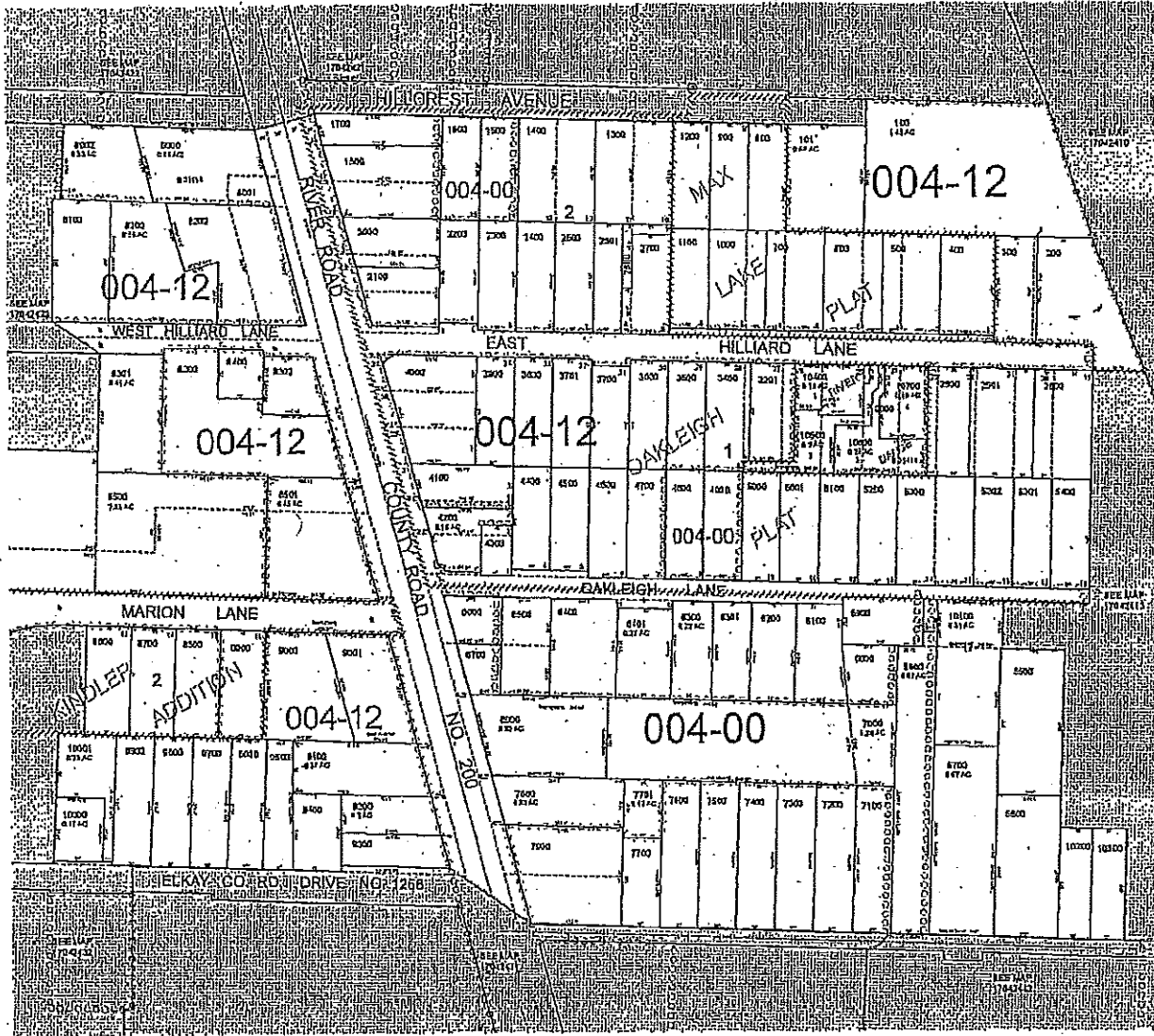
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Lane County
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Access Engineering LLC

August 6, 2013

Received

AUG 12 2013

City of Eugene
Planning Division

Will Dixon, AIA
Willard C. Dixon Architect, LLC
300 Blair Blvd.
Eugene, OR 97402-4150

RE: Street Connectivity Study, Oakleigh Meadows PUD.

134 E. 13th Ave. Suite 2
Eugene, Oregon 97401
Phone & Fax
541-486-3215
info@accesseng.com

Oakleigh Meadows PUD is a 28-unit co-housing development located at the east end of Oakleigh Lane in the River Road area. Oakleigh Lane is a dead-end local street that runs approximately 1000 feet east from the centerline of River Road; one of four consecutive streets that terminate at City park land on the west bank of the Willamette River. The street is has an oil-mat surface ~20-feet in width with intermittent gravel shoulders which allow parking in some areas. There are 21 fully developed residential properties along the street with commercial properties at the River Road intersection. There are no planned streets within a quarter mile of the site. Other than Oakleigh Lane there are no existing streets that abut or terminate at the development site. The Oakleigh Meadows PUD site is the last undeveloped property on the south side of the street. All properties abutting the site to the south along existing McClure Lane are fully developed. Existing City park land is immediately east of the site.

There is one remaining undeveloped privately owned parcel (tax lot 200 on map 17042413) abutting the east end of Oakleigh Lane and the north boundary of the site west of the end of Oakleigh Lane. The City requires a 20 foot dedication to complete the required Oakleigh Lane right-of-way on the existing street. Rather than continue that right-of-way dedication to the east end of the site, a "shadow plat" of the adjacent tax lot 200 shows how that property could develop and be served at the existing end of Oakleigh Lane. Figure 1, attached, shows a how four flag lots could be developed along the west boundary of tax lot 200 with an additional 9-foot dedication from Oakleigh Meadows for a distance of 116.5 feet east of the end of Oakleigh Lane for an emergency turnaround.

The City requires a Street Connectivity Study (Section 9.6815 (2)(g) of the Eugene Code) to show that the intent of the provisions in Section 9.6815 (1) are met with this proposal.

The following findings address subsection (2)(g)1 of Eugene Code 9.6815 Connectivity for Streets.

Transportation Engineering
Traffic Design
Trip Generation
Access Management
Traffic Counts
Street Lighting

In the context of a Type II or Type III land use decision, the city shall grant an exception to the standards in subsections (2)(b), (c) or (d) if the applicant demonstrates that any proposed exceptions are consistent with either subsection 1. or 2. below:

1. The applicant has provided to the city, at his or her expense, a local street connection study that demonstrates:

- a. That the proposed street system meets the intent of street connectivity provisions of this land use code as expressed in EC 9.6815(1); and*
- b. How undeveloped or partially developed properties within a quarter mile can be adequately served by alternative street layouts.*

9.6815 Connectivity for Streets.

(1) Purpose and Intent. The street connectivity standards of EC 9.6815(2) Street Connectivity Standards are established to ensure that all of the following are met:

- (a) Streets are designed to efficiently and safely accommodate emergency fire and medical service vehicles.*

Tax lot 200 can accommodate an emergency turnaround in the southwest corner of a future development with an additional right-of-way dedication from Oakleigh Meadows.

- (b) The layout of a street system does not create excessive travel lengths.*

The existing developments east of River Road and the Willamette River preclude any other street connections except to Oakleigh Lane which has a direct connection to River Road, an arterial street.

- (c) The function of a local street is readily apparent to the user through its appearance and design in order to reduce non-local traffic on local residential streets.*

The local function of the street is apparent from its oil-mat surface ~20-feet in width and the dead-end sign on the street name sign.

- (d) Streets are interconnected to reduce travel distance, promote the use of alternative modes, provide for efficient provision of utility and emergency services, and provide for more even dispersal of traffic.*

Because the area between Oakleigh Meadows and River Road is fully developed, the only available location for a future street connection is at the east end of both Oakleigh Lane and that would not change the travel distances or usage of either street.

- (e) New streets are designed to meet the needs of pedestrians and cyclists and encourage walking and bicycling as transportation modes.*

No new streets are proposed. The Oakleigh Meadows P.U.D. site plan provides sidewalks connecting to Oakleigh Lane and a bike/pedestrian path stubbed to the east property line for future connection to the riverbank trail. The site plan also shows an access lane that stubs to the south boundary of the site should the property to the south redevelop.

- (f) The street circulation pattern provides connections to and from activity centers such as schools, commercial areas, parks, employment centers, and other major attractors.*

There are a number of pedestrian/bike connections to the park land along the river on nearby parallel streets. A future bike/pedestrian connection to the riverbank trail is provided. All schools, commercial areas, employment centers, and other major attractors can be reached via River Road.

- (g) Street design is responsive to topography and other natural features and avoids or minimizes impacts to water-related resources and wildlife corridors.*

Tax lot 200 is flat and open with a line of trees along the east and south boundaries. The shadow plat shows that the access to the flag lots avoids impact to natural features.

- (h) Local circulation systems and land development patterns do not detract from the efficiency of adjacent collector streets or arterial streets which are designed to accommodate heavy traffic.*

Oakleigh Meadows and the potential development of tax lot 200 will not change existing travel patterns; all trips will use River Road.

- (i) Streets identified as future transit routes should be designed to safely and efficiently accommodate transit vehicles, thus encouraging the use of public transit as a transportation mode.*

Transit routes for the area exist on River Road.

- (j) Where appropriate, the street system and its infrastructure should be utilized as an opportunity to convey and treat storm water runoff.*

The Oakleigh Meadows access lane and the access for tax lot 200 will be constructed to City standards and provide appropriate storm water runoff.

b. How undeveloped or partially developed properties within a quarter mile can be adequately served by alternative street layouts.

Future development of tax lot 200 north of the site can be served by flag lots as shown in Figure 1, attached.

The above findings demonstrate that subsection (2)(g)1.a. and b. of Eugene Code 9.6815 is satisfied in that the proposed shadow plat of tax lot 200 meets the intent of street connectivity provisions; and can be adequately served by an alternative street layout.

Very truly yours,

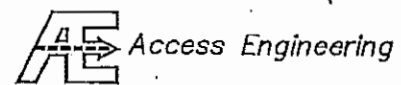
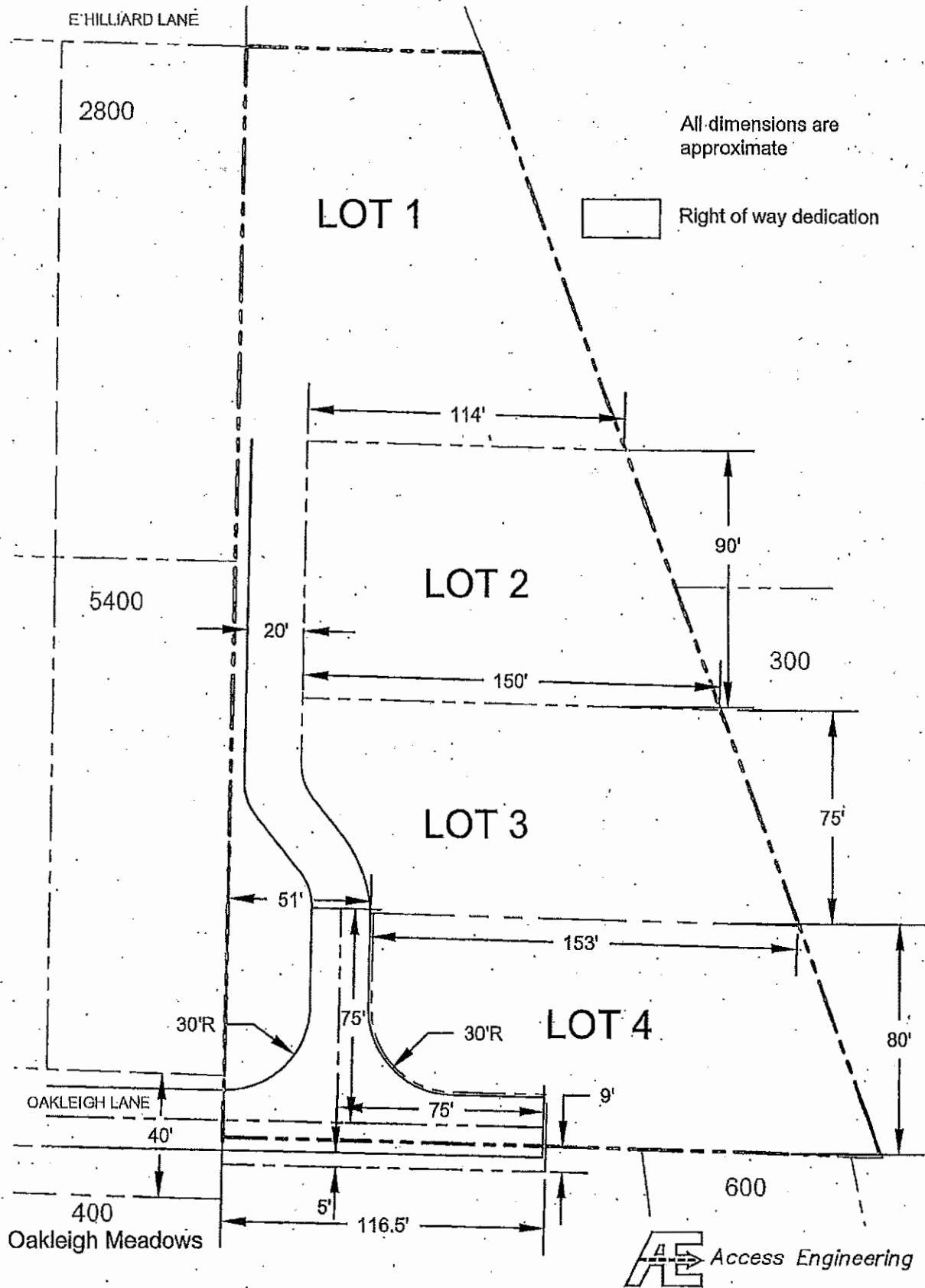


RENEWS 6/30/14

Michael Weishar, PE
Access Engineering LLC

Figure 1

Oakleigh Meadows PUD Connectivity Study Shadow Plat for TI 200 on map 17042413



CERTIFICATE OF FILING AND SERVICE

I certify that on July 9, 2014, I caused to be filed the original and four copies of Brief of Respondent with the Land Use Board of Appeals, at the following address, by causing the same to be deposited in the U.S. Mail at Eugene, Oregon enclosed in a sealed envelope with postage prepaid.

Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, OR 97301-1283

I further certify that on the same date, I served a true and complete copy of said document on the party or parties listed below, by causing the same to be deposited in the U.S. Mail at Eugene, Oregon enclosed in a sealed envelope with postage prepaid to the addresses as follows:

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Intervenor-Petitioner



Anne C. Davies, OSB #910149
Assistant City Attorney for Respondent
City of Eugene

June 16, 2014

Ms. Kelly Burgess

Oregon Land Use Board of Appeals

DSL Building

775 Summer Street NE

Suite 330

Salem OR 97301-1283

Dear Ms. Burgess,

Please find enclosed the original and four copies of my Intervenor-Petitioners' Amended Petition for Review for LUBA No. 2004-001.

As directed by the board's order of June 11, 2014, I have used 14-point Times New Roman font for both text and footnotes, and limited the petition to 50 pages, not counting the attachments.

Please accept my apologies for the incorrect formatting of my initial submission. I had inadvertently looked at an old copy of the OAR, which had different requirements.

Thank you for your understanding and patience.

Sincerely,

Paul Conte

Intervenor-Respondents

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

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

Petitioners,

and

PAUL CONTE and
SIMON TRAUTMAN

Intervenors-Petitioners

v.

CITY OF EUGENE,

Respondent

and

OAKLEIGH MEADOW LLC

Intervenor-Respondent.

LUBA No. 2014-001

INTERVENOR-PETITIONERS CONTE'S
AMENDED PETITION FOR REVIEW

(Names of attorneys and non-represented parties on reverse) June 16, 2014

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IV. ARGUMENT 8

FIRST ASSIGNMENT OF ERROR 8

The City erred in finding that the proposed PUD would provide safe and adequate transportation systems through compliance with standards for streets and other transportation system elements.

Subassignment of Error 1.A 14

The City did not adopt a condition of approval that would ensure the 45-foot right-of-way adjacent to the proposed development’s access point that the City’s findings required.

Subassignment of Error 1.B 16

The Decision did not properly apply adopted street standards to Oakleigh Lane, as required by EC 9.8320(5)(a), EC 9.6820(4) and EC 9.6870.

Subassignment of Error 1.C 22

The Decision did not properly evaluate the requirements of EC 9.8320(5)(b) with respect to Oakleigh Lane.

Subassignment of Error 1.D	29
The Decision failed to require a Traffic Impact Analysis as required by EC 9.8320(5)(c) and EC 9.8670.	
Subassignment of Error 1.E	33
The Decision failed to adequately evaluate whether the PUD would be a significant risk to public safety as required by EC 9.8320(6).	
Subassignment of Error 1.F	35
The Decision did not properly evaluate the requirements of EC 9.8320(11)(b) with respect to Oakleigh Lane.	
SECOND ASSIGNMENT OF ERROR	44
The City erred in finding that the proposed PUD would have minimal off-site impacts, as required by EC 9.8320(12).	
THIRD ASSIGNMENT OF ERROR	48
The City erred in finding that the proposed PUD would be reasonably compatible and harmonious with adjacent and nearby land uses, as required by EC 9.8320(13).	
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EXHIBIT B. EUGENE LOCAL STREET STANDARDS	

I. STANDING

Intervenor-Petitioners (“Conte”) has standing under ORS 197.830(2) and (7) because on several occasions, including October 9, 2013, Conte submitted written testimony to the City of Eugene Hearings Official in opposition to the proposed PUD (City Exhibit PH-49 at Rec 1308); and Conte filed a timely Motion to Intervene, which LUBA granted in their Order dated May 1, 2014.

II. STATEMENT OF THE CASE

A. NATURE OF THE DECISION AND RELIEF SOUGHT

The decision under appeal is that land use decision of Respondent (“City”) entitled “Final Order of the Eugene Planning Commission on Appeal: Oakleigh Meadows Cohousing PUD (PDT 13-1),” which became final on December 16, 2013, and which approved a Planned Unit Development for a proposed condominium development at the terminus of Oakleigh Lane.

Conte seeks relief by way of a remand with instructions to the City to correct the errors enumerated in this appeal by providing adequate findings and conditions of approval to ensure the proposed PUD development meets all of the City’s PUD approval criteria, or the application is denied.

B. SUMMARY OF ARGUMENTS

FIRST ASSIGNMENT OF ERROR

Decision erred in finding that the proposed PUD would provide safe and

1 adequate transportation systems through compliance with standards for streets
2 and other transportation system elements.

3 **Subassignment of Error 1.A.** The City did not adopt a condition of approval
4 that would ensure the 45-foot right-of-way adjacent to the proposed
5 development's access point that the City's findings required.

6 **Subassignment of Error 1.B.** Decision did not properly apply street standards
7 to Oakleigh Lane, as required by EC 9.8320(5)(a), 9.6820(4) and 9.6870.

8 **Subassignment of Error 1.C.** Decision did not properly evaluate the
9 requirements of EC 9.8320(5)(b) for pedestrian and bicycle circulation to
10 adjacent and nearby residential areas, transit stops and neighborhood activity
11 centers, with respect to Oakleigh Lane.

12 **Subassignment of Error 1.D.** Decision failed to require a Traffic Impact
13 Analysis as required by EC 9.8320(5)(c) and EC 9.8670.

14 **Subassignment of Error 1.E.** Decision failed to adequately evaluate whether
15 the PUD would be significant risk to public safety as required by EC 9.8320(6).

16 **Subassignment of Error 1.F.** The Decision did not properly evaluate the
17 requirements of EC 9.8320(11)(b) for Oakleigh Lane improvements.

18 **SECOND ASSIGNMENT OF ERROR**

19 Decision erred in finding that the proposed PUD would have minimal off-site
20 impacts, as required by EC 9.8320(12).

1 **THIRD ASSIGNMENT OF ERROR**

2 Decision erred in finding the proposed PUD would be reasonably compatible
3 and harmonious with adjacent and nearby land uses, as EC 9.8320(13) requires.

4 **C. SUMMARY OF MATERIAL FACTS**

5 Conte accepts Petitioners' Summary of Material Facts, with additions *infra*.

6 The proposed PUD will result in 29 new dwellings. Rec 41, 44. "[T]he
7 additional 29 residential units will increase the number of structures that access
8 this [sic] Oakleigh Lane by over 100 percent." Rec 1257.

9 The east boundary of the subject property abuts undeveloped City
10 parkland. Otherwise, the surrounding properties consist primarily of single-
11 family dwellings on individual lots or undeveloped lots that have potential for
12 future residential development (i.e. at the north end of Oakleigh Lane and
13 abutting the west boundary of the subject property). Rec 24, 662-663.

14 **Oakleigh Lane – substandard conditions and not maintained**

15 All of the 29 proposed PUD dwellings will be accessible only from Oakleigh
16 Lane. Rec 41, 44. Oakleigh Lane will provide the sole emergency access to the
17 development. Rec 24. There are no planned streets within a quarter mile of the
18 proposed PUD site. Rec 1439. The proposed PUD site is the furthest property
19 from River Road on the south side of the street. *Ibid*.

20 Oakleigh Lane is a narrow, substandard, dead-end lane, partially under

1 City of Eugene control and partially under Lane County control. Rec 647.

2 According to Lane County Public Works, Oakleigh Lane is a “local access
3 road,” which is “not a County road”; and the County is not required, and doesn’t
4 intend, to keep their portion of the road in repair. Rec 647, 883-884, 1313.

5 The Eugene portion is not an “adopted right-of-way” (Rec 1264), which
6 means the City is not required, and doesn’t intend, to maintain their portion of
7 the road because “the City does not maintain unimproved streets.” Rec 1172. In
8 Eugene’s local street sub-classifications “[a]ccess lanes generally serve 25 or
9 fewer homes” (Rec 680), as is the situation with Oakleigh Lane under current
10 conditions but which will *not* be the case if the PUD adds 29 dwelling units.

11 “EC9.6870 Street Width confirms that the required right-of-way width
12 for Oakleigh Lane is 45 feet, based on the street functioning as a Low-Volume
13 Residential Street.” Rec 39, 44. The Eugene Planning Commission (“EPC”)
14 adopted findings confirming that “the street has not yet been designed and built
15 to urban City standards and the projected ADT [Average Daily Traffic] is
16 within the 250 to 750 range.” Rec 16.

17 Exhibit A, incorporated herein, and based solely on evidence in the
18 record, shows Oakleigh Lane’s varying right-of-way (“ROW”) from River
19 Road to the proposed development site. Over three-fourths of the lane doesn’t
20 meet the City’s 45-foot right-of-way standards, and over 225 feet immediately

1 to the west of the proposed development's only vehicular access point has less
2 than half the width required to meet City standards.

3 The road has an oil mat surface, 18 to 20 feet wide, with intermittent
4 gravel shoulders. Rec 1439, 1167, 883-884. As shown in Exhibit B,
5 incorporated herein, both the ROW and pavement widths fall short of the
6 standard for any street type other than an alley, as specified in adopted *Design*
7 *Standards and Guidelines For Eugene Streets, Sidewalks, Bikeways and*
8 *Accessways*, November 1999. Rec 892. The same standards appear in Eugene's
9 *1999 Eugene Arterial and Collector Street Plan, "ASCP."* Rec 675. The ROW
10 and paving width standards for Access Lanes and Low-Volume Residential
11 Streets are adopted in Eugene Code at EC 9.65870. (See Exhibit B.)

12 Oakleigh Lane has no gutters, curbs, sidewalks, public stormwater
13 facilities or other improvements. Pedestrians, bicyclists and wheel-chair users
14 must share the road with cars and other motorized vehicles. Rec 864, 883.

15 Numerous residents park at least one vehicle on the shoulders of
16 Oakleigh Lane, in many cases partially blocking the paved portion. Rec 682-
17 683. Analysis by the Eugene Public Works Department ("PWD") indicates that
18 the paved surface must not be blocked by parked vehicles in order to ensure
19 adequate and safe access by emergency vehicles. Rec 1268. Although
20 technically, such parking is not allowed; the City cannot sign the lane for "no

1 parking” (and therefore cannot enforce no parking) because the City does not
2 maintain unimproved streets, such as Oakleigh Lane. Rec 1172.

3 Oakleigh Lane is over 1,000 feet long; and the distance from River Road
4 to the proposed development’s only vehicular access point is over 850 feet
5 (Rec 1439 and see Exhibit A), which is over twice the City’s 400-foot limit on
6 the length of a *cul-de-sac*. Rec 9, 40. There are no connecting streets between
7 Oakleigh Lane and East Hilliard Lane (which is parallel and to the north) or
8 McLure Lane (which is parallel and to the south), and any future connecting
9 street is precluded due to existing residential development. Rec 1262.

10 **Increased traffic volume from the proposed PUD**

11 There are 21 fully-developed residential properties, 19 of which are single-
12 family homes, along both sides of Oakleigh Lane. Rec 864, 1439.

13 According to the Institute of Traffic Engineers (ITE) *Trip Generation*
14 *Manual, 9th Edition*, the Average Daily Trip (ITE-ADT) rate per dwelling for
15 single-family, detached dwellings is 9.52. (ITE-ADT measures roundtrips.)

16 Thus, the estimated total ITE-ADT for the 19 current households is
17 180.88 (19 x 9.52). Rec 864. These trips would be distributed among the
18 current homes, which are spread out along the entire length of Oakleigh Lane.

19 The ITE-ADT rate per dwelling for condominiums (ITE “use type” 230)
20 is 5.81. Thus, the estimated total ITE-ADT for the 29 new dwellings in the

1 proposed PUD is 168.49 (29 x 5.81). *Ibid.* Almost all of these roundtrips by
2 PUD residents and visitors would travel the entire length of Oakleigh Lane.

3 The resulting total traffic volume on Oakleigh Lane would thus almost
4 double (1.9 times) from the current 181 ITE-ADT to a projected 350 ITE-ADT.

5 The City determines appropriate street standards based on ranges of daily
6 *one-way* trips, referred to as “Average Daily Traffic” (“City-ADT”),¹ as shown
7 in ASCP Table 2 in Exhibit B. The projected traffic volume of 700 City-ADT
8 would put traffic volume on Oakleigh Lane at the high end of the City’s range
9 (250-750 City-ADT) for a “Low-Volume Residential Street.” Rec 448-449.

10 The full impact of vehicle trips on Oakleigh Lane residents, other
11 drivers, and pedestrians and bicyclists is directly proportional to the number of
12 residences passed and other travelers encountered on the road. For comparison
13 purposes, a relatively good approximation of the total impact of one trip is the
14 number of residences passed by the vehicle making a trip. For example, a trip
15 to or from the residence closest to River Road would pass no other residence;
16 whereas a trip to or from the proposed development site would pass 18
17 residences. Tallying the cumulative “pass-by” counts, the 19 current single-

¹ Because Oakleigh Lane has only one way in and out, City-ADT (one-way) values are exactly twice ITE-ADT (roundtrip) values.

1 family dwellings generate 3,218 pass-bys per day, while the 29 proposed
2 dwelling units in the PUD would generate at least 6,065 pass-bys per day.
3 Thus, the PUD would cause traffic impacts, as measured by average daily
4 pass-bys, to almost triple (2.9 times) from 3,218 to 9,283. Rec 864-865.

5 III. JURISDICTION

6 The PUD approval was a land use decision that applied Eugene Code's land
7 use regulations in a discretionary manner. ORS 197.015(10)(a)(A)(iii)
8 Accordingly, it is a land use decision subject to LUBA's jurisdiction.

9 IV. ARGUMENT

10 FIRST ASSIGNMENT OF ERROR

11 **The City erred in finding that the proposed PUD would provide safe**
12 **and adequate transportation systems through compliance with**
13 **standards for streets and other transportation system elements.**

14 **Issue raised below.** The following appeal issues were raised below in
15 testimony before the Hearings Official (Rec 647-648, 860-861, 868-871) and in
16 the local appeal statement (Rec 320-340²).

17 **Standard of review.** LUBA must remand or reverse the application of a land
18 use regulation if the decision is not in compliance with applicable provisions of

² EC 9.8320(5) at Rec 323, EC 9.8320(6) at Rec 328, EC 9.8320(11)(b) at

1 the land use regulations. ORS 197.835(8) The challenged PUD approval
2 applies land use regulations and is therefore covered by this provision.

3 ORS 197.835(9)(a) scope of review is applicable in this case, and LUBA
4 must reverse or remand a land use decision if the final decision maker:

5 § (C) Made a decision not supported by substantial evidence in the
6 whole record; [or]

7 § (D) Improperly construed the applicable law.

8 LUBA owes no deference to the appointed Eugene Planning Commission who
9 made the City's final decision, and LUBA's review must determine whether the
10 City's decision is correct, both as a matter of law and as to the findings.

11 *Willamette Oaks LLC v. Lane County*, 63 Or LUBA 75 (2011).

