



AGENDA

Meeting Location:

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

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

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

TUESDAY, JANUARY 26, 2016 – 6:00 P.M.**PUBLIC HEARING: APPEAL OF HEARINGS OFFICIAL DECISION: CHAMOTEE TRAILS PUD (PDT 15-1)**

The Planning Commission will hold a public hearing on an appeal of the Hearings Official's decision to deny a tentative PUD application for a 10-lot residential development on West Amazon Drive, near the intersection of Fox Hollow and Owl Road. See attached agenda item summary for more information.

Lead City Staff: Erik Berg-Johansen, 541-682-5437
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Public Hearing Format:

1. Staff introduction/presentation.
2. Public testimony from applicant and others in support of application.
3. Comments or questions from neutral parties.
4. Testimony from opponents.
5. Staff response to testimony.
6. Questions from Planning Commissioners to staff.
7. Rebuttal testimony from applicant.
8. Closing of public hearing.

Commissioners: Steven Baker; John Barofsky; John Jaworski (Chair); Jeffrey Mills; Brianna Nicoletto;
William Randall; Kristen Taylor (Vice Chair)

AGENDA ITEM SUMMARY
January 26, 2016

To: Eugene Planning Commission

From: Erik Berg-Johansen, Assistant Planner, Eugene Planning Division

Subject: Appeal of Hearings Official Decision: Chamotee Trails PUD (PDT 15-1)

ACTION REQUESTED

The Planning Commission (PC) will hold a public hearing on an appeal of a Tentative Planned Unit Development (PUD) application that was recently denied by the Hearings Official. The appeal, filed by the applicant's representative, contests the denial of the application. As discussed further below, the application was reviewed under the Tentative PUD Criteria for Needed Housing. Deliberations on this appeal will occur beginning at the next regular meeting scheduled for February 8, 2016.

BACKGROUND

In February of 2015, the applicant submitted a PUD application for 10 buildable single-family lots and 1 common open space lot. The subject property is located on West Amazon Drive in the south hills of Eugene, just east of Fox Hollow Road. The property is zoned Low-Density Residential (R-1), and is surrounded by existing residential development within both R-1 and Agricultural (AG) zones.

Staff recommended denial to the Hearings Official (HO) based on EC 9.8325(6)(c), which is referred to as the "19-Lot Rule." The subject property is located on West Amazon Drive, which at this location, is a dead-end street. Since there are already 36 existing properties using West Amazon Drive as the only means of vehicular ingress and egress, staff found that the proposed development did not comply with the 19-Lot Rule. A graphical representation showing the layout of lots and streets in the area is provided in Attachments A and B (Vicinity Map; Lots Accessing West Amazon Drive Map). A reduced version of the applicant's site plan is also included for ease of reference, as Attachment C.

The 19-Lot Rule is not applied to every PUD proposal because it is only present under the PUD *Needed Housing Criteria* (as opposed to the *General Criteria*). In this case, the applicant elected to file the application under the Needed Housing Criteria. Unlike the more discretionary/subjective General Criteria, the Needed Housing Criteria are designed to be clear and objective. Proposals under the Needed Housing Criteria must also be proven to be "Needed Housing" according to State statute. During the open record period following the public hearing, the City's legal counsel prepared a memorandum for the Hearings Official that addresses relevant State statutes and "Needed Housing" issues presented by the appellant. That memo is included as Attachment H, and provides as useful background information for the commission as relevant to this appeal.

The initial evidentiary hearing on this proposal was held on November 4, 2015. At the request of neighbor Ross Williamson, and agreed upon by all parties, the record was held open to allow for the submittal of additional evidence and testimony. Following close of the public record, the Hearings

Official's decision was issued on December 4, 2015 and concluded that the proposal does not comply with EC 9.8325(6)(a), the "19-Lot Rule".

