AGENDA

EUGENE PLANNING COMMISSION

Phone: 541-682-5481
www.eugene-or.gov/pc

McNutt Room—City Hall, 777 Pearl Street
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 receptionist at 541-682-5481. Telecommunications devices for deaf assistance are available at 541-682-5119.

MONDAY, JUNE 11, 2012 – REGULAR MEETING (11:30 a.m. to 1:30 p.m.)

11:30 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.

11:40 a.m. II. RIVENDELL PUD (PDT 10-1) LAND USE BOARD OF APPEALS REMAND

Review of LUBA's final order on remand, and action to re-issue the Planning Commission's final local decision. Staff: Steve Ochs, 541-682-5697

1:15 p.m. III. ITEMS FROM COMMISSION AND STAFF

A. Other Items from Staff
B. Other Items from Commission

Commissioners: Jeffery Mills, Chair; Randy Hledik, Vice Chair; Jonathan Belcher; Rick Duncan; William Randall; John Jaworski; Steven Baker

AGENDA ITEM SUMMARY
June 11, 2012

To: Eugene Planning Commission

From: Steve, Ochs, Associate Planner
Emily Jerome, Deputy City Attorney

Subject: LUBA Remand: Rivendell PUD (City File PDT 10-1, LUBA No. 2010-107)

ACTION REQUESTED
To take action on remand from the Oregon Land Use Board of Appeals (LUBA). The Planning Commission is asked to re-issue its October 25, 2010 final order that approved Rivendell PUD with conditions, to resolve the assignment of error that was sustained by LUBA and remanded to the Planning Commission for this action.

BRIEFING STATEMENT
The application at issue is a tentative planned unit development for a five-phase, 61-lot single-family residential subdivision on 10.88 acres located east of the Northwest Expressway and north of Irving Road. There was no opposition to the application and the Hearings Official approved it with conditions on July 28, 2010. The applicant appealed one of the conditions to the Planning Commission. The Planning Commission modified that condition in a way that was not satisfactory to the applicant. The applicant appealed to LUBA. On April 24, 2012, LUBA issued its decision on *Treadmill v. City of Eugene*. There were two issues raised in that appeal. Only one issue requires Planning Commission action on remand.

First, the applicant challenged the City's local appeal fee. The City prevailed on this appeal issue. LUBA determined that it lacks jurisdiction and granted the City's motion to dismiss. In so doing, LUBA relied on the City's argument that the staff's imposition of the local appeal fee was nondiscretionary – it did not require staff to interpret any land use standard or exercise policy or legal judgment. This makes it something other than a "land use decision" and LUBA lacks jurisdiction to consider it. This means that any future challenge to the City's local appeal fee must be filed in circuit court.

Second, and relevant to the Planning Commission's role on remand, the applicant challenged a condition imposed by the Planning Commission. The applicant had initially requested a reduction in the minimum interior yard setback from 5-feet to 3-feet; the Hearings Official approved the reduction, but only for lots that will be developed with single story dwellings (the Hearings Official denied the requested reduction for lots to be developed with two-story dwellings). The applicant appealed this partial denial of requested setback reduction to the Planning Commission. The Planning Commission found the Hearings Official erred in limiting the setback reduction to lots with single-story dwellings because nothing in the code supported a setback distinction between lots with single-story and two-story dwellings. The Planning Commission therefore eliminated the one-story/two story distinction. However, the Planning

Commission imposed a *different* limitation that partially denied the setback reduction based on a different distinction, allowing the setback reduction except on interior lot lines that border neighboring subdivisions not part of the Rivendell PUD.

The applicant appealed the Planning Commission's partial denial of the requested reduction to LUBA, asserting the Planning Commission exceeded its authority because the only thing the applicant had appealed to the Planning Commission had been the Hearings Official's one-story/two-story distinction. The 'neighboring subdivision' issue was not a part of the local appeal.

LUBA agreed that the Planning Commission exceeded its authority in making the 'neighboring subdivision' distinction. LUBA held: "Where an applicant appeals a hearings official's decision challenging a condition of approval under a standard such as EC 9.7655(3), and the planning commission on appeal agrees that the condition of approval is not authorized by the code and eliminate[es] the condition, we believe the planning commission is entitled to consider the effect of eliminating the condition on the application as a whole. If *eliminating the condition* would affect compliance with an applicable approval standard, then we believe the planning commission could, without running afoul of EC 9.7655(3), go on to consider whether a new or modified condition is necessary to avoid noncompliance created by deleting the original impermissible condition." However, LUBA found that, in this case, that's not what happened. There was no apparent connection between the one-story/two-story distinction imposed by the Hearings Official and the effect of reduced setbacks on neighboring subdivisions. "In other words, eliminating the one-story/two-story condition did not cause or affect noncompliance with any approval standard" that was remedied by the neighboring subdivision distinction introduced by the Planning Commission. LUBA held there was no basis for the Planning Commission to impose its own limitation.

LUBA's decision directs that the Planning Commission eliminate the distinction it made that denied the setback reduction on interior lot lines bordering neighboring (non-Rivendell) subdivisions. Given LUBA's direction, the Planning Commission's role on remand is very limited and, given this very specific direction from LUBA, can be carried out without reopening the record.

CITY ATTORNEY RECOMMENDATION

The City Attorney's Office recommends that the Planning Commission follow LUBA's direction by sustaining the applicant's local appeal, such that the setback reduction is approved for all lots. This proposed action is reflected in the attached Revised Final Order (Attachment 1). While other options for addressing this issue on remand could be considered by the Planning Commission, such as revisiting its earlier rejection of the single-story/two-story distinction, the recommended approach above will minimize the risk of an additional appeal and remand.