12 **Introduction.** The City failed to properly interpret and evaluate several
13 approval criteria that require Oakleigh Lane to provide safe and adequate use
14 by motorists, bicyclists, pedestrians and emergency vehicles. As a
15 consequence, the City also failed to adopt adequate conditions of approval to
16 ensure Oakleigh Lane would provide safe and adequate use by motorists,
17 bicyclists, pedestrians and emergency vehicles after the PUD was developed.

18 Before examining the Decision's specific errors under each criteria, it's
19 important to understand the relevant context in order to properly follow the

1 rules of construction in applying the applicable code provisions. ORS 174.010.

2 EC 9.8320(6) provides a clear, overarching approval criterion for PUDs:

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

6 The Decision did not adequately evaluate the ability of Oakleigh Lane, from
7 the development site to River Road, to avoid significant public safety risks and
8 impediments to emergency response, if the PUD were developed.

9 Based on the City's adopted street standards, the Eugene Public Works
10 Department ("PWD") findings regarding the inadequate right-of-way and other
11 evidence in the record, Oakleigh Lane must have a wider right-of-way and
12 paving, as well as sidewalks, to be consistent with EC 9.8320(6). However, the
13 Decision failed to adopt adequate conditions of approval to ensure Oakleigh
14 Lane would meet the requirements of EC 9.8320(6).

15 The approval criterion in EC 9.8329(6) is consistent with the
16 overarching purpose of Eugene's land use code:

17 EC 9.0020 Purpose. The purpose of the land use code is to protect and
18 promote the health, safety, and general welfare of the public and to
19 preserve and enhance the economic, social, and environmental qualities
20 of the community." (Emphasis added)

21 A second PUD approval criterion, EC 9.8320(5), echoes the requirements of
22 EC 9.8320(6) with regards to transportation systems that serve or will be

1 impacted by a proposed PUD; and the subsections of this approval criterion
2 provide specific standards that must be met for approval.

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

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

8 (b) Pedestrian, bicycle and transit circulation, including related facilities,
9 as needed among buildings and related uses on the development site,
10 as well as to adjacent and nearby residential areas, transit stops,
11 neighborhood activity centers, office parks, and industrial parks,
12 provided the city makes findings to demonstrate consistency with
13 constitutional requirements. "Nearby" means uses within ¼ mile that
14 can reasonably be expected to be used by pedestrians, and uses within
15 2 miles that can reasonably be expected to be used by bicyclists.

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

18 The Decision did not adequately evaluate the ability of Oakleigh Lane, from
19 the development site to River Road, to meet the standards under subsections
20 EC 9.8320(5)(a), (b) and (c). The City also failed to adopt adequate conditions
21 of approval to ensure Oakleigh Lane meets the applicable standards prior to
22 PUD development.

23 It's important to note that EC 9.8320(5) requires that Oakleigh Lane
24 meet all applicable standards before the PUD is developed; however, the code
25 provisions do not require the *developer* to do anything beyond what is
26 consistent with constitutional requirements in order to meet those requirements.

1 For example, although EC 9.6870 requires that Oakleigh Lane have a
2 45-foot right-of-way, EC 9.6870 does not require the developer to acquire the
3 ROW, or even be able to acquire the ROW. As LUBA explained in *Butte*
4 *Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006), the ROW might be
5 provided through condemnation proceedings by the City or other means.

6 Finally, PUD approval criterion EC 9.8320(11) also relies on specific
7 public improvement standards adopted elsewhere in the code, which serve the
8 purpose of protecting the health, safety and general welfare of the public.

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

10 ...

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

12 EC 9.6505 Improvements–Specifications

13 (3)(b) Streets and Alleys

14 (4) Sidewalks

15 (5) Bicycle Paths and Accessways.

16 Eugene’s elected officials clearly intended that the three approval criteria in
17 EC 9.8329(5), (6) and (11)(b) work in consort to ensure a proposed PUD
18 development, such as the Oakleigh Meadows PUD, is served by one or more
19 street(s) and other accessways that are adequate, safe, pose no significant risk
20 to others and do not have impediments to emergency response vehicles.

21 It would produce an absurd outcome to apply these criteria in such a
22 manner that a new PUD at the end of Oakleigh Lane could be approved without

1 ensuring that Oakleigh Lane would be adequate, safe, pose no significant risk
2 to others and did not have impediments to emergency response vehicles. Yet
3 the Decision does just that. The Decision fails in numerous ways to provide
4 adequate findings. (*Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or
5 3, 21, 569 P.2d 1063 (1977).) The Decision also fails to adopt adequate
6 conditions of approval.

7 Since Oakleigh Lane is the only street that provides access to the
8 proposed PUD, it follows that the *entire length* of Oakleigh Lane – along
9 which *all* traffic to and from the proposed PUD must travel – must be adequate,
10 safe, pose no significant risk and not be an impediment to emergency response.
11 It was unreasonable for the City to interpret the applicable code to apply
12 approval criteria and standards to *only* the short segment of Oakleigh Lane
13 adjacent to the proposed development site. The City’s interpretation leaves
14 uncertain whether or not Oakleigh Lane will actually function in an adequate
15 and safe manner after the proposed PUD is developed.

16 The following sections demonstrate that, based on the City’s adopted
17 street standards, the Eugene PWD evaluation of Oakleigh Lane and the
18 preponderance of evidence in the record, Oakleigh Lane would fail to provide
19 safe and adequate use unless widened and improved; and that the Decision
20 failed to adopt adequate conditions of approval to ensure that sufficient right-

1 of-way and improvements were in place prior to the PUD being developed.

2 **Subassignment of Error 1.A. The City did not adopt a condition of**
3 **approval that would ensure the 45-foot right-of-way adjacent to the**
4 **proposed development's access point that the City's findings required.**

5 It is indisputable that the City's adopted findings for EC 9.8320(5)(a) state that
6 Oakleigh Lane would be unsafe unless the right-of-way were widened to 45
7 feet for at least fifty feet adjacent to the proposed PUD site. These findings are
8 clearly and forcefully presented in the Eugene PWD referral comments of
9 September 17, 2013. Rec 1255 to 1276. The staff comments were adopted by
10 the Hearings Official and the EPC. Rec 9, 16, 41-42, 44.

11 Based on the projected increase in traffic, the configuration and
12 condition of Oakleigh Lane and the number of additional structures and
13 residents that would be accessible only at the end of a 1,000-foot *cul-de-sac*,
14 the PWD analysis concluded that:

15 "It is in the public's interest to have Oakleigh Lane consist of 45 feet of
16 right-of way through the development site's entry drive aisle and to consist
17 of 33 feet beyond the drive aisle to the terminus of the street in order to
18 ensure: safety for pedestrians, bicyclists and motorists traveling on Oakleigh
19 Lane (a low-volume street); the efficient provision of emergency services;
20 and that the proposed development and adjacent properties are accessible
21 via Oakleigh Lane."³ (Rec 1256-1257)

³ PWD comments at Rec 1256-1258. Hearings Official copied cited text from PWD comments. Rec 41-42. EPC incorporated these findings at Rec 9.

1 Neither the EPC, the Hearings Official nor the applicant disputed this
2 conclusion by PWD staff that Oakleigh Lane in its current configuration would
3 *not* be safe after the increase in traffic that would arise if the PUD were
4 developed. The PWD findings go on to emphasize this requirement in no
5 uncertain terms and explicitly state that without additional right-of-way to
6 widen Oakleigh Lane, the public using Oakleigh Lane would be “at risk”:

7 “Because 45 feet of right-of-way is the minimum amount of right-of-way
8 necessary to construct Oakleigh Lane in this manner as a low-volume street
9 * * * the public interest in safe vehicular, pedestrian and bicycle travel and
10 emergency response and access will be at risk if the 22.5 and 13 foot strips
11 of right-of-way are not dedicated.” (Rec 1257. Emphasis added.)

12 PWD’s analysis clearly ties “public interest” to Oakleigh Lane meeting adopted
13 ROW standards for streets with projected traffic in the “low-volume” range.

14 The PWD analysis also explicitly states that, “without additional right-
15 of-way,” the public “will not be assured of safe access via Oakleigh Lane.”

16 “Without the additional right-of-way, Oakleigh Lane cannot be improved to
17 the City’s minimum street design standards and the 164 new vehicle trips
18 per day generated by the proposed development, along with the additional
19 pedestrian and bicycle traffic generated by the proposed development, will
20 not be assured of safe access via Oakleigh Lane.” (*Ibid.* Emphasis added.)

21 Despite the above findings, the Decision’s conditions of approval are
22 inadequate to ensure a 45-foot right-of-way for at least fifty feet adjacent to the
23 proposed PUD site. Instead, the decision requires the dedication of only an
24 additional 22.5 feet of ROW, which would result in a 42.5-foot ROW

1 (Rec 189), still less than the standard 45-foot ROW that the findings state is
2 necessary for adequate and safe access.⁴ The Decision cites to no basis for
3 allowing the PUD to be developed with less ROW than the findings state is
4 necessary, and the decision offers no explanation for how or when the
5 additional 2.5 feet of ROW would be dedicated.

6 The decision must be remanded for the City to impose an adequate
7 condition of approval, consistent with its findings, that requires a 45-foot ROW
8 for at least 50 feet adjacent to the proposed PUD site prior to PUD
9 development, or explain why a 42.5-foot ROW is adequate. (The necessary
10 condition does *not* have to require the developer to dedicate additional ROW.)

11 **Subassignment of Error 1.B. The Decision did not properly apply adopted**
12 **street standards to Oakleigh Lane, as required by EC 9.8320(5)(a),**
13 **EC 9.6820(4) and EC 9.6870.**

14 EC 9.8320(5) requires the proposed PUD to provide “safe and adequate”
15 transportation systems through compliance with EC 9.6800 through EC 9.6875.

16 **Standards for cul-de-sacs.** EC 9.6820 establishes standards for *cul-de-sacs*
17 and emergency vehicle turnarounds. The following standards apply to Oakleigh
18 Lane, which is a *cul-de-sac* over 1,000 feet long.

⁴ See conditions 3 and 4 of the Hearings Official decision. Rec 189.

1 (1) Except for streets that are less than 150 feet long and streets that will be
2 extended in the future, all streets that terminate shall be designed as a
3 cul-de-sac bulb or an emergency vehicle turnaround.

4 (3) There shall be no cul-de-sacs more than 400 feet long from the center-
5 line of the intersecting street to the radius point of the cul-de-sac bulb.

6 (4) Public accessways to provide safe circulation for pedestrians, bicyclists
7 and emergency vehicles shall be required from a cul-de-sac or
8 emergency vehicle turnaround longer than 150' in length when measured
9 from the centerline of the intersecting street to the radius point of the cul-
10 de-sac or to the center point of the emergency vehicle turnaround.

11 “[T]hese standards do apply since the existing right-of-way is being required to
12 be extended.” Rec 1261. Oakleigh Lane exceeds by 2½ times the maximum
13 length allowed by EC 9.6820(3). Oakleigh Lane has no sidewalks or other
14 “[p]ublic accessways to provide safe circulation for pedestrians [and] bicyclists.”

15 The Decision erroneously found Oakleigh Lane met the requirements for
16 an exception to EC 9.6820(3) and (4), standards that are intended to establish
17 the safe and adequate transportation system required by EC 9.8320(5)(a). The
18 EPC relied upon the following staff finding without additional analysis:

19 “The PC finds that there is existing development to the south and natural
20 resources to the east that warrant an exception to the cul-de-sac length,
21 pursuant to EC9.6820(5).” Rec 9.

22 The Hearings Official’s finding was more specific (at Rec 40):

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

25 The exceptions at EC 9.6820(5) require either:

26 (a) “Physical conditions preclude development of the connecting street”; or

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

5 The Decision erred in granting an exception pursuant to EC 9.6820(5) because
6 neither condition was met in this case. Natural resources to the *east* have no
7 impact on Oakleigh Lane, which runs only *west* of the proposed development.
8 And there is no development on the subject property or the property to the
9 north that prevents a connecting street, as demonstrated by the applicant’s own
10 street connectivity plan. Second Supplemental Rec 3.

11 Furthermore, even if it were the case that there were no feasible
12 alternative connection between the proposed development and River Road,
13 other than Oakleigh Lane, that situation would justify an exemption only to
14 EC 9.6820(3), but not to EC 9.6820(1) and (4).

15 EC 9.6820(1) and (4) are clearly meant as requirements that must apply
16 to a long, dead-end street, such as Oakleigh Lane, that exceeds the normal
17 length limit. EC 9.6820(4) makes absolutely clear that the City Council meant
18 to require improvements to long *cul-de-sacs* in order to “provide safe
19 circulation for pedestrians, bicyclists and emergency vehicles” – exactly the
20 same outcome that is required by the text of the EC 9.8320(5) PUD approval
21 criteria that references EC 9.6820.

1 **Right-of-way standards.** The subject PUD must comply with the EC 9.6870
2 adopted standards for street right-of-way and improvements, as shown in
3 Exhibit B, incorporated herein. Note that EC 9.6870 allows the City to require
4 a *greater*, but not lesser, right-of-way width for PUD applications submitted in
5 accordance with EC 9.8320 PUD approval, but the Decision cites no code
6 provision that allows an exception to the requirements of EC 9.6870.

7 The EPC failed to require Oakleigh Lane to meet the adopted standards:

8 “The [E]PC finds that the HO was correct in his application of
9 EC9.8320(5), as being limited in scope to compliance with the following: a)
10 that EC9.6800 through 9.6875 can be met * * *. That said, the PC agrees
11 that neither EC 9.8320(5)(a) nor EC9.6800 through 9.6875 require that an
12 existing street must meet certain standards in order to serve a proposed
13 development. EC 9.6870 only provides the required paving widths for
14 certain types of streets when and if those streets are ever fully improved to
15 City standards.” Rec 8.

16 The EPC cited no basis for this interpretation of the code, other than expressing
17 apparent agreement with the Hearings Official’s conclusion that Oakleigh Lane
18 didn’t have to meet City standards in order to ensure “safe and adequate
19 transportation systems.”⁵ The EPC finding also addresses only the paving

⁵ The Hearings Officials finding stated:

“The opponents [sic] 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

1 width standard under EC 9.6870; and erroneously neglected to even address the
2 right-of-way issue raised in the original hearing and in the local appeal.

3 Ultimately, the City’s decision relies on a finding that approval criterion
4 EC 9.8320(5) and subsection (a), which explicitly require that “[t]he PUD
5 provides safe and adequate transportation systems through compliance with * *
6 * EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public
7 Ways” doesn’t really mean what it plainly says. To put this another way, the
8 City’s decision appear to be based on an interpretation that:

- 9 a) The code’s street standards have no bearing on a public street unless and
10 until the street is being improved (which may never happen); and
11 b) The EC 9.8320(5) requirement for a proposed PUD to have “safe and

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. * * *

“* * * 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.” Rec 45.