PLANNING COMMISSION'S REVIEW ROLE

Based on procedural requirements set forth in the Eugene Code (see EC 9.7655), the PC may address only those issues set out in the written appeal statement. Further, the PC limits its consideration to the evidentiary record established before the HO; the PC may not accept new evidence, except that which it officially notices. The City Attorney has advised that the PC should not use its authority to take official notice of material that would be new evidence when it is considering an appeal.

The Eugene Code requires that the PC's decision on this appeal be based on whether or not the HO failed to properly evaluate the application or make a decision consistent with the applicable criteria. Those criteria are the Tentative Planned Unit Development Criteria – Needed Housing at EC 9.8325, to the extent they are implicated by the appeal. The PC's role on appeal is to determine whether or not the HO erred in his decision, based on the record of evidence and testimony he had before him.

Staff also notes that the primary criterion at issue in this zone change appeal is EC 9.8325(6)(c), which states the following (and the HO concluded was not met):

EC 9.8325(6)(c): The street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street when the PUD exceeds 19 lots or when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19.

Although the HO's decision found that the approval criterion at EC 9.8325(3) was met, the appellant also addresses this criterion in his appeal statement (see Assignment of Error #3 below):

EC 9.8325(3): The PUD provides a buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD according to EC 9.6210(7).

To assist the PC's review, a brief summary of the appeal issues and pertinent record information is provided below related to these two approval criteria; the full appeal statement and a supplemental letter from the appellant are included as Attachments E and F. The HO's full decision is also included as Attachment G.

In the event that the PC finds the HO did not err, the PC may simply affirm his decision, or adopt supplemental findings in support of that affirmation. If the PC determines the HO erred and chooses to modify or reverse the decision, the PC is required to provide specific findings of fact as to why the decision was in error. The PC cannot reverse the decision without such findings. The PC's decision must be made in accordance with the procedures for appeals at EC 9.7650 through EC 9.7685.

SUMMARY OF APPEAL ISSUES

The appeal at hand is primarily focused on the 19-Lot Rule. At the subject location, the sum of existing lots utilizing West Amazon Drive as the single means of ingress and egress is 36 (which exceeds the allowed number of 19 lots). If approved, the proposed PUD would increase the number to well over 40

lots. The HO relied on these facts in his findings for denial.

The appellant disagrees with the HO's interpretation of the 19-Lot Rule. The appellant argues that the word "disperse" is not clear and objective because it is not defined in the land use code. In effect, the appellant asserts this standard cannot be applied as part of the Needed Housing Criteria.

The appellant also raises issue with EC 9.8325(3), which requires a 30-foot wide landscape buffer. The Hearings Official did not use this criterion as a basis for denial; regardless, the appellant suggests that this criterion should not be applied to any PUD proposal under the Needed Housing Criteria. In summary, the appellant believes that if this criterion was applied literally, it would preclude access to any potential development site. In the past, staff has applied this criterion in a manner that allows driveways or streets to penetrate the landscape buffer.

- 1. First Assignment of Error: The 19 Lot Rule meaning in the Code: The Commission should find that the Hearings Official selected the wrong definition of "disperse." Neither the code language nor the context for the code language requires that traffic be dispersed to any particular point or distance from the project.***

Summary:

The appellant believes the land use code fails to specify how the word "disperse" should be applied in the context of the 19-Lot Rule, and that the HO otherwise selected the wrong definition of the word (see below). As a result, the appellant asserts that this criterion is ambiguous and therefore cannot be applied as a clear and objective standard under the Needed Housing statutes.

HO Decision:

The HO stated "Here, where the 'layout' of the PUD relies on only one public street to disperse motor vehicle traffic, that traffic at minimum must be able to go somewhere in two different directions that do not terminate in a dead end" (HO Decision, page 15).

The HO further states:

"Taking this part [1b] of the definition of 'disperse' into account contradicts the argument that it is enough that traffic can move in both directions along West Amazon from the proposed PUD. Mr. Kloos concedes that such traffic could only travel 1000 feet to the barrier on West Amazon – but he urges that even such a short distance is enough to meet the standard. By this logic the standard could be met if traffic could travel even one block to an existing cul-de-sac. This interpretation is contrary to the both the '1a¹ and 1b²' definition of "disperse" as used in EC 9.8325(6)(c)" (HO Decision, page 15).