ATTACHMENTS

1. Draft/Revised Final Order of the Eugene Planning Commission
2. LUBA Final Opinion and Order

The record is available for review at the Eugene Planning Division offices. The record will also be made available for review at the Planning Commission meeting.

FOR MORE INFORMATION:
Please contact Steve Ochs, Eugene Planning Division, by phone at (541) 682-5453, or by e-mail at steve.p.ochs@ci.eugene.or.us

AS ORDERED BY THE OREGON LAND USE BOARD OF APPEALS: REVISED FINAL ORDER, FINDINGS, AND CONCLUSIONS OF THE EUGENE PLANNING COMMISSION RIVENDELL PUD (PDT 10-1)

I. INTRODUCTION

The application subject to this appeal is a tentative planned unit development for a five-phase, 61-lot single-family residential subdivision. The development is proposed on 10.88 acres located east of the Northwest Expressway and north of Irving Road. The property is owned by Boyd Iverson, Treadmill Joint Venture, and is zoned R-1/WR/CAS Low-Density Residential with Water Resources and Commercial Airport Safety Overlay Zones.

The Eugene Hearings Official held a public hearing for the subject application on July 14, 2010 and issued a decision approving the request on July 28, 2010, subject to six conditions of approval. On August 11, 2010, an appeal of the Hearings Official's decision was filed by Bill Kloos, P.C. on behalf of Treadmill Joint Venture. The Eugene Planning Commission held a public hearing on this appeal on September 7, 2010 according to the statutory procedures for quasi-judicial hearings, and otherwise set forth in the Eugene Code (see EC 9.7065 through 9.7095).

Testimony was received from the applicant, Boyd Iverson and his attorney Bill Kloos in support of the appeal. Additional written argument was also provided as well as a request to consider, as evidence in support of the appeal, application materials and other public records from the previous development of Rivendell Subdivision that were referenced in the original application and testimony before the Hearings Official but not specifically included in the file record or physically placed before the decision-maker. On September 9, 2010, the applicant also consented in writing to a 60-day extension of the 120 day statutory limit for a final local decision on the application.

The Planning Commission met on September 13, 2010 to address the applicant's request to consider this additional evidence, and under the provisions of EC 9.7095(1)(a), the Planning Commission voted to "take official notice" and consider the following additional materials as part of the record on this appeal:

1) Public Records Request Form from Bill Kloos, dated 09/01/10.

2) Cover letter re: Public Records to be Submitted to the Planning Commission, dated 09/01/10.

3) Approved Revised Site Review Plans for Rivendell (SR 00-10), dated 07/30/01.

4) Planning Director's Decision for Minor Site Review Modification for Rivendell Subdivision (MDA 01-2), dated 04/12/01.

5) Planning Director's Decision for Site Review Modification for Rivendell Subdivision (MDA 03-13), dated 10/13/03.

6) Approved Revised Site Review Plans for Rivendell Subdivision (MDA 03-13), dated 12/29/03.

Following the public hearing, the Planning Commission also posed several questions to staff related to the Hearings Official's decision and the applicant's proposal. Staff's responses to those questions were either provided at that time or in written form prior to deliberations which began at the Planning Commission's subsequent meeting on September 27, 2010.

The Planning Commission further deliberated the appeal issues at its meeting on October 25, 2010, before taking final action on the appeal. The appeal is based on the record, including the additional items noted above, and limited to the assignments of error contained in the applicant's appeal statement. The only question at issue in this appeal is whether or not the Hearings Official erred in establishing conditions and limitations in approving the applicant's tentative planned unit development proposal, based on the approval criteria of EC 9.8320(11)(k).

~~As described below,~~ On October 25, 2010, the Planning Commission issued an order affirming the Hearings Official's decision to approve the subject application, with additional findings, modifications to a condition of approval, and new conditions of approval, in some instances. ~~Those additional findings and modifications are detailed below with respect to each related assignment of error.~~ **The applicant appealed the Planning Commission's October 25, 2010 order to the Oregon Land Use Board of Appeals (LUBA). This order, adopted on remand from LUBA, replaces the October 25, 2010 order.**

II. APPLICABLE CRITERIA

The tentative PUD application for Rivendell PUD is required to meet approval criteria at EC 9.8320. The appeal issues in question relate specifically to EC 9.8320(11)(k), which requires that the PUD complies with: "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," as provided below:

EC 9.8300 Purpose of Planned Unit Development. The 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 reasonable compatible with the surrounding area.

III. ADDITIONAL FINDINGS, MODIFIED AND NEW CONDITIONS OF APPROVAL

The August 11, 2010 written appeal statement submitted by Bill Kloos P.C. on behalf of Treadmill Joint Venture includes one assignment of error (with three sub-assignments of error) related to the Hearings Official's decision, and one assignment of error regarding the appeal fee. Each of these assignments and sub-assignments of error are set forth below, followed by the Planning Commission's findings of fact and conclusions of law as to each one.

The Planning Commission affirms the Hearings Official's decision, with modified findings and conditions of approval described more fully below. The Planning Commission's decision on this appeal is otherwise based upon consideration of all other relevant evidence and argument within the record to date.

Appellant's First PUD Assignment of Error

The Hearings Official erred in not approving the relief requested by the applicant related to:

(a) minimum front yard setback standards for corner lots.

(b) minimum interior yard setbacks for primary residences.

(c) minimum interior yard setbacks for garages and detached structures.

This first appeal issue refers to the Hearings Official's findings, conditions, and limitations at EC 9.8320(11)(k) found on pages 25-29 of the decision. The Planning Commission's review is limited to whether the Hearings Official: (1) failed to properly evaluate the application; or (2) made a decision that was not consistent with the applicable criteria.