The EPC, however, rejected the entire Hearings Official’s argument:

“To the extent the HO’s decision concludes that EC 9.8320(5)(a) relates only to the dedication of land, the [E]PC disagrees. EC 9.6800 through 9.6875 establish standards for dedication, design and location of public ways, generally.” Rec 8.

1 adequate transportation systems” can therefore be satisfied by
2 *indefinitely* deferring any action to bring the only street serving the PUD
3 up to City street standards.

4 Such an interpretation would eviscerate the meaning from EC 9.8320(5) and
5 subsection (a) and cannot have been the intent of the City Council.

6 There’s also explicit context in Eugene Code that supports the plain
7 language interpretation of EC 9.8320(5) and subsection (a). The purpose of
8 EC 9.6870 is set forth in EC 9.6800 and states:

9 “[s]ections 9.6800 through 9.6875 establish standards for the dedication,
10 design and location of public ways to address the purpose of this land use
11 code contained in EC 9.0020 Purpose.”

12 As mentioned earlier, EC 9.0020 Purpose states:

13 “The purpose of the land use code is to protect and promote the health,
14 safety, and general welfare of the public * * *” (Emphasis added)

15 The correct interpretation is that the purpose of EC 9.6800 through 9.6875 is to
16 “establish standards for the dedication, design and location of public ways to”
17 “protect and promote the health, safety, and general welfare of the public.”

18 The language of EC 9.8320(5) echoes this purpose and is precisely why
19 it relies on the standards in EC 9.6800 through 9.6875 being applied to, in this
20 case, the *only* street that provides access to the PUD.

21 The Decision must be remanded for the City to properly apply

1 EC 9.8320(5)(a) and EC 9.6820(4), EC 9.6870 and Table EC 9.6870 to the
2 *entirety* of Oakleigh Lane from the development site to River Road.

3 **Subassignment of Error 1.C. The Decision did not properly evaluate the**
4 **requirements of EC 9.8320(5)(b) with respect to Oakleigh Lane.**

5 EC 9.8320(5) requires the proposed PUD to provide “safe and adequate”
6 transportation systems through compliance with the following subsection:

7 EC 9.8320(5)(b) Pedestrian, bicycle and transit circulation, including
8 related facilities, as needed among buildings and related uses on the
9 development site, as well as to adjacent and nearby residential areas, transit
10 stops, neighborhood activity centers, office parks, and industrial parks,
11 provided the city makes findings to demonstrate consistency with
12 constitutional requirements. “Nearby” means uses within ¼ mile that can
13 reasonably be expected to be used by pedestrians, and uses within 2 miles
14 that can reasonably be expected to be used by bicyclists.

15 As legislative context, this requirement is directly supported by Metro Plan
16 Policy F.26, which and requires the City to:

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

20 Policy F.26 implements OAR 660-012-0045(3) whose “purposes * * * are to
21 provide for safe and convenient pedestrian, bicycle and vehicular circulation
22 consistent with * * * the function of affected streets * * *.” Rec 235-236.

23 Accordingly, EC 9.8320(5)(b) cannot be limited to just the segment of
24 Oakleigh Lane abutting the PUD because Oakleigh Lane’s function depends on

1 the configuration, condition and projected use along its *entire* length.

2 The uses on River Road are less than 1/4 mile from the development site,
3 and Oakleigh Lane provides the only direct route to/from River Road for
4 pedestrians and bicyclists from the PUD and residences on Oakleigh Lane. The
5 EPC failed to actually evaluate whether Oakleigh Lane would provide a “safe
6 and adequate” pedestrian and bicycle route to River Road. The Decision states:

7 “The constitutional findings address a future need for street improvements
8 abutting the property, rather than any immediate need, based on safety
9 issues or otherwise, associated with the proposed PUD. The [E]PC
10 concludes that no additional right-of-way dedication or street improvements
11 are necessary to meet the approval criteria. Based on these findings, the
12 pedestrian, bicycle and transit circulation requirements of EC 9.8320(5)(b)
13 are met.” Rec 9.

14 Because EC 9.8320(5)(b) addresses bike/ped connections to nearby areas, the
15 scope of this approval criteria cannot be limited to “street improvements
16 abutting the property.” Instead the standard must necessarily encompass the
17 *entire* length of Oakleigh Lane from the development site to River Road.

18 The Hearings Official based his findings on the following interpretation:

19 “The language of EC 9.8320(5) states: ‘[t]he PUD provides safe and
20 adequate transportation systems through compliance with the following:’
21 The underlined section demonstrates that the provision is limited by its own
22 words to a requirement showing three things: * * * b) that pedestrian, bicycle
23 and transit circulation can be achieved, * * *.” Rec 44.

24 This interpretation impermissibly omits the code requirement that “safe and
25 adequate” pedestrian, bicycle and transit circulation can be achieved, and the

1 Hearings Official failed to evaluate that aspect of the entirety of Oakleigh Lane.

2 The Hearings Official also erred in his statement:

3 “Once again, the Hearings Official has not been directed to evidence that
4 shows that pedestrian safety will necessarily be decreased to unacceptable
5 levels simply because 164 ADT are added to Oakleigh Lane.” Rec 47.

6 The PWD analysis, excerpted *supra*, provided substantial evidence that without
7 widening Oakleigh Lane, “pedestrian and bicycle traffic generated by the
8 proposed development, will not be assured of safe access via Oakleigh Lane.”

9 The PWD analysis further contradicts the Hearings Official:

10 “[w]ithout the additional right-of-way, Oakleigh Lane cannot be improved
11 to the City’s minimum street design standards and the 164 new vehicle trips
12 per day generated by the proposed development, along with the additional
13 pedestrian and bicycle traffic generated by the proposed development, will
14 not be assured of safe access via Oakleigh Lane.” Rec 1257.

15 The PWD analysis cited *supra* made clear that 45 feet of right-of-way was
16 necessary to ensure safety for pedestrians and bicyclists on Oakleigh Lane.

17 The Hearings Official also relied upon the following staff findings:

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

26 “Public Works staff confirm that, until such time that property owners elect
27 to improve Oakleigh Lane to full City standards (including sidewalks), the
28 existing paved surface of Oakleigh Lane will continue to adequately provide

1 for vehicle and pedestrian traffic, as well as for emergency vehicles and
2 delivery services, provided the paved surface is not blocked by parked
3 vehicles. With regard to public comments received about vehicle parking
4 occurring on the shoulders of the roadway, Public Works staff notes that,
5 technically, such parking is not allowed. The street could be signed for no
6 parking as part of improving the street, but not before, because the City does
7 not maintain unimproved streets.” Rec 46-47.

8 This staff statement directly conflicts with the more specific and thorough
9 evaluation provided by PWD traffic engineers as the justification for the
10 exaction of right-of-way and future improvements on and adjacent to the
11 northern area of the development site. Inescapably, if the conclusory statements
12 in the staff finding (just cited) were true, then the City would have no
13 justification for imposing Conditions of Approval 3, 4 and 7 at Rec 83.

14 Instead, despite numerous disclaimers by the City, the only reasonable
15 conclusion about the PWD analysis is this: 45 feet of right-of-way is what’s
16 necessary for the last fifty feet of Oakleigh Lane to be adequate and safe; and
17 therefore that longer part of Oakleigh Lane leading to and from the final fifty
18 feet must be as wide. There will be almost *twice* the traffic on the section of
19 Oakleigh Lane closest to River Road than on the section adjacent to the PUD.⁶

20 Further, although the above staff statement is lengthy, it doesn’t provide

⁶ While there may be factor(s) that would require wider or narrower ROW on parts of Oakleigh Lane, the record contains no claim or evidence to suggest that’s the case. If such factors exist, the City must explain them on remand.

1 a shred of evidence that supports the conclusion. The few bits of actual
2 evidence in this statement support the PWD's more thorough assessment with
3 respect to the need for wider right-of-way. For example, this statement asserts
4 that the "expectation is that pedestrians and bicyclists will share the paved
5 surface with vehicles" and yet admits that there is illegal parking on the right-
6 of-way and the City cannot even post "No Parking" signs. Under such
7 conditions, there are going to be unavoidable conflicts *in the roadway*; and in
8 some of those situations, the pedestrian won't be able to step off the roadway
9 due to a car parked on the roadside. With this possibility, Oakleigh Lane cannot
10 be a "safe" route for pedestrians; and this is one obvious reason why Oakleigh
11 Lane needs a wider right-of-way to be safe as the amount of traffic doubles.

12 Motorists may or may not travel more slowly on some dead-end streets;
13 however, the record contains no probative and relevant evidence specific to
14 Oakleigh Lane under current or future configurations. There also is no
15 evidence in the record that this phenomenon, even if true, would actually
16 provide for "safe and adequate transportation systems for pedestrian and
17 bicycle" users on Oakleigh Lane after the PUD is built at the end of the road, as
18 required by EC 9.8320(5)(b). If the PUD's consistency with EC 9.8320(5)(b)
19 were justified, based on this phenomenon, then the City's justification for
20 Conditions of Approval 3, 4 and 7 would necessarily be invalid.

1 The staff statement also depends entirely on the condition – “provided
2 the paved surface is not blocked by parked vehicles” – for the conclusion that
3 the paved surface of Oakleigh Lane would continue to adequately provide for
4 vehicle and pedestrian traffic, as well as for emergency vehicles and delivery
5 services. Yet in the very same paragraph, the staff statement makes clear that
6 the necessary condition *cannot* be ensured. Thus, this statement is in no way
7 reliable, probative and substantial, as required for adequate findings.

8 The Hearings Official also relied upon the applicant’s claim that:

9 “the queuing effect of having a single travel lane along Oakleigh Lane is
10 likely to result in lower speeds and acceptably safe conditions for
11 pedestrians.” Rec 47.

12 This assertion came from the applicant’s attorney, not a traffic engineer or
13 anyone with any relevant expertise on this issue. Moreover, it was not based on
14 any evidence or analysis specific to Oakleigh Lane and doesn’t even claim
15 anything stronger than that it is “likely” to result in safe conditions. To satisfy
16 EC 9.8320(5)(b), the applicant would have to provide substantial evidence that
17 the “queuing effect” would *ensure* safe conditions.

18 Furthermore, if the “queuing effect” were adequate to create safe
19 conditions, the PWD traffic engineers would presumably have relied on that
20 same effect and would not have found that Oakleigh Lane needed widening and
21 improvements to ensure safety. In fact, the full citation for the “queuing effect”

1 does not even claim that it “results in ... acceptable safe conditions for
2 pedestrians” in any way shape or form. All the *Eugene Local Street Design*
3 *Standard* states is the following:

4 “This queuing effect has been found to be an effective and safe method to
5 reduce speeds and non-local traffic.” Rec 894.

6 In other words, the queuing effect may reduce speeds and non-local traffic, but
7 there’s no assurance regarding a pedestrian or bicyclist’s safety *when they must*
8 *use the same roadway as vehicles*. Quite the contrary – the cited standard
9 actually makes clear that the street *must be designed and striped for a single*
10 *traffic lane* and at least one parking lane:

11 “The single traffic lane is intended to create a ‘queuing street’, such that
12 when opposing vehicles meet, one of the vehicles must yield by pulling into
13 a vacant portion of the adjacent parking lane.” *Ibid*.

14 The cited standard also says nothing about a “queuing street” that does not
15 have sidewalks and therefore forces pedestrians to walk in the street.

16 Oakleigh Lane clearly does not meet the standards for a “queuing street,”
17 and thus the “queuing effect” is not at all relevant to this case unless the City
18 were to impose adequate conditions of approval for the entirety of Oakleigh
19 Lane to have the necessary right-of-way, striped lanes and sidewalks to meet
20 the standards for a safe and adequate “queuing street.”

21 In sum, both the EPC and the Hearings Official ignored substantial

1 evidence from the PWD analysis that indicates Oakleigh Lane would require
2 widening and improvements to meet the requirements of EC 9.8320(5)(b). The
3 Decision failed to thoroughly evaluate the issues and relied on invalid and
4 irrelevant “evidence” as the basis for the decision. The decision must therefore
5 be remanded for the City to properly apply EC 9.8320(5)(b) to the *entire*
6 portion of Oakleigh Lane between the development site and River Road and to
7 rely on reliable and probative evidence in its findings.

8 **Subassignment of Error 1.D. The Decision failed to require a Traffic**
9 **Impact Analysis as required by EC 9.8320(5)(c) and EC 9.8670.**

10 EC 9.8320(5) requires the proposed PUD to provide “safe and adequate”
11 transportation systems through compliance with the following subsection:

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

14 The Decision failed to apply the following provision for requiring a TIA:

15 EC 9.8670 Applicability.

16 * * *

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

22 The PWD analysis *supra* included extensive conclusions, which were adopted
23 by the Hearings Official. Among these are findings documenting the City’s

1 specific concerns about bicycle and pedestrian safety on Oakleigh Lane:

2 “Public Works staff indicates that the applicant’s proposal is sufficient to
3 accommodate the turnaround, but not the area necessary to extend the
4 sidewalk along the south side of the turnaround, to separate pedestrians
5 from vehicles and provide a safe public walking surface for the residents of
6 the proposed development.” Rec 39. And:

7 “Improving Oakleigh Lane to these [City] standards will allow for two-way
8 vehicular and bicycle traffic [and] will provide separation between vehicular
9 traffic and pedestrians” Rec 41. (Emphasis added.)

10 Thus, the condition of EC 9.8670(2) is met, and a TIA is required.

11 The EPC simply relied on the Hearings Official’s findings. Rec 9. The
12 Hearings Officials findings include patently incorrect statements, such as:

13 “... the strong assertion that an increase in ADT will result in traffic
14 accidents or actual danger to pedestrians and bicyclists is not supported by
15 evidence in the record.

16 ...
17 Contrary to Mr. Conte’s assertion, Staff’s position that there are no traffic
18 safety concerns associated with the proposal or Oakleigh Lane is some
19 evidence that a TIA under EC 9.8670(2) is not necessary. Public Works did
20 a lengthy and thorough analysis of traffic conditions that is largely repeated
21 in the Staff report. Neither Mr. Conte nor any other party submitted
22 evidence to the contrary, and that is what is required in order for Staff or the
23 Hearings Official to determine that EC 9.8670(2) might be implicated by
24 this application. ” Rec 48-49.