Staff Comments:

The HO concluded that the 19-Lot Rule is clear and objective, and that staff correctly applied it. The PC is tasked with determining whether or not the HO erred in applying this standard to the subject

1 Webster's Third New International Dictionary, definition 1a of "disperse": *To cause to break up and go in different ways: send or drive into different places*

2 Webster's Third New International Dictionary, definition 1b of "disperse": *To cause to become spread widely*

property based on the record of information he had before him. Staff's findings in the initial staff report, which he agreed with, stated the following:

"The proposal does not include any new streets within the PUD, and the unimproved segment of West Amazon Drive to the north precludes its use for dispersal of motor vehicle traffic onto more than one public local street.....Their application materials do not address the fact that motor vehicles cannot actually use this unimproved right-of-way as a means of secondary access, and the reality that there is only one way in or out, where West Amazon Drive connects to Fox Hollow Road" (Chamotee Trails PUD Staff Report, page 9).

An illustration of the above discussion is presented in Attachment D, which shows the right-of-way and approximate location of the dead end to the east of the subject property.

The appellant also argues that the unimproved section of West Amazon Drive, whether or not paved and accessible, meets the definition of a "street" and should therefore be considered as an additional connection serving the proposed PUD. The Hearings Official agreed with staff (and disagreed with the appellant) in that "streets", in the context of the 19-Lot Rule, must be passable and have the ability to accommodate vehicle traffic.

Finally, the following statement from the appellant should be noted before moving on to Assignment of Error #2: "If the Commission agrees with the applicant's reading of the 19 Lot Rule then it need not address Issue 2 below."

- 2. Second Assignment of Error: The 19 Lot Rule under State Law: The Hearings Official erred in finding, at pages 14-15, that the 19 Lot Rule is a clear and objective standard because "disperse" has a plain meaning. The standard is ambiguous because "disperse" is not defined. There are at least two possible interpretations – one that the application would comply with, and one that it would not. The Needed Housing Statute prohibits applying standards that are not clear and objective. Therefore, the 19 Lot Rule may not be applied.***

Summary:

As discussed above, the appellant believes that the word "disperse," in the context of the land use code, can be interpreted in multiple ways and therefore means the 19-Lot Rule is not clear and objective and cannot be applied.

HO Decision:

The HO stated "It is also my conclusion that the necessity to determine the plain meaning of words such as 'disperse' or 'motor vehicle traffic' does not transform the clear and objective standard into a discretionary exercise" (HO Decision, pages 14-15).

The HO further states:

"Although Mr. Kloos offers the '1a' part of the Webster's definition in his argument, there is a second part to the primary definition that has been left out. That part is '1b' which states: 'to cause to become spread widely.' Taking this part of the definition of 'disperse' into account contradicts the argument that it is enough that traffic can move in both directions along West

Amazon from the proposed PUD. Mr. Kloos concedes that such traffic could only travel 1000 feet to the barrier on West Amazon – but he urges that even such a short distance is enough to meet the standard. By this logic the standard could be met if traffic could travel even one block to an existing cul-de-sac. This interpretation is contrary to the both the “1a and 1b” definition of ‘disperse’ as used in EC 9.8325(6)(c)” (HO Decision, page 15).

Staff Comments:

The HO found the word “disperse” is not ambiguous, even if it is not explicitly defined in the land use code. The HO also referenced the full definition of the word according to Webster’s Dictionary, but found that regardless of how the definition is read, the 19-Lot Rule cannot be rendered inapplicable. Further, the clear intent of the 19-Lot Rule is to preclude extensive development in areas with only one way in, and one way out. In the case of the subject site, West Amazon Drive is the only means of vehicular access to the rest of the City’s street system. As mentioned earlier, this section of West Amazon Drive already provides ingress and egress to 36 lots, and the applicant did not present any evidence to suggest otherwise.