Sub-assignment of Error 1(a) *[Noncompliance #4 of the Hearings Official decision]:*

The applicant proposed noncompliance for the front yard setback standard on all corner lots to be reduced from 10 feet (as required per EC 9.2750) to 5 feet for the street side of each corner lot not used for vehicular access to a garage or carport. The Hearings Official approved this proposed reduction as being consistent with the purposes set out in EC 9.8300; however, he also clarified specific limitations to intrusions through the following condition: "A note shall be added to the final site plans that states the 5-foot front yard setback shall be measured from the leading edge of the structure and that eaves, overhangs, chimneys, bay windows, etc. shall not be allowed intrusions in the remaining 5-foot front yard setback."

In his decision, the Hearings Official found that such projections could have negative impacts on the pedestrian-friendliness of the development, which he said would be inconsistent with EC 9.8300(1)(b), which encourages alternatives to the use of the automobile. The Hearings Official further notes that such projections would limit the type, location, and density of landscaping possible in the setback area—which he stated is "an important component of creating a pedestrian-friendly neighborhood…".

Planning Commission finds that the Hearings Official's reliance upon the provisions of EC 9.8300(1)(b) to restrict the applicant's requested allowance is misplaced in this instance, as there is no direct link between such projections and the encouragement of alternatives to the use of the automobile. Furthermore, as code allows for fences up to 6 feet high along the property boundary on the side of corner lots not providing access to a garage or carport, the issue of how these projections might impact

the pedestrian realm is moot. Planning Commission finds that EC 9.8300(2) is the more appropriate criterion by which to evaluate this particular request, as the issue is more about quality and compatibility with the surrounding area than it is about alternative modes of transportation. As the appellant notes in his testimony, the side of the yard that does not provide access to a garage or carport acts essentially as an interior yard space. Section 9.6745 of the Eugene Code provides guidance regarding permitted intrusions—specifying that certain "building features may project… into the required interior yard setback no more than 2 feet…". Furthermore, City File MDA 03-13 permitted reduced setbacks on all corner lots of the adjacent Rivendell Subdivision, without specifying restrictions on projections.

Although the Hearings Official approved the request for a reduced front yard setback for the side not providing access to a garage or carport, he made a decision regarding the permitted intrusions that was not consistent with the applicable criteria at EC 9.8300(2) and EC 9.6745. Therefore, the Planning Commission modifies the Hearings Official's condition of approval (#3) to read:

> For corner lots, the minimum setback (except at garages and carports) may be reduced to five feet at one of the two front yards. This side of the lot shall be subject to the permitted intrusion provisions of EC 9.6745, and it shall be considered an "interior yard" for these purposes. Garage doors and carports shall conform to setback standards of EC Table 9.2750.

With these additional findings and imposition of the modified condition of approval, the Planning Commission affirms the appellant's first sub-assignment of error.

Sub-assignment of Error 1(b) *[Noncompliance #7 of the Hearings Official decision]:*
The applicant proposed noncompliance with the minimum interior yard setback for all lots to be reduced from 5 feet (as required per EC 9.2750) to 3 feet for the primary residential structure (with the minimum required distance between buildings being reduced from 10 feet to 6 feet). The applicant also requested that standard encroachments (such as roof overhangs, footings, and building projections) be allowed to extend 12 inches into the reduced interior yard setback. The Hearings Official granted the applicant's requested reduction to the minimum interior yard setback, but only between two single-story dwellings. A dwelling that is more than one-story would require a full 5-foot setback. Furthermore, the Hearings Official precluded any encroachments into the setbacks for dwellings that have a reduced interior yard setback. Thus, the interior distance between two single-story dwellings could be 6 feet; the interior yard between two-story dwellings would be 10 feet, and the interior yard between one one-story and one two-story dwelling could be eight feet (5 feet for the two-story dwelling plus 3 feet for the single-story dwelling).

In his decision, the Hearings Official relied upon a number of factors that are neither pertinent to the application criteria nor, with the additional information recently submitted by the appellant and admitted as part of the public record, accurately portray the information available to the Hearings Official at time of the decision. The Hearings Official noted that the applicant created the original hardship himself by designing on narrow lots, however the PUD criteria specifically provides for a high degree of flexibility in the design of the site while allowing for increased density. The Hearings Official also noted that he had no information other than the applicant's oral statement at the hearing showing that the adjacent Rivendell Subdivision had been built to the same density and reduced

setbacks, and there was no information in the record about how the residents from the earlier development feel about the density and reduced setbacks. As the appellant notes, however, photos were submitted showing similarly reduced setbacks in the previous subdivision, and meeting minutes from the neighborhood/applicant meeting were also submitted showing that no concerns about density or reduced setbacks were raised. Also, though not provided directly by the applicant, the public record includes findings from the previous applications of Rivendell.

The decision whether or not to accept the applicant's proposed noncompliance should be based on EC 9.8300(2) regarding reasonable compatibility with the surrounding area. Planning Commission, with all available information—including photos and previous decisions, finds the proposal to be reasonably compatible with the surrounding area including the previous Rivendell subdivision. A look at what was allowed in the previous development shows that 3-foot interior yard setbacks were permitted per MDA 01-02. Specifically, the allowance stated that the interior yard setback "shall be relaxed to require a 6-foot separation between structures for all lots in Rivendell subdivision except lots which border neighboring subdivisions."