25 The PWD conclusions, cited in opposition testimony below, provide
26 substantial, reliable and probative evidence of a documented City concern
27 about pedestrian and/or bicyclist safety. The PWD’s “thorough analysis of
28 traffic conditions” relied upon as the primary evidence for the Hearings
29 Official’s findings, in fact, concluded exactly the opposite of what the Hearings

1 Official implies – the PWD identified serious safety concerns with the current
2 configuration of Oakleigh Lane. The Hearings Official ignored this evidence.

3 In addition, the Hearings Official made the following erroneous finding:

4 “Those implicit assumptions are that under EC 9.8670(1), a proposal will
5 not potentially create unsafe traffic conditions unless the development will
6 increase peak vehicle trips by more than 100 trips.” *Ibid.*

7 Neither the code nor any reasonable analysis would justify this assumption.

8 The correct assumption under EC 9.8670(1) is exactly the reverse: A proposal
9 will potentially create unsafe traffic conditions when the development would
10 increase peak vehicle trips by more than 100 trips – that’s one of the reasons a
11 TIA is required for developments that meet this condition. But the converse is
12 not necessarily true, i.e., when the development would increase peak vehicle
13 trips by 100 or fewer trips, there is no basis to conclude that there is no
14 potential for unsafe traffic conditions.

15 Obviously, if the Hearings Official’s interpretation of EC 9.8670(1) were
16 correct, the triggering conditions of EC 9.8670(2) and (3) would be entirely
17 unnecessary. However, that interpretation would conflict with the ORS 174.010
18 requirement that: “where there are several provisions or particulars such
19 construction is, if possible, to be adopted as will give effect to all.”

20 In dismissing EC 9.8670(2), the Hearings Official provides an
21 incomplete statement of the provisions in this code section:

1 “Under EC 9.8670(2), it is implied that a TIA and associated mitigation
2 measures do not need to be considered unless there is evidence of
3 “problems” caused by accident rates, traffic volumes or speed.” *Ibid.*

4 The Hearings Official completely neglected to consider the last part of the
5 EC 9.8670(2) text, which also triggers a TIA: “* * * identified locations where
6 pedestrian and/or bicyclist safety is a concern by the city that is documented.”

7 The Hearings Officials omission was impermissible under the ORS 174.010
8 requirement to not “omit what has been inserted.”

9 In summary, the Hearings Official never even evaluated the relevant
10 TIA-triggering condition in EC 9.8670(2), and he ignored substantial and
11 probative evidence that the “trigger” condition was met in this case. As a result
12 the City erroneously failed to require the necessary TIA.

13 It bears noting that a TIA would have provided location-specific data and
14 analysis, including current and projected volumes of vehicle, pedestrian and
15 bicycle traffic, and the interactions among these modes of travel. Thus, a TIA
16 analysis would have provided the probative evidence required to conclude
17 whether or not widening of, and/or improvements to, Oakleigh Lane were
18 necessary to be consistent with the traffic and safety-related approval criteria.
19 The Hearings Official erred by not requiring the TIA, and then he relied on
20 erroneous findings to conclude no widening or improvements were necessary.

21 The decision must be remanded for the City to properly evaluate

1 EC 9.8320(5)(c) and require a TIA, based on the provision of EC 9.8670(2)
2 that requires a TIA for “identified locations where pedestrian and/or bicyclist
3 safety is a concern by the city that is documented.”

4 **Subassignment of Error 1.E. The Decision failed to adequately evaluate**
5 **whether the PUD would be a significant risk to public safety as required**
6 **by EC 9.8320(6).**

7 EC 9.8320(6) requires that the “PUD will not be a significant risk to public ...
8 safety, including but not limited to ... an impediment to emergency response.”

9 The EPC simply relied on the Hearings Official’s findings. Rec 10. The
10 Hearings Official did not directly evaluate emergency response and traffic
11 safety issues that were raised below, and instead relied on staff findings. Rec 50.

12 The staff findings (Rec 49-50) provide no analysis at all of the
13 configuration of Oakleigh Lane with respect to either public safety or
14 emergency response. Instead, the staff findings (and therefore the City’s
15 Decision) rely on staff findings for EC 9.8320(5)(b) and (11)(b).

16 When findings for one criterion rely on findings for a separate criterion,
17 the decision must identify the specific findings for the referenced criterion that
18 are being relied upon and must explain how those findings ensure consistency
19 with the subject criterion. In this instance, neither the EPC, Hearings Official
20 nor the staff provided the required explanation for an adequate finding.

1 The City specifically erred in not explaining how the current
2 configuration of Oakleigh Lane would not be an impediment to emergency
3 response when the PWD’s analysis explicitly found that “emergency response
4 and access will be at risk” unless Oakleigh Lane’s right-of-way was widened
5 and the road improved. Nothing in the staff findings for EC 9.8320(5)(b) and
6 (11)(b) could reasonably be construed as adequately addressing this issue.

7 In the staff comments under EC 9. 320(5)(b), staff cites to a PWD
8 statement that “the existing paved surface of Oakleigh Lane will continue to
9 adequately provide for * * * emergency vehicles and delivery services,
10 provided the paved surface is not blocked by parked vehicles.” Rec 46. But the
11 same statement admits that nothing ensures the paved surface would not
12 blocked by parked vehicles at the time an emergency vehicle travels down or
13 back on Oakleigh Lane. Thus, the PWD statement does *not* provide an
14 adequate finding. There is also no explanation in the referenced findings of
15 how such the conclusory statement related to EC 9.8320(5)(b) squares with the
16 more extensive analysis provided in the PWD justification of the exactions.

17 The assertion that “Oakleigh Lane will continue to adequately provide for
18 ... emergency vehicles” is simply a conclusory statement that is inconsistent
19 with the more thorough analysis provided in the same document to justify the
20 exaction of right-of-way. Lane County and City public works staff also make

1 clear that Oakleigh Lane will not be maintained even after the PUD is
2 developed. Rec 883-884, 1172. Thus, the Decision’s finding that this already
3 deficient road will “continue” to be adequate is contrary to the preponderance of
4 evidence and wholly unreasonable.

5 Furthermore, in interpreting the requirements of EC 9.8320(6), the EPC,
6 Hearings Official and staff failed to consider the context that clearly shows
7 City Council’s intent, including the requirements of EC 9.8320(5) and
8 EC 9.8320(5)(b), and the purpose statements set forth in EC 9.0020 and
9 EC 9.6800. Additional context in this particular case can be found in the
10 provisions of EC 9.6820(4), described *supra*, that state “[p]ublic accessways to
11 provide safe circulation for pedestrians, bicyclists and emergency vehicles shall
12 be required from a cul-de-sac * * * longer than 150’ in length.”

13 The decision must be remanded for the City to properly evaluate
14 EC 9.8320(6) and to require adequate right-of-way, sidewalks and other
15 improvements on Oakleigh Lane between the development and River Road, so
16 that the resulting vehicular, bicycle, pedestrian and emergency vehicle traffic
17 on Oakleigh Lane is not at risk.

18 **Subassignment of Error 1.F. The Decision did not properly evaluate the**
19 **requirements of EC 9.8320(11)(b) with respect to Oakleigh Lane.**

20 EC 9.8320(11) requires that the PUD complies with all of the following:

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

2 EC 9.6505 Improvements–Specifications

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

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

9 EC 9.6505(4) Sidewalks

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

15 EC 9.6505(5) Bicycle Paths and Accessways.

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

21 With respect to EC 9.6505(3)(b), as explained previously, the City required the
22 dedication of only 22.5 feet of right-of-way, adjacent to the development site.

23 That would result in a total right-of-way of 42.5 feet, which is less than
24 required by the standards in EC 9.6870. Rec 83. Therefore, the Decision did
25 not ensure that the proposed development would comply with EC 9.6505(3)(b).

26 With respect to all three requirements, the Decision erred by requiring
27 only an irrevocable petition for *future* improvements in the unlikely
28 circumstance that the City brings Oakleigh Lane up to the standards for a Low
29 Volume Residential Street. All three requirements must be met *before* the PUD

1 is developed and not left to the indefinite future. *Ibid.*

2 The decision must be remanded for the City to require the developer to
3 provide adequate right-of-way, sidewalks and other improvements on Oakleigh
4 Lane adjacent to the development site before the PUD is in use.

5 **The City's argument for ignoring the PWD analysis**

6 The City's findings for EC 9.8320(5)(b), (6) and (11)(b) (as well as for
7 EC 9.8320(12) and EC 9.8320(13), discussed under the Second and Third
8 Assignments of Error *infra*) rely on an erroneous assertion that PWD's findings
9 cited *supra* are irrelevant to the approval criteria addressed in this appeal.

10 For example, the Decision found for EC 9.8320(5)(b):

11 "The [E]PC finds that the constitutional findings in the Public Works
12 [Department] referral comments are limited to justification for a
13 proportional right-of-way exaction along the frontage of the subject
14 property that would accommodate future public street improvements. The
15 constitutional findings address a future need for street improvements
16 abutting the property, rather than any immediate need, based on safety
17 issues or otherwise, associated with the proposed PUD. The PC concludes
18 that no additional right-of-way dedication or street improvements are
19 necessary to meet the approval criteria. Based on these findings, the
20 pedestrian, bicycle and transit circulation requirements of
21 EC9.8320(5)(b)are met." (Rec 9)

22 The Decision found similarly for EC 9.8320(6):

23 "Based on the previous determination under the second assignment of error
24 about the limited scope of the PW[D] constitutional findings for right-of-
25 way exaction, the PC finds no basis in the record to require additional right-
26 of-way dedication or street improvements. The PC concludes that the HO's
27 conditions for right-of-way dedications and irrevocable petitions address a

1 future need for street improvements, rather than any immediate need
2 associated with the proposed PUD.” (Rec 10)

3 The Decision again found for EC 9.8320(11)(b):

4 “The PC finds that the HO did not err in finding compliance with
5 EC9.8320(11)(b). As confirmed under the second assignment of error, the
6 PC determines that the PW referral comments are not evidence of a safety
7 concern under existing or proposed conditions.” (*Ibid*)

8 The Decision reiterated essentially the same findings near its conclusion. Rec 15.

9 In all of these findings, the City made a fundamental error by relying on a
10 conclusion that the “findings in the Public Works [Department] referral comments
11 are limited to justification for a proportional right-of-way exaction” and the
12 “findings included in the staff report and PW[D] referral comments (Pages 2-4 of
13 Exhibit PH-30) were adopted to justify exaction from the applicant.”

14 While it’s true that the City *used* the PWD analysis only to justify
15 exaction, the analysis nevertheless reached a substantial and probative conclu-
16 sion – which the City adopted – that “[w]ithout the additional right-of-way,
17 Oakleigh Lane cannot be improved to the City’s minimum street design stan-
18 dards and the 164 new vehicle trips per day generated by the proposed develop-
19 ment, along with the additional pedestrian and bicycle traffic generated by the
20 proposed development, will not be assured of safe access via Oakleigh Lane.”

21 Note that the PWD conclusion describes what’s required to ensure “safe
22 access via Oakleigh Lane.” PWD’s analysis did *not* limit this conclusion to

1 “safe access at the entry to the development site from Oakleigh Lane.” Nor did
2 PWD make any claim or provide any explanation that the section of Oakleigh
3 Lane where the right-of-way dedication was required was any different than the
4 rest of Oakleigh Lane between the development site and River Road.

5 Facts are facts; and when the City finds that, without being widened,
6 Oakleigh Lane is unsafe in order to justify an exaction, the City cannot then
7 ignore that finding when the City evaluates the application’s compliance with
8 approval criteria that require the PUD be served by a safe and adequate street.

9 Although the PWD findings do not state *explicitly* that Oakleigh Lane
10 would be unsafe after the PUD is developed unless all or most of Oakleigh
11 Lane is also widened from the development site to River Road, such a
12 statement is unnecessary for Conte’s argument since no other reasonable
13 conclusion can be drawn from the PWD findings. To conclude otherwise would
14 require a finding that the lack of adequate right-of-way immediately adjacent to
15 the development’s northern property line is the *only* deficiency on Oakleigh
16 Lane that would warrant PWD’s findings that “safe vehicular, pedestrian and
17 bicycle travel and emergency response and access will be at risk” and “the 164
18 new vehicle trips per day generated by the proposed development, along with
19 the additional pedestrian and bicycle traffic generated by the proposed
20 development, will not be assured of safe access via Oakleigh Lane.”

1 Despite the fact that the City used the PWD analysis only for the purpose
2 of supporting exaction of “the 22.5 and 13 foot strips of right-of-way” that the
3 City imposed as a condition of approval, there is nothing at all in the PWD
4 comments asserting that it is *only* the lack of these two right-of-way strips that
5 would put at risk “safe access via Oakleigh Lane.” Applying consistent
6 reasoning for all or most of Oakleigh Lane from the development site to River
7 Road would lead inevitably to similar conclusions – i.e., Oakleigh Lane will be
8 inadequate and potentially unsafe unless all (or at least most) of the lane meets
9 the City’s adopted right-of-way standards for the projected volume of traffic.

10 It would be absurd to conclude that Oakleigh Lane would be inadequate
11 and potentially unsafe solely because the lane doesn’t meet City right-of-way
12 standards for the final fifty or so feet.

13 At the very least, given the PWD conclusions regarding the implications
14 of an insufficient right-of-way at the end of Oakleigh Lane, the City must at
15 least conduct an adequate analysis of the substandard right-of-way on the
16 longer portion of Oakleigh Lane and provide an explanation for why a different
17 conclusion regarding the impacts on adequacy and safety is warranted. The
18 City must also explain how an *unmaintained* street will remain adequate and
19 safe with twice as many vehicles running over it for years to come.

20 The City cited to several other statements in the PWD comments that are

1 clearly inconsistent with the extensive findings that were adopted to support
2 exaction. These PWD statements are addressed specifically under other
3 sections in this petition; but in general, the City cannot rely on selected
4 excerpts from their own analysis that are inconsistent with the more substantial
5 findings the City relied upon for exaction.⁷

6 **The City conflated approval criteria and exaction**

7 The Hearings Official and EPC mistakenly conflated the approval criteria's
8 various requirements for an adequate and safe street with the constitutional
9 limits on exactions. While the City was correct that it could not *exact* more than
10 a proportional share of right-of-way dedications and street improvements, the
11 City can – and was required to – ensure the PUD would be served by a safe and

⁷ LUBA has previously recognized limits on the City's reliance on statements by staff that are conclusory and inconsistent with substantial conflicting evidence: "While the hearing official is entitled to rely on the expert opinion of the county sanitarian, where opponents have offered a detailed explanation for why the subject property may not be able to accommodate the required expansion and replacement drain-field, we agree that more than an unexplained expression of belief that it will be possible is required. *Bartels v. City of Portland*, 20 Or LUBA 303, 308 (1990). There may well be adequate responses to all of the concerns expressed about the property's ability to accommodate the required drain-field expansion and any required replacement drain-field. But those responses are not present in the hearing official's decision or in any evidence in the record that has been brought to our attention. Remand is required so that the hearing official may explain why those concerns are not well taken." *Phillips v. Lane County*, 62 Or. LUBA 92 (2010)

1 adequate street. These are separate actions, and the City cannot waive
2 conformance with approval criteria ensuring public safety just because it
3 cannot exact from the applicant all that would be necessary to meet the criteria.