The staff report also references the PC’s previous findings for the Deerbrook PUD, as relevant to the present case. That PUD was proposed on land to the northeast of the subject property (along West Amazon Drive and south of Martin Street). The PC stated the following in regards to the 19-Lot Rule, which they found was met in that case because the applicant proposed to improve West Amazon Drive and make the street connection to Martin Street:

“This standard is really about dead-end streets, where there is only one way in or out. With the applicant’s improvement of West Amazon Drive, the site can be accessed from the north via Martin Street or from the south via Fox Hollow Road. The issue here would have been if West Amazon Drive did not connect to Fox Hollow Road” (Page 32; PC Final Order adopted 12-17-2012).

The “issue” they describe is the current situation, where an additional connection is not proposed and there is only one way in or out.

- 3. Third Assignment of Error: The 30’ Landscape Buffer under State Law: The Hearings Official erred in applying this standard at all. He interpreted the standard to include an exception as to where the buffer applies when the plain language does not allow any interpretation. His rationale is unexplained. He should have declined to apply the standard in its entirety because, if applied according to its plain terms, it would not allow any development, contrary to the Needed Housing Statute.***

Summary:

The appellant believes EC 9.8325(3) should not be applied this project, because if applied literally, it would prevent site development (a buffer around the entirety of the site’s perimeter would block site access).

HO Decision:

The HO stated “As noted above in the Summary of Decision, the plain wording of the text seeks a buffer from surrounding properties. The Hearings Official reads this standard to be achievable even where a road may need to pierce a section of the buffer to provide access to interior lots.

However, I decline to address Mr. Kloos's other arguments with regard to this criterion" (HO Decision, page 8).

Staff Response:

Staff has consistently applied this standard in a manner that allows construction of roads and access driveways. While it is not explicitly stated, the standard was never intended to block site access, but to provide for a buffer between adjacent properties (which can still be achieved if road access penetrates the buffer). Furthermore, the standard was found to be met in this instance.

- 4. *Fourth Assignment of Error: Although the Hearings Official did not address this issue, it would be error for the City to direct the applicant to the Needed Housing Partition process as an alternative approach to developing this project. That approach, although it would not invoke the 19 Lot Rule, would unreasonably delay and increase the cost of needed housing, contrary to ORS 197.307(4).***

Summary:

The appellant describes this fourth assignment of error as "precautionary" and asserts that the City directing the applicant to follow an alternate process involving multiple partitions would violate Needed Housing statutes by causing unreasonable cost and delay.

HO Decision:

The HO did not address this issue, other than to conclude that it was not relevant to the findings set forth in his decision.

Staff Comments:

Staff never suggested that another means of developing would be easier or more cost effective, nor directed the applicant to follow any alternative process; staff simply made the point that pursuing a PUD under the Needed Housing Criteria was not the only available development path at the applicant's disposal. For example, a PUD application could be submitted and evaluated under the General Criteria (wherein the 19-Lot Rule does not apply). A PUD submitted under the General Criteria would have the exact same application fees and processing timeframes. In any event, staff believes the PC need not address this issue any further since it is not related to any of the applicable Needed Housing approval criteria for the subject PUD.

STAFF RECOMMENDATION

Staff recommends that the Planning Commission determine whether to affirm, modify, or reverse the Hearings Official's decision regarding the 19-Lot Rule (EC 9.8325(6)(c)) and the landscaping buffer (EC 9.8325(3)).