Although the Hearings Official approved the request for 3-foot interior yard setbacks for single-story structures, his limitation of 5-foot interior yard setbacks for two-story structures was not consistent with the applicable criteria at EC 9.8300(2). By neither acknowledging the submitted photos nor taking into account other available information regarding the previous related development, the Hearings Official did not properly evaluate the application. Furthermore, to the extent that the width of the setbacks affects the type and size of interior yard landscaping and the amount of light and air movement between buildings is relevant to the application, Planning Commission finds that these concerns are resolved via the evidence submitted by the applicant. Therefore, Planning Commission grants the applicant's request for the minimum interior yard setback for all lots to be reduced from 5 feet to 3 feet for the primary residential structure (with the minimum required distance between buildings being reduced from 10 feet to 6 feet). ~~Planning Commission notes that, in order to be consistent with the conditions of the previous Rivendell subdivision, a similar restriction regarding lots which border neighboring subdivisions should also be included.~~ Therefore, Planning Commission modifies the Hearings Official's decision and imposes the following new condition of approval:

> A note shall be added to the final plans that states: "The minimum interior yard setback shall be relaxed from 5 feet to 3 feet for all lots in the PUD, except for Lots 10 and 11 ~~and all lot lines which border neighboring subdivisions other than Rivendell (e.g. relevant lot lines for Lots 1-8, 15-21, and 41-45)~~. In regards to permitted encroachments (such as overhangs, footings, and building projections), the provisions of EC 9.6745 shall apply, except that a minimum 5-foot separation shall be maintained between permitted encroachments of one building and the permitted encroachments or wall of an adjacent building at all times."

With these additional findings and imposition of the new condition of approval, the Planning Commission affirms the appellant's second sub-assignment of error.

Sub-assignment of Error 1(c) *[Noncompliance #8 of the Hearings Official decision]:*
The applicant proposed noncompliance with the minimum interior yard setbacks for garages and detached structures (including secondary dwelling units, sheds and other similar buildings allowed by code) to be reduced from 5 feet (as required per EC 9.2750) to zero feet, allowing for the construction of common wall garages and common wall detached structures between adjoining parcels. The applicant further requested that, where common walls are not utilized, a minimum setback of 3 feet (with minimum 6-foot separation between structures) be allowed on each parcel between said structures. In his decision, the Hearings Official allowed for common wall construction for garages detached from the dwelling and stipulated that, if there is no common wall, then setbacks may be reduced down to 3 feet between two single-story garages. The Hearings Official notes that this setback "shall be as the Hearings Official approved in (noncompliance) number 7 above for the primary residence...". It is assumed that, since the Hearings Official made no specific mention precluding the reduced setbacks of other detached structures, as defined by the applicant, that these permitted setbacks were intended to apply to those structures, as well.

Although the Hearings Official refers to EC 9.8300 as basis for approving the applicant's request to allow the use of common walls between detached buildings, it is unclear what his basis is for restricting the request as detailed above, other than staff's recommendation. Since he references the setback limitations approved for the previous proposed noncompliance, it is assumed that the Hearings Official was using similar justification for these limitations—that the applicant created the original hardship himself, that there was limited information available to justify the request, and that the requested setbacks and intrusions would negatively impact the landscaping potential as well as light and air movement between buildings.

Similar to the previously appealed request, additional evidence admitted as part of the record for Planning Commission indicates that the first note on Sheet 2 of the approved Site Review plan for SR 00-01 of the initial Rivendell subdivision allowed for garages to share a common wall. As with sub-assignment 1(b) above, Planning Commission determines that the applicable criterion in this instance is EC 9.8300(2) as it regards reasonable compatibility with the surrounding area. The applicant's request was for a 3-foot setback for all detached structures (regardless of height) in the case that a common wall was not utilized. There is nothing that substantially differentiates the detached structures at subject of this request from the primary structures and attached garages shown in the photos provided by the applicant to the Hearings Official and approved for common wall construction or a 3-foot "side yard" setback as approved through SR 00-01 and shown on the site plans. Again, to the extent that the width of the setbacks affects the type and size of interior yard landscaping and the amount of light and air movement between buildings is relevant to the application, Planning Commission finds that these concerns are resolved via the evidence submitted by the applicant. In setting limitations upon the applicant's request, the Hearings Official did not properly evaluate the application. Also, although there was no specific request for additional intrusions into the reduced interior yard setback as requested for the previous noncompliance, it is assumed that the request was intended. Therefore, the Planning Commission affirms the appellant's third sub-assignment of error and modifies the Hearings Official's decision, imposing the following new condition of approval:

> A note shall be added to the final plans that states: "The minimum interior yard setback for garages and detached structures (including secondary dwelling units, sheds, and other similar buildings allowed by code) shall be relaxed from 5 feet

to zero feet to allow for the construction of common wall garages and common wall detached structures between adjoining parcels, except for Lots 10 and 11 ~~and all lot lines which border neighboring subdivisions other than Rivendell (e.g. relevant lot lines for Lots 1-8, 15-21, and 41-45).~~ Where common walls are not utilized, a minimum 5-foot separation shall be maintained between permitted encroachments of one building and the permitted encroachments or wall of an adjacent building at all times. Otherwise, all provisions of EC 9.6745 regarding permitted intrusions will apply."

With these additional findings and imposition of the new condition of approval, the Planning Commission affirms the appellant's third sub-assignment of error.

Appellant's Second PUD Assignment of Error:

The City erred in imposing an appeal fee that is disproportionate to the actual or average costs of this appeal and is also unreasonable.

EC 9.7655(3) requires that appeal statements specify how the Hearings Official: (1) failed to properly evaluate the application; or (2) made a decision that was not consistent with the applicable criteria. The appellant does not specify how the imposition of the allegedly unreasonable appeal fee is the result of the Hearings Official's failure to properly evaluate the application or the Hearings Official's decision's inconsistency with an applicable criterion. The Planning Commission's review is limited to whether the Hearings Official: (1) failed to properly evaluate the application; or (2) made a decision that was not consistent with the applicable criteria.