4 LUBA dealt with the distinction between these two aspects of adequate
5 street access in *In Butte Conservancy v. City of Gresham, supra*. *Butte*
6 *Conservancy* addressed the petitioner’s argument that City of Gresham was
7 *required* to deny the applicant’s development proposal because the applicant
8 could never secure from other property owners (who opposed the development)
9 the right-of-way necessary to meet Gresham’s street access requirements.

10 LUBA held that City of Gresham could require adequate right-of-way to
11 meet the street access approval criterion through conditions of approval, and
12 then could approve the application, based on those conditions of approval –
13 even if the only likely means the developer had to acquire the right-of-way was
14 by persuading the City to condemn portions of the other property owners’ land.

15 LUBA summarized what would be sufficient, in the present case, for the
16 City of Eugene to approve the Oakleigh PUD:

17 “In our view, it is sufficient for the local government in such circumstances
18 to (1) adopt findings that establish that fulfillment of the condition of
19 approval is not precluded as a matter of law, and (2) ensure, in imposing the
20 condition of approval, that the condition will be fulfilled prior to final
21 development approvals or actual development.” (Emphasis added.)

22 Conte does not argue that achieving the necessary right-of-way is precluded as

1 a matter of law (and therefore the application must be denied). But Conte does
2 argue that the City is required to impose conditions of approval to ensure that
3 Oakleigh Lane has sufficient right-of-way and improvements for adequate and
4 safe use prior to actual development, as required by PUD approval criteria.

5 Although the present case has a different focus than in *Butte*
6 *Conservancy*, LUBA's decision in *Butte Conservancy* nonetheless shows that
7 the City of Eugene was not prevented from adopting similar conditions of
8 approval (as the City of Gresham had adopted⁸) in order to ensure the Oakleigh
9 PUD would conform to the criteria in EC 9.8320(5)(b), (6) and (11)(b).

10 In summary, the City erred by dismissing the PWD findings cited *supra*
11 as inapplicable to several approval criteria, and the City erred by assuming that
12 constitutional limits on exactions prohibited (or exempted) the City from
13 requiring adequate street right-of-way and/or improvements for portions of
14 Oakleigh Lane between the development site and River Road to be in place as
15 conditions of approval. The Decision must be remanded with instructions to

⁸ The City of Gresham had adopted conditions of approval "requiring that the applicant submit as part of final plat documents:

- (1) a 20-foot wide right of way or easement across the residential lot within the Kingswood Heights subdivision, dedicated to the county,
- (2) construction plans for the access, and
- (3) a county street construction permit."

1 remedy the errors with regard to the criteria in EC 9.8320(5)(b), (6) and (11)(b).

2 **SECOND ASSIGNMENT OF ERROR**

3 **The City erred in finding that the proposed PUD would have minimal**
4 **off-site impacts, as required by EC 9.8320(12).**

5 **Issue raised below.** Appeal issues were raised below in testimony before the
6 Hearings Official (Rec 648, 881) and in the local appeal statement (Rec 332).

7 **Standard of review.** The standard of review is the same as stated under the
8 First Assignment of Error, which is incorporated here by reference.

9 **Argument.** The City erred in finding the PUD met the approval criterion:

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

13 With respect to traffic impacts, the EPC generally repeats elements in the
14 Hearings Official's findings. Rec 11.

15 Neither the EPC nor the Hearings Official provided a reasonable
16 explanation for how "minimal impacts" should be evaluated. While "minimal"
17 is admittedly subject to various interpretations, it must be given some
18 independent meaning and applied to the evidence in the record.

19 Nowhere does the Decision address the obvious fact that the PUD will
20 almost *double* daily vehicle trips and *triple* daily impacts from vehicle
21 pass-bys. Otherwise, the Decision provides no other scale on which to evaluate

1 the acknowledged impacts from increased traffic.

2 The Hearings Official cobbles up an approach that has no foundation in
3 the code and doesn't follow the ORS 174.010 and "PGE" rules for statutory
4 construction. The basis of his interpretation is the following assumption:

5 "[I]t makes no sense that the City Council would ask an applicant to go
6 through the analysis in EC 9.8320(5) and potentially complete a TIA if the
7 proposed PUD could be denied for having 'some' impacts on the
8 transportation system." Rec 72.

9 If Council had intended that a proposed development that satisfied EC 9.8320(5)
10 and/or a TIA was therefore a development that had minimal offsite impacts from
11 increased traffic, then Council could have written that into the code. But they
12 didn't. Instead EC 9.8320(12) explicitly identifies "impacts such as traffic." The
13 Hearings Official and EPC cannot render the clear legislative intent of
14 EC 9.8320(12) meaningless because of the EC 9.8320(5) or TIA requirements.

15 Furthermore, the Hearings Official statement that it "makes no sense" is
16 mere hand-waving and cannot substitute for the required explanation of *how*
17 satisfying a TIA would necessarily satisfy the "minimal impacts" requirement.

18 A cursory examination of the TIA requirements would have proven the
19 Hearings Official's assumption wrong because, by providing adequate
20 infrastructure improvements to accommodate increased traffic, a development
21 can have huge traffic impacts and still be considered safe and meet the TIA

1 Level-Of-Service requirements. But being “safe” doesn’t” guarantee minimal
2 impacts. If that were the case, Oakleigh Lane could be turned into a freeway
3 and the City would still find the traffic had minimal impacts on residents.

4 The Hearings Official also relied on a *non sequitur* that concluded:

5 “[W]hen none of the conditions exist that would trigger a TIA under
6 EC 9.8670, it is reasonable to question whether EC 9.8320(12) is implicated
7 as to traffic.

8 * * *

9 That is the case for this application and this record. There are no conditions
10 identified in the record which come anywhere close to triggering a TIA.
11 The peak vehicle trip estimates are less than a third of that required to
12 trigger a TIA, and no ‘problems’ or LOS deficiencies are identified. The
13 neighbors’ fear that there will be more cars on Oakleigh Lane than before is
14 not enough to view those new cars as more than a minimal impact, let alone
15 a negative off-site impact. As such, the Hearings Official concludes that
16 the increase in peak vehicle trips from the proposed PUD will result in
17 minimal off-site impacts.” Rec 73.

18 Again, the Hearings Official runs afoul of ORS 174.010. Nothing in the code
19 says the thresholds that trigger a TIA can serve as a universal standard for
20 “minimal offsite impacts,” and the Hearings Official provided no explanation at
21 all for why this would be so. For one thing, “minimal offsite impacts” is
22 substantially dependent on the particular uses that are “offsite,” so no single
23 standard would be reasonable in all contexts where a PUD might be developed.
24 The TIA process is focused on levels of service and safety, and doesn’t concern
25 such impacts as noise, headlight glare and dust that arise from traffic.

26 Thus, the Hearings Official erred by failing to apply an even marginally

1 defensible analysis for the EC 9.8320(12) criterion.

2 Further, both the EPC and the Hearings official failed to consider PWD's
3 conclusion that "safe vehicular, pedestrian and bicycle travel and emergency
4 response and access will be at risk" with the additional traffic, if Oakleigh Lane
5 is not widened and improved. No reasonable person would conclude that
6 placing drivers, pedestrians and bicyclists on Oakleigh Lane at significant risk,
7 as the PWD analysis concludes, is only a "minimal" offsite impact.⁹

8 In summary, the Decision did not explain a reasonable standard for
9 "minimal offsite impact" with respect to traffic and failed to address the
10 substantial evidence in the record that the traffic generated by PUD residents
11 would have greater than minimal offsite impacts. Consequently, there were not
12 adequate findings to conclude the PUD is consistent with EC 9.8320(12).

13 The decision must be remanded for the City to provide a reasonable
14 interpretation that gives independent meaning to "minimal impacts," and to
15 adequately evaluate the potential impacts for noise, headlight glare, dust and

⁹ Even if approval criteria identified under the First Assignment of Error were found not to apply to Oakleigh Lane between the development site and River Road, the safety implications demonstrated in the discussion *supra* are relevant to impacts on all residents and other users along *all* of Oakleigh Lane.

Also, *future* ROW dedications cannot be relied upon to keep safety problems "minimal," because dedication of a 45-foot right-of-way would then cause a huge negative impact on Oakleigh Lane property owners. Rec 648.

1 other concrete impacts from the undisputed near doubling of vehicle trips along
2 Oakleigh Lane. In addition, the City must explain why the substantial potential
3 impacts that were used as the basis for the exaction of right-of-way are not
4 indicative of greater “risk” – and thus significant impacts – to individuals
5 residing along or using Oakleigh Lane.

6 **THIRD ASSIGNMENT OF ERROR**

7 **The City erred in finding that the proposed PUD would be reasonably**
8 **compatible and harmonious with adjacent and nearby land uses, as**
9 **required by EC 9.8320(13).**

10 **Issue raised below.** The appeal issues were raised below in testimony before
11 the Hearings Official (Rec 882) and in the local appeal statement (Rec 333).

12 **Standard of review.** The standard of review is the same as stated under the
13 First Assignment of Error, which is incorporated here by reference.

14 **Argument.** The City erred in finding the PUD met the approval criterion:

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

17 The EPC generally relied upon the Hearings Official’s findings. Rec 11.

18 The Hearings Official relied primarily on an untenable conclusion:

19 “Here, a finding that the proposed PUD is incompatible and unharmonious
20 despite having complied with all the applicable provisions of EC 9.8320
21 would, at least in this case, be logically and legally indefensible.” Rec 74.

1 This interpretation would make EC 9.8320(13) superfluous and conflicts with
2 ORS 174.010. (“where there are several provisions or particulars such
3 construction is, if possible, to be adopted as will give effect to all.”)

4 The Hearings Official’s entire evaluation of whether the traffic that
5 would arise from 29 new dwellings at the end of the road would be reasonably
6 compatible and harmonious was as follows:

7 “As to arguments about traffic impacts, the Hearing Official adopts the
8 findings for EC 9.8320(12) here by this reference. Evidence of a modest
9 increase in total vehicle trips, where there is no evidence of associated
10 traffic problems, is sufficient to demonstrate that the proposed PUD will be
11 compatible with adjacent and nearby uses.” Rec 75.

12 The Hearings Official also adopted the staff findings for this criterion, but the
13 staff findings did nothing more than equate “minimal off-site impacts” with
14 “reasonably compatible,” with no further explanation:

15 “As noted at EC 9.8320(5)(c) in regards to traffic, ... the proposed
16 development will have minimal off-site impacts related to traffic Based
17 on the above findings, the development is reasonably compatible with the
18 nearby land uses.” Rec 74.

19 The referenced staff findings at EC 9.8320(5)(c) don’t actually address
20 “minimal off-site impacts” and consequently provide no evidence, analysis or
21 explanations demonstrating the application’s consistency with EC 9.8320(13).

22 The Hearings Official’s reliance on his findings for EC 9.8320(12) are
23 also inadequate as explained under that criterion *supra*. Furthermore, by
24 ORS 174.010, “compatibility” and “harmony” must be given independent

1 meaning from “minimal offsite impacts,” which the Decision failed to do.

2 Doubling of traffic, which the PWD analysis concludes would create
3 unsafe conditions on Oakleigh Lane, cannot be considered “compatible” or
4 “harmonious” and falls short of any reasonable application of EC 9.8320(13).

5 The decision must be remanded for the City to provide a reasonable
6 interpretation that gives independent meaning to “compatible” and
7 “harmonious” with respect to nearby single-family homes and to adequately
8 evaluate what level of noise, headlight glare, dust and other concrete impacts
9 arising from development traffic would remain “compatible” and
10 “harmonious.” In addition, the City must explain why the substantial potential
11 safety impacts that were used as the basis for the exaction of right-of-way are
12 not evidence of incompatibility and/or disharmony with the current residents,
13 pedestrians and bicyclists residing along and/or using Oakleigh Lane.

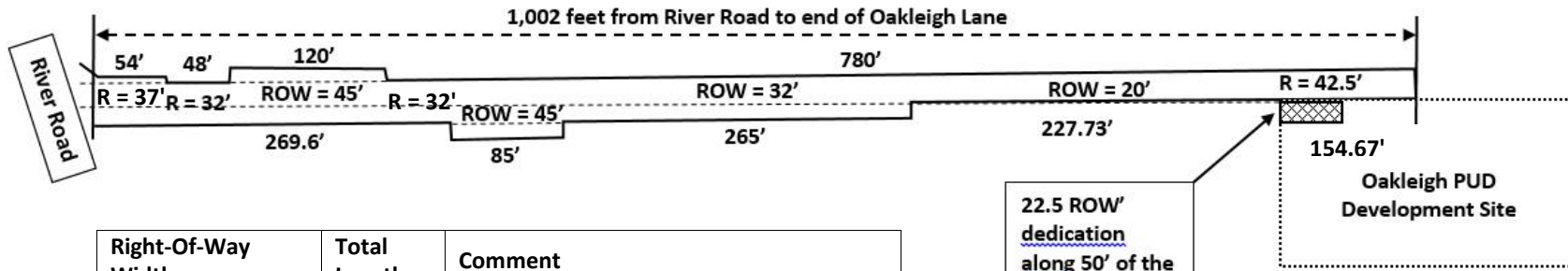
14 **V. CONCLUSION**

15 LUBA must remand the Decision for the City to provide adequate findings and
16 conditions of approval to ensure the PUD meets approval criteria or is denied.

17 DATED this 16th day of June, 2014,

18 By: _____
19 Paul Conte
20 Intervenor-Respondents

Exhibit A. Oakleigh Lane Right-of-Way Segments



Right-Of-Way Width	Total Length	Comment
20 feet	227.73'	
32 feet	360.60'	
37 feet	54.00'	
42.5 feet	50.00'	After dedication of 22.5' ROW from PUD
45 feet	205.00'	
Beyond PUD entry	104.67'	
TOTAL	1002.00'	

NOTE ADDED FOR REMAND
The actual length of the segment with only 20' of ROW is 250'.