ATTACHMENTS

- A. Vicinity Map
- B. Lots Accessing West Amazon Drive Map
- C. Applicant's Site Plan (reduced)
- D. Right-of-Way Map
- E. Applicant's Appeal Statement
- F. Applicant's Supplemental Letter to the PC

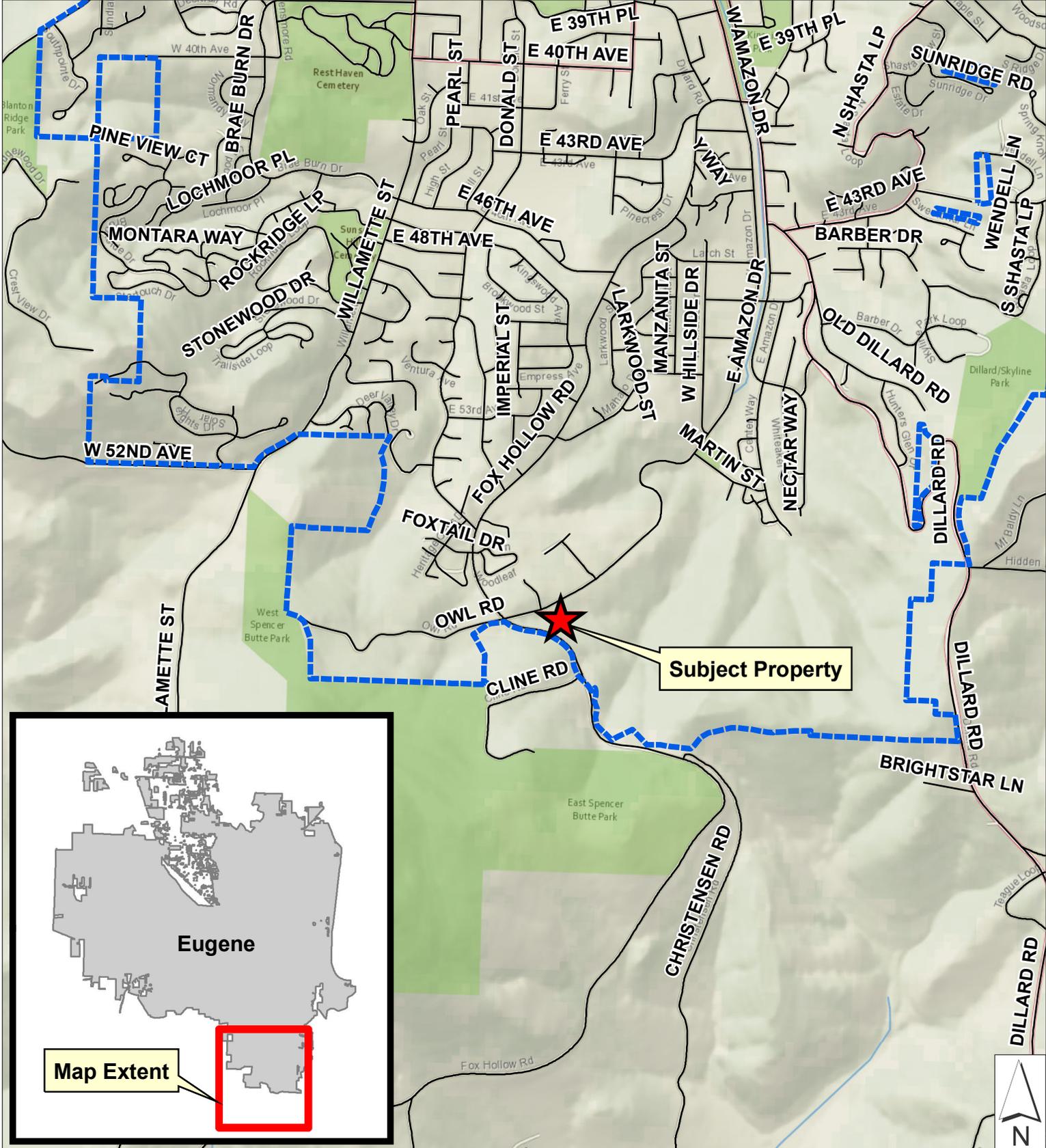
- G. Hearings Official Tentative PUD Decision
- H. Needed Housing Memo from City Attorney

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 separately. The full record will also be available at the public hearing.