While the appellant may be raising an important issue, it is not one that the Planning Commission can substantively address. The Hearings Official's decision did not determine or impose the appeal fee and it would have been beyond the scope of the Hearings Official's authority to do so. Even if the appellant was correct in his assertion that the City's appeal fee structure dictated an appeal fee that, in this case, is too high, that determination would not result in a change to the Hearings Official's decision and it does not call the Planning Commission's jurisdiction into question. Whether the City's appeal structure, as applied in this case, is inconsistent with state law is an independent question that is beyond the scope of the Planning Commission's authority. The Planning Commission lacks the authority to allow any deviation from the City's adopted fee structure.

In the absence of a specific criterion or related findings that would serve as a basis for error, Planning Commission affirms the Hearings Official with respect to the appellant's second PUD assignment of error, based on the conclusion above.

IV. CONCLUSION

The Eugene Planning Commission has reviewed the record and the appellant's assignments of error, and has voted to affirm the Hearings Official's decision (herein incorporated by reference except as modified) to approve the tentative planned unit development and modify it with the conditions listed below. Additional findings and the modified conditions of approval, and new conditions of approval are provided in Section III of this Final Order; the modified and new conditions of approval are also included below for reference:

PUD Decision Condition of Approval, as modified:

3. For corner lots, the minimum setback (except at garages and carports) may be reduced to five feet at one of the two front yards. This side of the lot shall be subject to the permitted intrusion provisions of EC 9.6745, and it shall be considered an "interior yard" for these purposes. Garage doors and carports shall conform to setback standards of EC Table 9.2750.

New PUD Decision Conditions of Approval:

8. A note shall be added to the final plans that states: "The minimum interior yard setback shall be relaxed from 5 feet to 3 feet for all lots in the PUD, except for Lots 10 and 11 ~~and all lot lines which border neighboring subdivisions other than Rivendell (e.g. relevant lot lines for Lots 1-8, 15-21, and 41-45)~~. In regards to permitted encroachments (such as overhangs, footings, and building projections), the provisions of EC 9.6745 shall apply, except that a minimum 5-foot separation shall be maintained between permitted encroachments of one building and the permitted encroachments or wall of an adjacent building at all times."

9. A note shall be added to the final plans that states: "The minimum interior yard setback for garages and detached structures (including secondary dwelling units, sheds, and other similar buildings allowed by code) shall be relaxed from 5 feet to zero feet to allow for the construction of common wall garages and common wall detached structures between adjoining parcels, except for Lots 10 and 11 ~~and all lot lines which border neighboring subdivisions other than Rivendell (e.g. relevant lot lines for Lots 1-8, 15-21, and 41-45)~~. Where common walls are not utilized, a minimum 5-foot separation shall be maintained between permitted encroachments of one building and the permitted encroachments or wall of an adjacent building at all times. Otherwise, all provisions of EC 9.6745 regarding permitted intrusions will apply."

Accordingly, **as ordered by LUBA**, approval is hereby affirmed for the Rivendell PUD. The foregoing findings and conclusions are adopted as the Final Order of the Eugene Planning Commission for Rivendell PUD (PDT 10-01), this ~~25th day of October, 2010~~ **11th day of June, 2012**.

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Jeff Mills, Chair
Eugene Planning Commission

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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TREADMILL JOINT VENTURE and
BOYD IVERSON,
Petitioners,

APR24'12 PM 2:10 LUBA

vs.

CITY OF EUGENE,
Respondent.

LUBA No. 2010-107

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners.

Emily N. Jerome, City Attorney, Eugene, filed the response brief and agued on behalf of respondent.

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

REMANDED 04/24/2012

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 In LUBA No. 2010-107, petitioners appeal a planning commission decision that
4 approves petitioners' application for a planned unit development (PUD), with additional
5 conditions of approval. This appeal is consolidated with LUBA No. 2010-078, which
6 concerns a city staff decision charging petitioners a fee to appeal a hearings official's
7 decision on the PUD application to the planning commission. In a separate final order and
8 opinion issued this date, we bifurcate LUBA No. 2010-078 from LUBA No. 2010-107, and
9 dismiss LUBA No. 2010-078.

10 **FACTS**

11 The procedural posture of this case is unusual, and we describe both the proceedings
12 below and the proceedings before LUBA.

13 The hearing official approved petitioners' application for phase III of the Rivendell
14 PUD, with six conditions of approval. Under the city's code, an applicant for a PUD can
15 request relief from compliance with applicable development standards, where the applicant
16 shows that proposed noncompliance is consistent with the purposes of the PUD provisions.
17 Eugene Code (EC) 9.8320(11)(k). One purpose of PUD development is to provide for
18 development "at least equal in quality to those that are achieved through the traditional lot by
19 lot development and that are reasonably compatible with the surrounding area." EC
20 9.8300(2).

21 The hearing official rejected in whole or part petitioners' requests for relief from
22 three setback standards. Only one such request for relief is at issue in this appeal. Petitioners
23 requested a reduction in the minimum interior yard setback from five feet to three feet for all
24 lots. The hearing official granted the reduction for all lots that will be developed with single
25 story dwellings, but denied it for all lots to be developed with two-story dwellings.

On August 11, 2010, petitioners filed a timely appeal with the city, accompanied by an appeal fee in the amount of $9,268.46. The statement accompanying the appeal challenged the hearing official's resolution of petitioners' requests for relief to adjust the three setbacks, and also included a challenge to the local appeal fee. Pursuant to a fee schedule adopted by the city manager, the local appeal fee is 50 percent of the application fee. Petitioners argued in their appeal statement that an appeal fee set at 50 percent of the application fee is inconsistent with ORS 227.180(1)(c).[1] Based on those arguments, petitioners requested that the city waive or return the appeal fee. City staff took no action on petitioners' request, but issued petitioners a receipt for the appeal fee. On August 30, 2010, petitioners filed with LUBA a self-described "precautionary" appeal of the city staff decision to charge the local appeal fee, attaching to the notice of intent to appeal a copy of the receipt and petitioners' appeal statement. Notice of Intent to Appeal (LUBA No. 2010-078) 1.