Exhibit B. Eugene Local Street Standards

Excerpt from *Design Standards and Guidelines For Eugene Streets, Sidewalks, Bikeways and Accessways*, November 1999. Rec 892. Adopted by Council Resolution No. 4608. Rec. 889.

Local Street Standards

Table 2

Type of Street	R.O.W Width	Paving Width			(Setback) Sidewalks	Planting Strips	Avg. Daily Traffic
		No Park.	Parking 1 Side	Parking 2 Sides			
Access Lane	40'		21'		1 @ 6'	7' and 6'	< 250
	55'			28'	2 @ 6'	2 @ 7'-6"	ADT
Low Vol. Residential	45'	20'			2 @ 6'	2 @ 6'-6"	250 to
	45'		21'		2 @ 6'	2 @ 6'-0"	750
	55'			28'	2 @ 6'	2 @ 7'-6"	ADT

Exhibit B (continued). Eugene Local Street Standards

Excerpt from Eugene Land Use Code:

EC 9.6870 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. When a street segment right-of-way width is not designated on the Street Right-of-Way map, the required street width shall be the minimum width shown for its type in Table 9.6870 Right-of-Way and Paving Widths. Based on adopted plans and policies, adopted “Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways, and Accessways,” or other factors which, in the judgment of the planning and public works director necessitate a greater street width, a right-of-way width greater than the minimum width shown for its type in Table 9.6870 can be required for applications submitted in accordance with EC 9.8090, 9.8055, 9.8215, 9.8320, 9.8440 or 9.8515.

Type of Street or Alley	Right-of-Way (for Public Streets and Alleys only)	Paving Width
Major Arterials	100' – 120'	68' – 94'
Minor Arterials	65' – 100'	46' 70'
Major Collector	60' – 75'	32' – 44'
Neighborhood Collector	40' 55'	20' – 43'
Bicycle and Pedestrian Accessway:		
With Fire Accessibility	20'	20'
Without Fire Accessibility	10'	10'
Local Streets		
Alley (secondary access) only	14'	12'
Alley (primary access)	20'	12' one-way travel 20' two-way travel
Access Lane	40' – 55'	21' – 28'
Low Volume Residential	45' – 55'	20' – 28'
Medium Volume Residential	50' – 60'	20' – 34'
Commercial and Industrial	55' – 70'	30' – 44'
Cul-de-sac Bulb Radius:		
Residential	48.5"	35'
Non-residential	62'	50'

*Measured from face to face of curbs

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I served by certified, first class mail, postage prepaid, an original and four copies of the foregoing INTERVENOR-PETITIONERS' AMENDED PETITION FOR REVIEW on the Oregon Land Use Board of Appeals at DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283.

I further certify that I served a true and correct copy of this INTERVENOR-PETITIONERS' AMENDED PETITION FOR REVIEW by first class mail to:

Attorney for Petitioner:

Lauren C. Regan, AAL
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259 East Fifth Ave., Suite 300A
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(541) 687-9180

Intervenor-Petitioner

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Hutchinson Cox, Coons Orr
& Sherlock, PC
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Dated: June 16, 2014.

Paul Conte

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KAREN AND SCOTT FLEENER-GOULD, CECELIA AND PAUL BAXTER-HEINTZ,
Petitioners,

and

PAUL CONTE, Intervenor-Petitioner,

vs.

CITY OF EUGENE, Respondent

and

OAKLEIGH MEADOWS CO-HOUSING, LLC, Intervenor-Respondent

LAND USE BOARD OF APPEALS NOS. 2014-001

The filed record may include black and white copies of maps/diagrams/photos originally submitted in color and/or maps and plans reduced from their original size. These materials, in their original color and/or size, will be included in the retained exhibits delivered to the Board on the date of oral argument. Retained exhibits are referred to as "RE."

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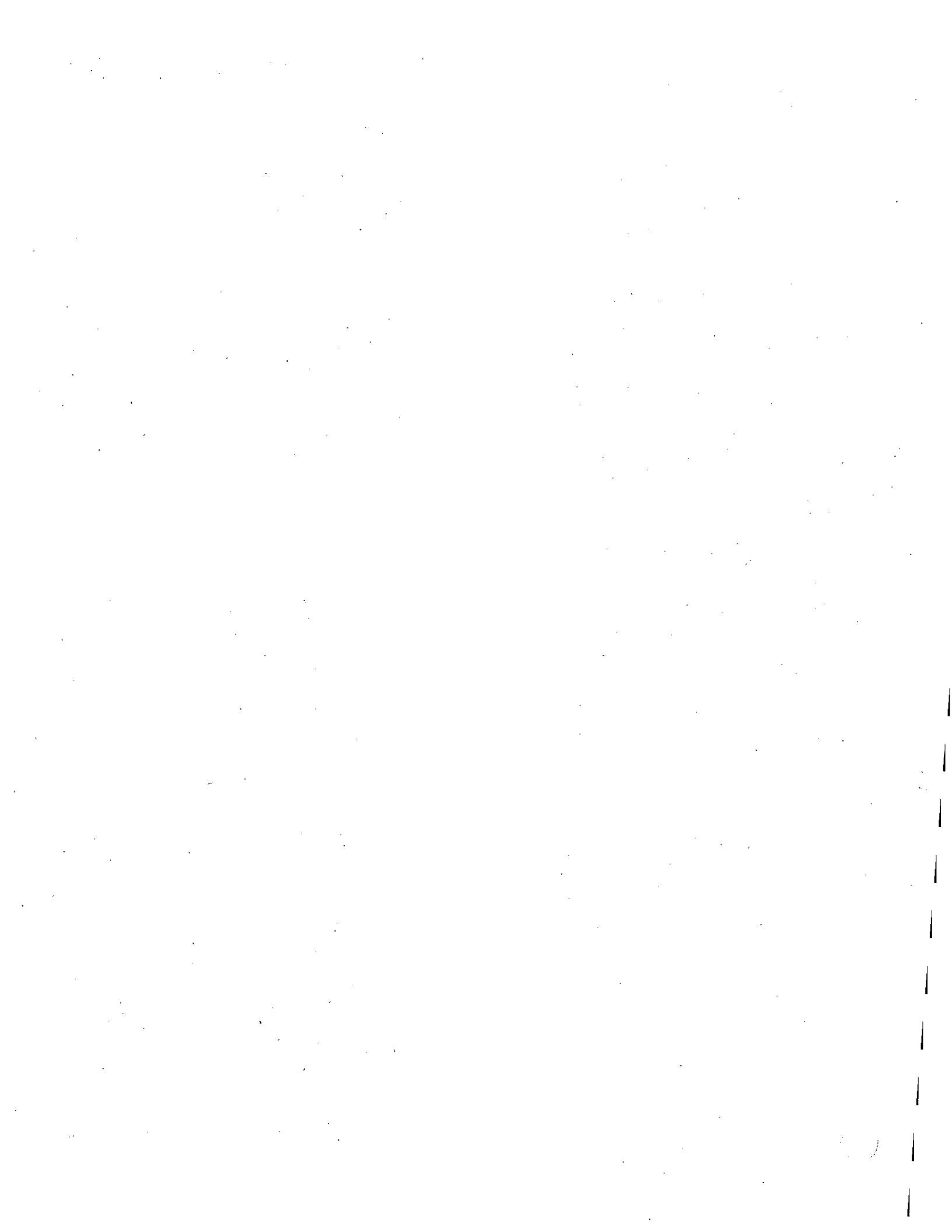
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- RE-B DVD of December 9, 2013 Planning Commission meeting (Item 5)
- RE-C Color map of site plan attached to Agenda Item Summary for December 9, 2013 Planning Commission meeting (Item 6)
- RE-D DVD of December 5, 2013 Planning Commission public hearing (Item 7)
- RE-E Color copy of neighborhood opposition report from Bryn Thoms, received October 9, 2013 (Item 22.a)
- RE-F CD of neighborhood opposition report from Bryn Thoms, received October 9, 2013 (Item 22.a)
- RE-G CD of opposition testimony of Lauren Regan received October 9, 2013 (Item 22.b)
- RE-H Color copy of Lower River Road Concept Plan attached to e-mail from Lauren Regan, received October 9, 2013 (Item 22.c)
- RE-I Color copy of Attachment C, map of Oakleigh Lane (Item 22.d)
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I, Anne C. Davies, certify that the items described above and included herein are true copies of the originals.



 Anne C. Davies, OSB #910149
 Assistant City Attorney for Respondent
 City of Eugene





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December 16, 2013

NOTICE OF DECISION: OAKLEIGH MEADOWS COHOUSING PUD (PDT 13-1)

On December 16, 2013, the Eugene Planning Commission affirmed the Eugene Hearings Official's decision to conditionally approve the Tentative Planned Unit Development noted above, with additional findings and modified conditions of approval. Please contact staff for a copy of the Final Order, Findings, and Conclusions of the Eugene Planning Commission.

The decision of the Eugene Planning Commission is final. 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.

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Mailed

12-17-13

AO

CERTIFICATE OF MAILING

I hereby certify that I served the final order and/or notice of decision of the Planning Commission for an **appeal of a tentative planned unit development** request for **Oakleigh Meadows Cohousing (PDT 13-1)** by mailing a true copy to the names on the attached list.

12-17-13

Dated:



Amy Janisch

(PDT13-1)		(PDT13-1)		(PDT13-1)
FLEENER-GOULD, KAREN OAKLEIGH LN EUGENE OR 97404	GLASSBERG, PLANT PO BOX 11011 EUGENE OR 97440		HUNN, JULIE GOEHRING, MARK 100 REDUBUD WY NEVADA CITY CA 95959	
(PDT13-1)		(PDT13-1)		(PDT13-1)
GOLDMAN, STEVE 1495 W HILLIARD LN EUGENE OR 97404	GRANT, BETTY PO BOX 40656 EUGENE OR 97404		GREENLEE, DALE 108 OAKLEIGH LN EUGENE OR 97404	
(PDT13-1)		(PDT13-1)		(PDT13-1)
HEINTZ, CECELIA & PAUL 118 MCCLURE LN EUGENE OR 97404	HENNER MARTIN E 984 LINCOLN STREET EUGENE, OR 97401		HENNER, MARTIN 990 LINCOLN #17 EUGENE OR 97401	
(PDT13-1)		(PDT13-1)		(PDT13-1)
HOLTZ, PATRICIA 130 MCCLURE EUGENE OR 97404	HUTCHINSON, MAJ 114 OAKLEIGH LN EUGENE OR 97404		Jennifer Holst JENNIFER HOLST 1582 HACKAMORE WAY EUGENE, OR 97401	
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JIM O'CONNER & PEN SAND 1430 WILLAMETTE ST #240 EUGENE OR 97401	JOHNSON, SHAWN 113 OAKLEIGH LN EUGENE OR 97404		JUSTICE, DANEEN 103 MCCLURE LN EUGENE OR 97404	
(PDT13-1)		(PDT13-1)		(PDT13-1)
KAHLE, DON 400 E 32ND AVE EUGENE OR 97405	KILLIAN, TERRENCE 116 OAKLEIGH LN EUGENE OR 97404		LAURA FISCHRUP 1755 EAST 23RD EUGENE OR 97403	
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Interested Parties: Oakleigh Cohousing (PDT 13-1)		*OAKLEIGH MEADOW LL 300 BLAIR BLVD EUGENE OR 97402	ADEE DAVID & CONNOLLY JOAN 131 MCCLURE LN EUGENE, OR 97404
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CROSS, FRANNIE & RC 2457 NIXON ST EUGENE OR 97403		CUTTING, DAVID 125 MCCLURE LN EUGENE OR 97404	DAMBROV, RICH 119 OAKLEIGH LN EUGENE OR 97404
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DIXON, LYNN 115 E HILLIARD LN EUGENE OR 97404		DON MCLEAN ELIZABET MARSHALL 109 E HILLCREST DR EUGENE OR 97404	FENN, JOHN 111 OAKLEIGH LN EUGENE OR 97404

(PDT13-1)

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Interested Parties From:
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Eugene Planning Commission

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

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 9th and 16th, 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 a 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 "espaliere" 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 16th 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



City Attorney's Office

Memorandum

Date: December 11, 2013

To: Eugene Planning Commission

From: Anne C. Davies

Subject: Oakleigh PUD PDT 13-01

The Planning Commission has asked for guidance on a couple of issues prior to continuing deliberations on the Oakleigh PUD.

1. *Bothman v. City of Eugene*

The first assignment of error in the appeal statement asserts that the Planning Commission must address two Metro Plan policies that the hearings official failed to address (*Metro Plan* Policy F.26 and *Metro Plan* Policy F.36): The appellant argues that the Planning Commission must address these policies even though they are not worded as mandatory approval criteria.

The general rule is that a comprehensive plan or refinement plan policy need not be addressed in a specific land use action (such as this PUD) unless the policy uses mandatory language that would make it an applicable approval criterion. However, there are some instances where the language of a policy is not mandatory, but where the language could require the Planning Commission to "consider" the policy or weigh certain factors. In the case cited, *Bothman*, the refinement plan policy in question provided: "[r]ecognize the existing general office and commercial uses located along the west side of Coburg Road, north of Willakenzie Road, and discourage future rezonings of these properties." LUBA held that, in a request to rezone several properties within that area from C-1 and GO to C-2, the Planning Commission was required to at least "consider" the policy. LUBA recognized that the role that any particular policy would play depends on the actual text and context of the policy at issue.

The two policies raised by the appellant in this case are not like the policy at issue in *Bothman*. Policy F.26 provides: "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." Policy F.36 provides: "Require that new development pay for its capacity impact on the transportation system." First, the applicant contends that the policies do not provide mandatory approval standards. Letter dated December 5 from Zack Mittge. Further, unlike the policies in *Bothman*, 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. The Planning Commission should include

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findings explaining (1) why those policies are or are not mandatory approval criteria, and (2) whether the policies require any additional consideration even if they are not mandatory approval criteria. If the Planning Commission determines that consideration of those policies is not required, the Planning Commission could also choose to make alternative findings that, even though consideration of the policies is not required, approval of the PUD is nonetheless consistent with those policies.

2. Exaction Primer

In order to approve any proposed development, the local decision maker must be able to point to sufficient evidence and rationale demonstrating that each and every approval criterion is satisfied. If an approval criterion is not or cannot be satisfied, then the application should be denied. Sometimes a particular approval criterion can be satisfied, but only if a condition of approval is imposed.