FOR MORE INFORMATION:

Please contact Erik Berg-Johansen, Assistant Planner, Eugene Planning Division, by phone at (541) 682-5437, or by e-mail at erik.berg@ci.eugene.or.us

Attachment A - Vicinity Map



Subject Property

Map Extent

Legend

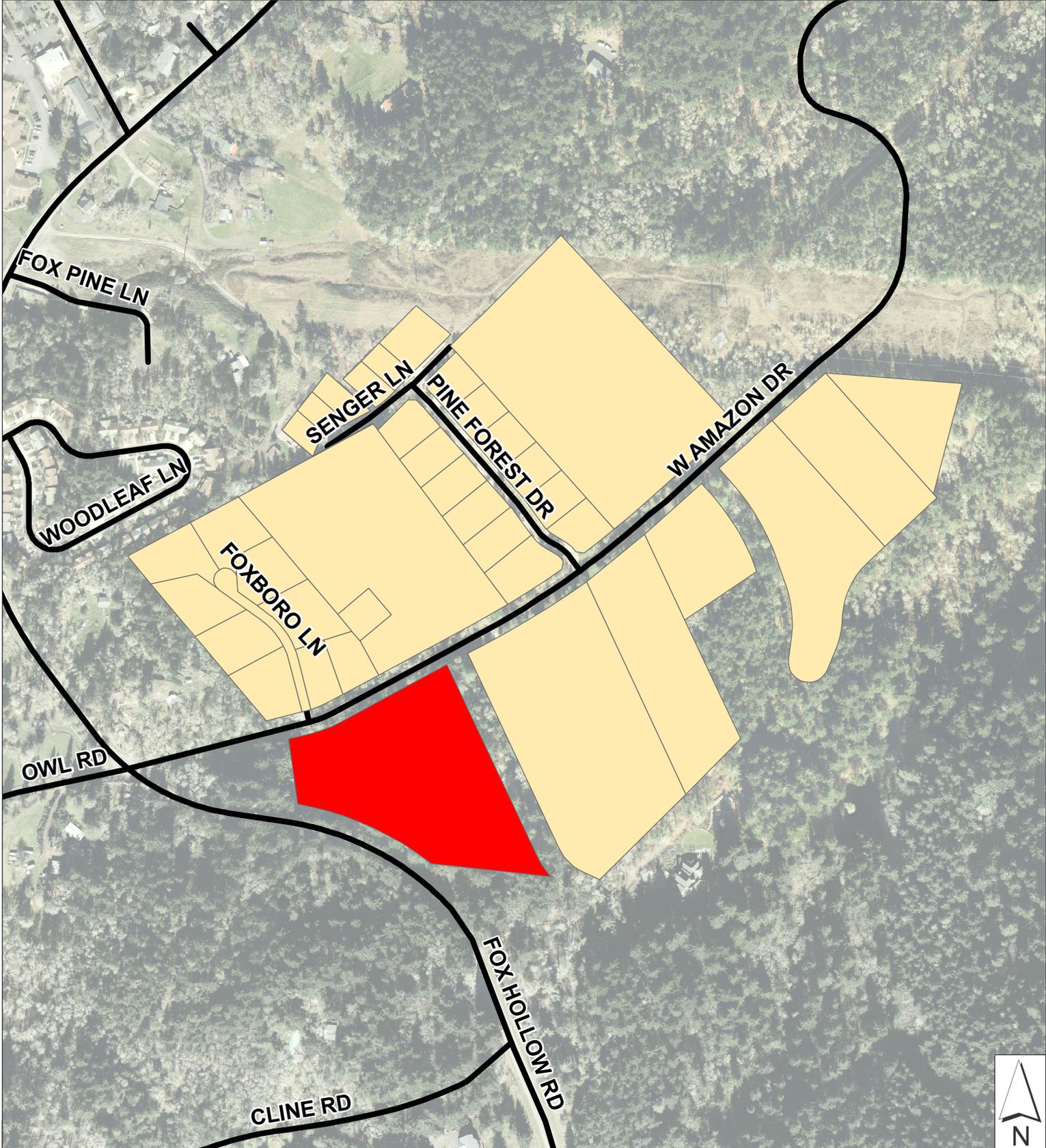
- City Limits
- Streets



Caution:
This map is based on imprecise
source data, subject to change,
and for general reference only.