Meanwhile, petitioners continued to pursue the local appeal process. The planning commission conducted an on-the-record hearing and, on October 10, 2010, issued a final decision that wholly approved two of the three requested setback reductions. With respect to the reduction from the five-foot interior yard setback, the planning commission agreed with petitioners that the hearing official had erred in limiting the yard setback to lots developed with single-story dwellings, because nothing in the city's code supported a distinction based on single-story or two-story dwellings. The planning commission approved the reduction from five feet to three feet regardless of dwelling type for all lots in the PUD, but added a

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[1] ORS 227.180(1)(c) provides in relevant part that

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearing officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. * * *"

1 restriction that required the full setback from all lot lines that border neighboring
2 subdivisions not part of the Rivendell PUD.

3 With respect to the appeal fee issue, the planning commission accepted into the record
4 petitioners' testimony on that issue, but determined that the issue was beyond its scope of
5 review under Eugene Code (EC) 9.7655(3).[2]

6 Petitioners appealed the October 10, 2010 planning commission decision to LUBA,
7 and that appeal was assigned LUBA No. 2010-107. Petitioners moved to consolidate LUBA
8 No. 2010-107 with LUBA No. 2010-078, as "closely related" decisions under OAR 661-010-
9 0055. In the meanwhile the city filed a motion to dismiss LUBA No. 2010-078, and opposed
10 consolidation. LUBA allowed consolidation, and took the motion to dismiss LUBA No.
11 2010-078 under advisement. *Treadmill Joint Venture v. City of Eugene*, 62 Or LUBA 538
12 (2010).

13 The consolidated appeals then proceeded to briefing and oral argument. The
14 consolidated petition for review includes two assignments of error. The first assignment of
15 error challenges the planning commission's condition limiting the setback reduction for lots
16 that border neighboring subdivisions. The second assignment of error challenges both the
17 staff decision to charge the local appeal fee at issue in LUBA No. 2010-078, and the planning

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[2] EC 9.7655 governs appeals from the hearing official to the planning commission, which is the city's final decision maker for the types of land use decisions at issue here, and provides in relevant part:

> "2. The appeal shall be submitted on a form approved by the city manager, be accompanied by a fee established pursuant to EC Chapter 2, and be received by the city no later than 5:00 p.m. of the 12th day after the notice of decision is mailed. 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 appeal issues shall be accepted.
>
> "3. The appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how and hearings official or historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The basis of the appeal is limited to the issues raised during the review of the original application."

1 commission's determination that the planning commission lacks review authority to consider
2 petitioners' challenges to the local appeal fee, at issue in LUBA No. 2010-107. At oral
3 argument, the Board asked the parties if they would consent to suspend this review
4 proceeding pending a decision by the Court of Appeals in an appeal of a different city
5 planning commission decision that involved a challenge to the same city appeal fee at issue in
6 the present appeals. The parties consented to suspend the present review proceeding.

7 On August 17, 2011, the Court of Appeals decided *Willamette Oaks LLC v. City of*
8 *Eugene*, 245 Or App 47, __ P3d __ (2011), *rev den* 351 Or 586, __ P3d __ (2012)
9 (*Willamette Oaks*), in which the Court held that LUBA erred in remanding a decision to the
10 City of Eugene planning commission to allow the petitioners in that appeal to submit into the
11 local record testimony and evidence challenging the city's local appeal fee. The Court held
12 that under EC 9.7655(3) the planning commission lacked authority to accept new evidence
13 regarding the appeal fee, as well as review authority to consider a challenge to the local
14 appeal fee, and that LUBA had not identified any legal basis to remand the decision to the
15 planning commission for further proceedings on the appeal fee issue. 245 Or App at 56-57.

16 After the Court's decision in *Willamette Oaks* became final, the parties moved the
17 Board to re-activate these appeals and resolve the various motions and the merits. We now
18 do so.

19 **REPLY BRIEF, MOTION TO STRIKE, MOTION TO TAKE EVIDENCE**

20 Petitioners request permission to file a reply brief to address the city's assertion in its
21 response brief that the city's appeal fee is based on the "average cost" of appeals, consistent
22 with ORS 227.180(1)(c). Relatedly, petitioners move to strike the assertion in the response
23 brief, as not supported by the record. Attached to the motion to strike are three documents
24 related to petitioners' public records request to the city to locate the documents forming the
25 basis for the city's appeal fee.

The city objects to the reply brief, arguing that it is not limited to a "new matter" raised in the response brief, and therefore the reply brief is not warranted under OAR 661-010-0039 (allowing a reply brief confined solely to new matters raised in the respondent's brief). The city also objects that the three documents attached to the motion to strike are not in the record before LUBA. In response to the latter argument, petitioners filed a motion to take evidence under OAR 661-010-0045 to allow LUBA to consider the three documents.

For reasons explained below, the disputed reply brief, the motion to strike and the motion to take evidence all revolve around an issue—whether the city's local appeal fee complies with ORS 227.180(1)(c)—that under the circumstances of this case cannot form a basis for reversal or remand of the challenged decision. That being the case, there is no point in resolving the merits of the disputed motions. The motion to file a reply brief, the motion to strike, and the motion to take evidence are denied.

FIRST ASSIGNMENT OF ERROR

Petitioners challenge the condition imposed by the planning commission limiting the interior yard setback reduction to exclude lot lines that border some neighboring subdivisions. According to petitioners, the planning commission exceeded the permissible scope of the issues presented in the appeal statement, and further that the decision to impose the new condition is not supported by adequate findings or substantial evidence.