Where that condition of approval is the requirement that an applicant or property owner dedicate land for public use, the local government must make constitutional findings justifying the exaction (often referred to as Dolan findings). The findings must demonstrate, first, that there is a legitimate state interest justifying the imposition of the exaction. Second, the local government must demonstrate that there is a nexus between the permit condition and a legitimate state interest. *I.e.*, the condition being imposed actually serves or furthers the valid public purpose. Finally, the local government must demonstrate that the exaction and the anticipated impact of the proposed development are “roughly proportionate.” For instance, a local government cannot require a developer of a duplex to construct a new three-lane highway, because the condition imposed would have absolutely no relationship to the amount of traffic to be generated by the proposed development.

In this case, Public Works staff provided Dolan findings on public interest, nexus and rough proportionality justifying the dedications that the City was requiring of the applicant. The findings are very formulaic. They identify the public interest in having a 45-foot right of way dedication (PW Referral Comment at 2), the necessary nexus between the required dedication and the public interest (PW Referral Comment at 3, first full paragraph), and explain how the dedication is roughly proportional to the anticipated impacts of the proposed development (PW Referral Comment at 3, second paragraph). A similar analysis is done for the pedestrian and bicycle dedication (PW Referral Comment at 4). The Hearings Official and the applicant point out that the Dolan findings do not state that the roadway will be unsafe unless it is improved now; rather, they state that safe vehicular, bicycle, pedestrian and emergency access will be at risk in the future without the required dedication. The findings point out that this is the last opportunity the City will have to require the dedication needed for any future street construction.

Further, the Dolan findings do not even attempt to justify requiring that the applicant actually construct or improve the road, only that the applicant dedicate portions of its land for a public right-of-way. Had the applicant been required to improve Oakleigh Lane, the City would have needed to provide similar findings justifying that requirement.

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There is no challenge to the exaction findings themselves in this case. That would be an argument that an applicant would typically make to fight the City's ability to require that it dedicate land to the public. The gist of Appellant's Tenth Assignment of Error is that the exaction findings (referenced above) demonstrate that neither Oakleigh Lane nor the bike/ped path will be safe unless they are improved, and unless Oakleigh Lane is improved all the way to the east end of the subject property. The Hearings Official concludes that the exaction findings cannot be read to say that the existing roadway is not safe, Decision at 27, and concludes that the existing paved surface provides safe passage of vehicles. Decision at 26. That finding is based on evidence in the PW Referral Comments. Regarding the need for Oakleigh Lane to be immediately improved, Public Works staff stated:

"With the exception of street lights, Oakleigh Lane has an approximate 19 foot wide paved surface, but has not been improved to city standards, lacking curbs and gutters, storm drainage, sidewalks, and street trees. As is typical for unimproved local streets in the River Road area, i.e., those streets which do not have paving, curb & gutter and sidewalks or which 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, for motorists to travel at slower, more cautious speeds, because of the perceived narrowness of the street. Until such time that property owners elect to improve Oakleigh Lane to full City standards, including sidewalks, the existing paved surface in Oakleigh Street will continue to adequately provide for motorized and foot traffic, as well as for emergency vehicles and delivery services, provided the paved surface is not blocked by parked vehicles. Since the existing paved surface provides safe passage for two-way vehicular traffic, bicycles, pedestrians and emergency vehicles, and since there is nothing to suggest that the impacts of the proposed development will result in unsafe conditions in Oakleigh Lane, it is appropriate to defer public improvements via an irrevocable petition." (PH-30 at 14).

To address Assignment of Error 10.A., the Planning Commission has to decide whether the Hearings Official erred in concluding that the Dolan findings do not determine that vehicle, bike and pedestrian traffic along Oakleigh Lane will be unsafe unless the full length of Oakleigh Lane is improved now.

ACD:abm

**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 vehicle 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.¹

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.

¹The 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 18.² 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.

² 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 $(4,024 + 3230)$ 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 be 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.

As 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 12th day of November, 2013.

Mailed this 12th day of November 2013.

Kenneth D. Helm

Kenneth D. Helm
Hearings Official

SEE NOTICE OF HEARINGS OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS

SUMMARY MINUTES
Eugene Planning Commission Regular Meeting
Atrium Building – Sloat Room
11:00 a.m., December 16, 2013

PLANNING COMMISSIONERS PRESENT:

William Randall, Chair
John Jaworski, Vice Chair
John Barofsky
Jon Belcher (Joined meeting for Agenda Item III)
Rick Duncan
Jeff Mills

PLANNING COMMISSIONERS NOT PRESENT:

Stephen Baker

CITY STAFF PRESENT:

Anne Davies, Gabe Flock, Carolyn Burke, Becky Taylor, Steve Nystrom, Heather O'Donnell, Terri Harding

Meeting called to order at 11:30 a.m. by Commissioner Randall, Chair.

I. PUBLIC COMMENT:

None.

II. APPEAL OF HEARINGS OFFICIAL DECISION FOR OAKLEIGH MEADOWS COHOUSING (PDT 13-1) – DELIBERATIONS & ACTION

Jon Belcher did not participate as he recused himself from deliberations.

Gabe Flock gave a quick overview of materials provided to Planning Commission. Discussion followed.

Motion:

Commissioner Barofsky moved to accept the final order and conclusions of the Oakleigh Meadows Cohousing PUD (PDT 13-1) with the added conditions discussed today. Commissioner Duncan seconded the motion. Motion approved 3:2 with Commissioners Jaworski and Mills voting opposed.

Staff will make required edits to the final order and bring back for commissioner signatures at end of meeting today.

III. ENVISION EUGENE: HOUSING REDESIGNATIONS – DELIBERATIONS & ACTION

Heather O'Donnell gave presentation on remaining items to be discussed: Gilham Road, Willamette, Rest Haven and touch on 13th and Naval Reserve site.

Planning Commission chose to discuss each area separately.

1. Gilham Road Site:

Commissioner Jaworski moved to accept the staff recommendation for redesignation of Gilham Road Site. Second by Rick Duncan. Motion carried with all commissioners voting in favor of motion. (6:0).

2. Rest Haven Site:

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IV. ITEMS FROM COMMISSION AND STAFF

Carolyn Burke announced that the City Council Action on Single Family Code Amendments that was originally scheduled tonight (December 9, 2013) has been postponed.

Meeting adjourned at 1:34 p.m.

Recorded by: Rhonda Crocker (from webcast)



Phone: 541-682-5481
www.eugene-or.gov/pc

Meeting Location:
Sloat Room—Atrium Building
99 W. 10th Avenue
Eugene, OR 97401

The Eugene Planning Commission welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. 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 Division at 541-682-5675.

MONDAY, DECEMBER 16, 2013 – REGULAR MEETING (11:00 a.m. to 2:00 p.m.)

11:00 a.m. I. PUBLIC COMMENT

The Planning Commission reserves 10 minutes at the beginning of this meeting for public comment. The public may comment on any matter, except for items scheduled for public hearing or public hearing items for which the record has already closed. Generally, the time limit for public comment is three minutes; however, the Planning Commission reserves the option to reduce the time allowed each speaker based on the number of people requesting to speak.

11:10 a.m. II. APPEAL OF HEARINGS OFFICIAL DECISION FOR OAKLEIGH MEADOWS COHOUSING (PDT 13-1) – DELIBERATIONS/ACTION

Staff: Becky Taylor, 541-682-5437

12:30 p.m. III. ENVISION EUGENE: HOUSING REDESIGNATIONS – DELIBERATIONS/ACTION

Staff: Heather O'Donnell, 541-682-5488
Staff: Terri Harding, 541-682-5635

1:45 p.m. IV. ITEMS FROM COMMISSION AND STAFF

- A. Other Items from Staff
- B. Other Items from Commission
- C. Learning: How are we doing?

Commissioners: Steven Baker; John Barofsky; Jonathan Belcher; Rick Duncan; John Jaworski (Vice-Chair); Jeffery Mills; William Randall (Chair)

AGENDA ITEM SUMMARY

December 16, 2013

To: Eugene Planning Commission

From: Becky Taylor, Associate Planner, Eugene Planning Division

Subject: Appeal of Hearings Official Decision: Oakleigh Meadows Co-Housing PUD (PDT 13-1)

ACTION REQUESTED

To complete deliberations and take final action on the Oakleigh PUD (PDT 13-1) appeal. The PC's decision – to affirm, reverse, or modify the Hearings Official's (HO) decision – is due by December 20, 2013, in order to meet the 120-day statutory deadline.

BACKGROUND INFORMATION

This is the second deliberation meeting following the December 5, 2013 public hearing of the Oakleigh PUD appeal (PDT 13-1). At the first deliberation meeting on December 9, 2013, the Planning Commission (PC) received clarification from staff on the record materials and, without taking any formal votes, shared their inclination toward the two overarching issues of transportation and compatibility.

As discussed in the December 9th AIS, the appeal identifies ten primary assignments of error in the Hearings Official's decision. Appeal Issues 1, 2, 3, 4, 5, 6 (in part), and 10 focus on traffic impacts associated with the proposed development. Appeal Issues 6 (in part), 7, 8 and 9 are primarily focused on criteria related to compatibility with the surrounding area. The PC began its review of the ten assignments of error with Appeal Issue 6 because it contains arguments related to the two main areas of concern regarding traffic impacts and compatibility.

The PC indicated that they were leaning toward agreeing with the HO's approval, with some modifications to address compatibility and screening. The PC expressed a general comfort with the transportation issues, finding that the traffic impacts were within reason, but requested legal clarification regarding the constitutional requirements for exactions. A memorandum from Anne Davies, Deputy City Attorney, was sent earlier to the PC which addresses those issues, which is included in the attached draft Final Order as Attachment A. Commissioner Jaworski noted that he may be in the minority in believing that improvements should be built abutting the development site, rather than deferring those improvements with an irrevocable petition.

With regard to compatibility, the PC indicated that the buildings abutting the north property line needed to be setback with landscaping installed within this setback to address compatibility. The PC recognized that the required right-of-way for future street, hammerhead, and bicycle/pedestrian path improvements along the north property line would put the abutting building within a foot of the street

and would omit the landscaping originally proposed by the applicant. The PC agreed that the HO decision needed to be modified to address those issues.

The PC indicated that a building within five feet of the future bike path along the north property seemed too tight and that, for safety reasons, the landscaping in between should be limited in height. The PC discussed the idea of requiring a ten-foot setback with L-2 Low Screen landscaping, but without trees, abutting the future bike path. The close proximity of the cedar trees to the north and the overhead power lines further warrants omitting trees along this eastern portion of the north property line.

With regard to setbacks and screening along the western portion of the north property line, abutting the future street right-of-way, the PC indicated that five feet would be an acceptable setback and that landscaping was also needed in this location, including trees. The PC observed that the applicant's original landscape plan was acceptable, but that the abutting building needed to be setback five feet from the required right-of-way to install that landscaping. The attached draft Final Order attempts to capture the PC's direction.

The PC expressed comfort with the HO's decision on the east, south, and west boundaries of the site, regarding compatibility and screening, but wanted to ensure that the concrete wall along the west boundary included the green features proposed by the applicant. The PC also concurred that the wall should be setback 5' from the property line. The attached draft Final Order suggests a condition that would ensure compliance as proposed.

Since there is an appeal issue that questions the subjectivity of the HO's condition for additional screening along the east and south property lines, staff has also recommended in the attached draft Final Order that his condition be amended to more specifically reference the L-3 High Screen Landscape standard for clarity.

The PC did not express any other fundamental concerns with compatibility or traffic impacts, and as such, based on the PC's direction, staff has drafted findings for all remaining assignments of error to facilitate deliberations and a final decision on the appeal. Pending further deliberations and direction from the PC, staff is prepared to make additional revisions to the draft as necessary.

ATTACHMENT

Draft Final Order
City Attorney Memo

The entire record of materials for the subject application is available for review at the Eugene Planning Division offices, and will be provided to the PC under separate cover.

FOR MORE INFORMATION:

Please contact Becky Taylor, Associate Planner, Eugene Planning Division, by phone at (541) 682-5437, or e-mail at becky.g.taylor@ci.eugene.or.us

**DRAFT FINAL ORDER, FINDINGS, AND CONCLUSIONS OF THE EUGENE PLANNING COMMISSION:
OAKLEIGH MEADOWS COHOUSING PUD (PDT 13-1)**

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 9th and 16th, and reached its final decision on December __, 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.

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.

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 intended only to support the right-of-way exaction and are not relevant to other approval criteria. 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 five 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, along the remainder of the north property line, but without the requirement for additional canopy trees.

The PC further finds that the HO's condition for additional screening along the east and south property lines is appropriate to address EC 9.8320(12) and EC 9.8320(13), but that more specificity is necessary regarding the screening requirement to ensure compliance. The HO did not adequately specify the type of landscaping required (see Condition #15 on page 64 of the HO decision) other than to require 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 add more specificity, for clarity and objectivity upon review at the final PUD stage, and recognizing that the City's Type II application process for final PUD approval affords adequate public notice and opportunity for appeal, the PC modifies the HO's decision to replace approval Condition #15, with the following:

- The final PUD plans shall show landscaping along the eastern and southern property lines meeting the High Screen Landscape Standard (L-3) at EC 9.6210(3), except for the portion of the south property line which includes a proposed wall for screening of the parking and access area (see related Condition #13). Also note that the landscaping cannot be placed within the public wastewater easement along the east property line, per the restriction at EC 9.6500(3).

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 wall as a requirement. Plans shall also be revised to show a minimum 5-foot setback for the wall along the west and south boundaries of the site. The required landscaping shall be the responsibility of the owner(s) and maintained as a requirement of the PUD approval.

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" necessarily 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 necessarily 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) had no applicability other than the abutting street segment because the findings were used only to justify exactions from the applicant. Further, 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.

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 five 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, along the remainder of the north property line, but without the requirement for additional canopy trees.

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 wall as a requirement. Plans shall also be revised to show a minimum 5-foot setback for the wall along the west and south boundaries of the site. The required

landscaping shall be the responsibility of the owner(s) and maintained as a requirement of the PUD approval.

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

- The final PUD plans shall show landscaping along the eastern and southern property lines meeting the High Screen Landscape Standard (L-3) at EC 9.6210(3), except for the portion of the south property line which includes a proposed wall for screening of the parking and access area (see related Condition #13). Also note that the landscaping cannot be placed within the public wastewater easement along the east property line, per the restriction at EC 9.6500(3).

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 _____ day of December, 2013.

William Randall, Chair
Eugene Planning Commission

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

**DRAFT FINAL ORDER, FINDINGS, AND CONCLUSIONS OF THE EUGENE PLANNING COMMISSION:
OAKLEIGH MEADOWS COHOUSING PUD (PDT 13-1)**

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 9th and 16th, and reached its final decision on December __, 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.

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.

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 intended only to support the right-of-way exaction and are not relevant to other approval criteria. 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 five 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, along the remainder of the north property line, but without the requirement for additional canopy trees.