~~Attachment D~~ - Lots Accessing West Amazon Drive



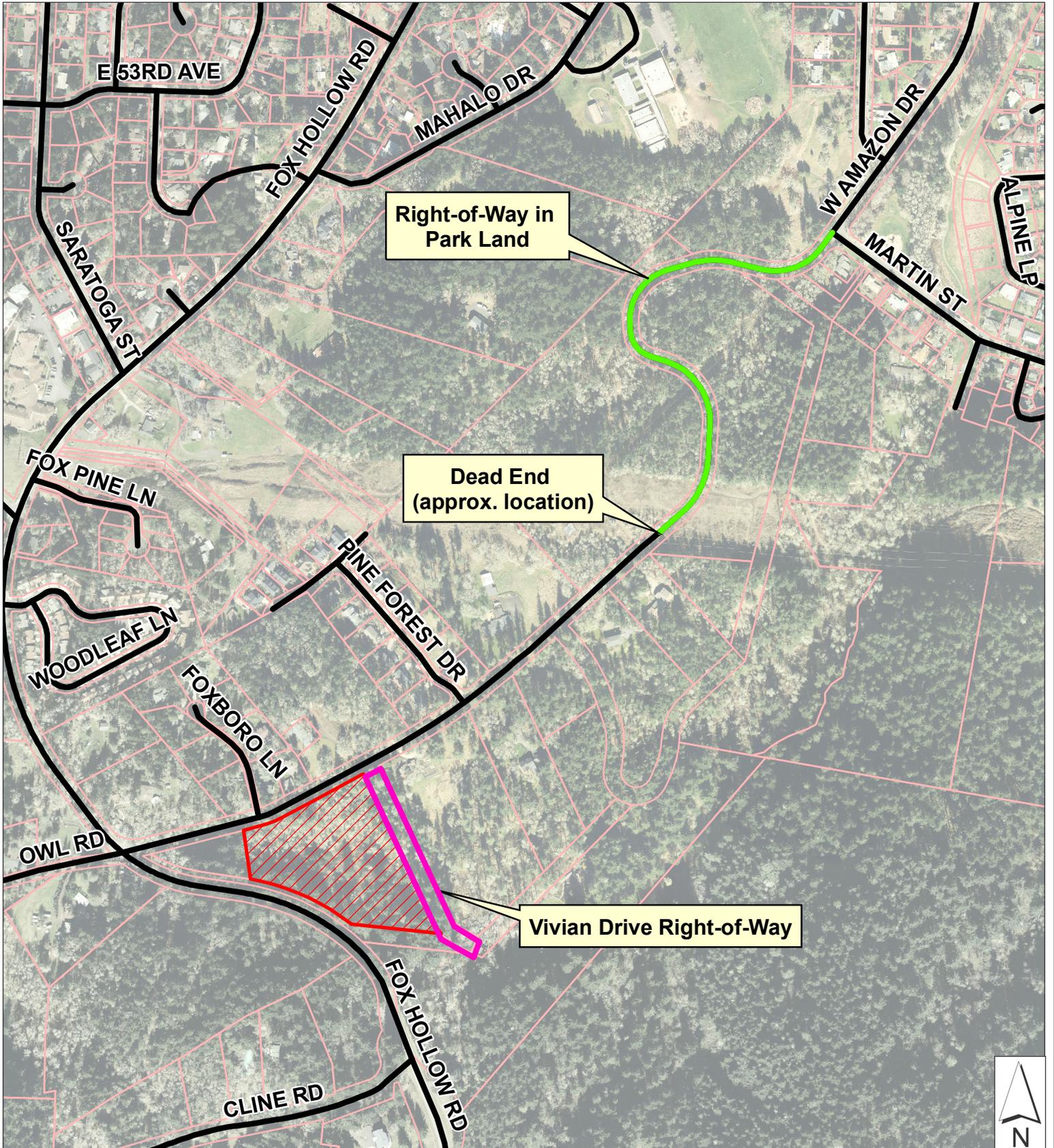
- Lots Accessing W. Amazon (36 lots)
- Subject Property
- Streets



Caution:
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and for general reference only.