EC 9.7655(3) provides that "[t]he appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues." *See* n 2. Petitioners' appeal stated, in relevant part:

> "**Comment on item 7: Limiting relief re the minimum interior yard setbacks for primary residence**: The limitation on reduced interior yard setbacks to single story dwellings only is described by the Hearing Official without any reference to any standard that requires the limitation. The Staff Report describes this limitation in terms of preventing structures from 'looming' over the adjacent structure. Again, the 'looming' description, which is a staff editorial, is not tied to any of the approval standards." 2010-107 Record 103.

Petitioners contend that the only issue raised in the above statement is a challenge to the hearings official's limitation of the setback reduction to lots with single story dwellings. Under the hearings official's decision, no distinction is drawn with respect to setbacks between lots that are adjacent to other subdivisions and those that are not. In the appeal statement, petitioners argued to the planning commission that the one-story/two-story distinction drawn by the hearings officer has no basis in the city's code, and requested that the condition be removed. Accordingly, petitioners argue, the issues before the planning commission were limited in relevant part to the single-story/two-story distinction drawn by the hearings official, and no issue was raised or could have been raised regarding the effect of reduced setbacks on adjoining subdivisions, because the hearings official adopted no such restrictions. From petitioners' perspective, the planning commission took something away that the hearings officer had granted (a reduced yard setback for lots adjacent to other subdivisions), but no issue had been raised regarding such lots in the appeal statement. Because EC 9.7655(3) limits the issues the planning commission can consider to those "set out in the filed statement of issues," petitioners argue that the planning commission lacked authority to impose an entirely different restriction intended to protect the residents of neighboring subdivisions. *See Smith v. Douglas County*, 93 Or App 503, 763 P2d 169 (1988), *aff'd* 308 Or 191, 777 P2d 1377 (1989) (where the code limited county board review to issues raised in the local notice of appeal, the board lacked authority to consider an additional issue not raised in the local notice).

At petitioners' request, the planning commission took official notice of decisions approving other phases of the Rivendell PUD, which petitioners argued had been approved with the same reduced three-foot yard setback requested in the present application. The planning commission agreed with petitioners that the single-story/two-story distinction drawn by the hearings officer had no basis in the code, and agreed to remove that condition. However, the planning commission went on to find:

"The decision whether or not to accept the applicant's proposed noncompliance [with the five-foot interior yard setback] should be based on EC 9.8300(2) regarding reasonable compatibility with the surrounding area. Planning Commission, with all available information—including photos and previous decisions—finds the proposal to be reasonably compatible with the surrounding area including the previous Rivendell subdivision. A look at what was allowed in the previous development shows that 3-foot interior yard setbacks were permitted per MDA 01-02. Specifically, the allowance stated that the interior yard setback 'shall be relaxed to require a 6-foot separation between structures for all lots in Rivendell subdivision *except lots which border neighboring subdivisions*.'

"* * * Therefore, Planning Commission grants the applicant's request for the minimum interior yard setback for all lots to be reduced from 5 feet to 3 feet for the primary residential structure (with the minimum required distance between buildings being reduced from 10 feet to 6 feet). *Planning Commission notes that, in order to be consistent with the conditions of the previous Rivendell subdivision, a similar restriction regarding lots which border neighboring subdivisions should also be included.* Therefore, Planning Commission modifies the Hearing Official's decision and imposes the following new condition of approval:

"A note shall be added to the final plans that states: 'The minimum interior yard setback shall be relaxed from 5 feet to 3 feet for all lots in the PUD, <u>except for * * * all lot lines which border neighboring subdivisions other than Rivendell (e.g. relevant lot lines for Lots 1-8, 15-21, and 41-45)</u>. * * *." 2010-107 Record 7 (emphasis and underline added).

Petitioners argue that the planning commission lacked authority to impose the underlined portion of the condition, based on the emphasized findings.

The city responds that the planning commission simply gave petitioners what they asked for. According to the city, petitioners requested in the appeal statement that the planning commission take notice of the decisions approving Phases I and II of the Rivendell PUD, specifically to demonstrate that "these earlier phases were approved with the same relief requested here." 2008-107 Record 142. The city argues that the restriction regarding lots that border neighboring subdivisions is taken verbatim from the conditions imposed in the decisions that petitioners requested that the planning commission take official notice of. Further, the city notes that the underlying approval standard is whether the requested reduction is consistent with the purposes of the PUD provisions, including the purpose to

provide for development that is "reasonably compatible with the surrounding area." EC 9.8300(2). The city contends that in considering whether to grant the requested setback reduction the planning commission was entitled to consider whether the reduction provides for development that is reasonably compatible with adjoining subdivisions. Under these circumstances, the city argues, the planning commission did not exceed its authority under EC 9.7655(3) to consider issues not raised in the appeal statement.

We agree with the city up to a point. Where an applicant appeals a hearing official's decision challenging a condition of approval under a standard such as EC 9.7655(3), and the planning commission on appeal agrees that the condition of approval is not authorized by the code and eliminating the condition, we believe the planning commission is entitled to consider the effect of eliminating the condition on the application as a whole. If *eliminating the condition* would affect compliance with an applicable approval standard, then we believe the planning commission could, without running afoul of EC 9.7655(3), go on to consider whether a new or modified condition is necessary to avoid noncompliance created by deleting the original impermissible condition. *See* EC 9.7680 (authorizing the planning commission to "affirm, reverse or modify any decision, determination or requirement of the hearings official," including the authority to change "any of the conditions of the hearings official").

However, as we understand the circumstances here, that is not the case. The hearings officer imposed no conditions regarding setbacks on lots adjacent to other subdivisions, and his rationale for denying the reduction for lots developed with two-story dwellings was not, apparently, based on a concern to protect residents of neighboring subdivisions or ensure compatibility with the surrounding area. There is no apparent connection between the one story/two story distinction challenged in the appeal statement and ultimately rejected by the planning commission and the effect of reduced setbacks on neighboring subdivisions. In other words, eliminating the one-story/two-story condition did not cause or affect noncompliance with any approval standard. Instead, the planning commission imposed a

new condition to address a different perceived code compliance issue that was (1) not addressed in the hearings official's decision and (2) not appealed to the planning commission. We agree with petitioners that in doing so the planning commission exceeded its authority under EC 9.7655(3).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Under the second assignment of error, petitioners argue that the city's local appeal fee is inconsistent with ORS 227.180(1)(c), and that the planning commission erred in failing to address petitioners' challenge to the fee. The city responds, and we agree, that for the reasons set out in the Court of Appeals' *Willamette Oaks* decision the city planning commission, which is the city's final decision-maker, lacked authority to develop an evidentiary record on, or review at all, petitioners' challenges to the city's appeal fee. Concomitantly, we believe that LUBA has no basis to reverse or remand the planning commission decision to the planning commission for any reason related to the city's appeal fee. Under the circumstances of this case, if petitioners have a right to challenge the city's appeal fee for inconsistency with ORS 227.180(1)(c), that challenge must be brought in another forum, presumably in the circuit court pursuant to a writ of review or a declaratory ruling.

The governing body of the City of Eugene, its city council, has delegated to the city planning commission the authority to render the city's final decision with respect to the type of land use decision at issue here. However, the city council did not delegate all of the city council's powers that the city council might exercise if it were the final decision maker. Specifically, the appeal and hence the planning commission's review is limited to the questions of whether the hearings official (1) "failed to properly evaluate the application" and (2) failed to "make a decision consistent with applicable criteria." EC 9.7655(3). A challenge to the city's appeal fee does not fall within either element of the planning commission's limited scope of review.

In *Willamette Oaks*, the Court of Appeals distinguished the City of Eugene's local appeal scheme from the scheme at issue in *Young v. Crook County*, 224 Or App 1, 197 P3d 48 (2008). *Young* involved an as-applied challenge to the county's appeal fee that was presented on appeal of a planning commission decision to the county's board of commissioners. Under the county's code the board of commissioners could accept new evidence on appeal, and nothing in the code limited the governing body's scope of review to preclude consideration of the appeal fee challenge. In *Willamette Oaks*, the Court characterized *Young* as standing for the proposition that "when local land use regulations give a party the opportunity to submit evidence to establish a *prima facie* case that an appeal fee violates ORS 227.180(1)(c), the party must take advantage of that opportunity in order for subsequent appellate review bodies to address the merits of the appeal fee challenge." 245 Or App at 56. However, the Court held, "*Young* did not establish a free-standing principle that entitles parties to submit evidence on which to challenge the validity of an appeal fee at the local level without regard to whether the local land use regulations establish a basis on which to do that." *Id.*

Turning to the City of Eugene case before them, the Court noted that EC 9.7655 limits the planning commission's review to the issues presented to the hearings officer and precludes the planning commission from taking new evidence on any issue. The Court concluded that LUBA had not identified any authority by which it can require the planning commission to accept evidence on remand on the appeal fee challenge, or any basis to conclude that the planning commission's review procedures are unlawful. Accordingly, the Court held that LUBA erred in remanding the decision to the planning commission to take evidence on whether the appeal fee violates ORS 227.180(1)(c). Under *Willamette Oaks*, it is clear that because the planning commission lacks authority to accept new evidence, there is no basis for LUBA to remand a planning commission decision to accept new evidence, on an appeal fee issue or any other issue.

In a footnote, the Court stated that:

> "Because of our resolution of the evidentiary aspect of LUBA's remand order, we do not consider whether the apparent absence of any basis for the planning commission to consider the merits of Willamette Oaks's appeal fee challenge affects LUBA's authority to address the fee challenge." 245 Or App at 57, n 4.

Thus, the Court left open the question of whether the planning commission's limited authority to review the hearings official's decision for error independently affects LUBA's authority to address the appeal fee challenge.

In supplemental briefing, petitioners argue that *Willamette Oaks* is distinguishable, because unlike the petitioners in that case, petitioners do not seek remand to allow petitioners to submit new evidence to the planning commission. According to petitioners, their appeal fee challenge turns on the complete lack of evidence in the record indicating that the city's appeal fee is no more than the average cost of appeals or the actual cost of petitioners' appeal, as required by ORS 227.180(1)(c). However, that argument is a variant of the argument we and the Court of Appeals rejected in *Young*, and we reject it here. As explained in *Young*, petitioners cannot simply allege that the appeal fee is inconsistent with ORS 227.180(1)(c) and thereby place the evidentiary burden on the local government to demonstrate that its appeal fee is consistent with the statute. Petitioners' appeal fee challenge in the present case is, in essence, an evidentiary challenge. For the reasons set out in *Willamette Oaks*, because the city's final decision maker lacks authority to develop an evidentiary record on the basis for the appeal fee, LUBA has no basis to reverse or remand the challenged decision under this assignment of error.

In addition, we believe that because EC 9.7655(3) limits the planning commission's review to addressing errors committed by the hearings official, the planning commission lacks authority to consider other matters such as a challenge to the city's appeal fee. While the city council presumably has that inherent authority, it was not delegated to the planning commission. For that additional reason, even if petitioners' appeal fee challenge turned on

1 questions of law rather than questions of fact, the planning commission committed no error in
2 failing to address petitioners' appeal fee challenge. As a practical matter, that means that
3 LUBA cannot review challenges to the city's appeal fee in an appeal of a planning
4 commission decision like the one before us.

5 The second assignment of error is denied.

6 **CONCLUSION**

7 For the reasons set out in the first assignment of error, LUBA No. 2010-107 is
8 remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2010-107 on April 24, 2012, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 24th day of April, 2012.

Kelly Burgess
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