~~Attachment C~~ - Right-of-Way Map



Right-of-Way in Park Land

Dead End (approx. location)

Vivian Drive Right-of-Way

-  Subject Property
-  Right-of-Way in Park Lands
-  Streets
-  Taxlots



Caution:
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December 16, 2015

Eugene Planning Commission
c/o Eugene Planning and Development
Atrium Building
99 West 10th Ave.
Eugene, OR 97401

Re: Chamotee Trails PUD (PDT 15-1/ARA 15-13);
Applicant's Appeal of Hearings Official Denial to Planning Commission

Dear Commissioners:

The proposal is for a 10-lot tentative planned unit development on 5.19 acres in the South Hills, to be processed under the Needed Housing Track in the code and the state law that applies directly to such applications.

This appeal incorporates our attached Final Argument to the Hearings Official dated November 23. We have also attached a full copy of LUBA's decision in *Group B LLC v. City of Corvallis*, ___ Or LUBA ___ (August 25, 2015), because it is on point and discussed extensively in the record. It is a good read.

References herein to the major documents will be:

Applicant Hearing Letter (Nov. 3)
Branch Engineering Post-Hearing Letter (Nov. 12)
Applicant Final Argument (Nov. 23)

Staff Report (Oct. 23)
Staff Hearing Memo (Nov 3)
Staff Post-Hearing Memo (Nov. 12)
City Attorney Memo (Nov. 12)

As a final introductory note, the decision of the Hearings Official borrows much text from the Staff Report, and it refers to a "Staff Decision." There is no staff decision, just a Staff Report. The Hearings Official made the initial decision.

I. Introduction

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The Hearings Official denied the application solely for failure to comply with the code standard commonly called the 19 Lot Rule.

“The Hearings Official finds that the application should be denied because it cannot comply with EC 9.8325(6)(c) – the 19 lot rule. The proposal is for “needed housing” as used in ORS 197.303-306. However, EC 9.8325(6)(c) is a clear and objective standard with which this particular application cannot comply.”

The “19 Lot Rule” is:

Standard EC 9.56875(c): The street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street when the PUD exceeds 19 lots or when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19.

The 19 Lot Rule applies to Needed Housing PUDs but not to Needed Housing Partitions or any kind of approvals under the General Track with discretionary standards.

The error the City is making here is the same as in *Group B*. There the City applied what it said was a clear and objective standard to deny a Needed Housing application. LUBA found the standard to be ambiguous, and then applied the Needed Housing Statute to tell the City it could not apply the standard. It reversed the denial. The central themes in this appeal related to the Needed Housing Statute are:

Here we have the same situation as in *Group B*. The Hearings Official and the City Attorney found that the standard is clear and objective. It is not. “Disperse” is ambiguous. Because the term is ambiguous, and can be read to either approve or deny the use, the standard may not be applied at all, as in *Group B*.

The City finding that the developer of this site can take its chances under the discretionary standards of the General Track is contrary to state law. That statute only allows the City to apply discretionary standards if the “applicant retains the option of proceeding under the approval process” that applies clear and objective standards. ORS 197.307(6). So, the city position is contrary to the statute.

When the City included this land in the Buildable Land Inventory (BLI) it vouched to the state that the land would be available for residential development under clear and objective standards. Now the City is saying that it is not available. That finding is contrary to the acknowledged plan and contrary to the Needed Housing Statute, which guarantees the right to develop under clear and objective standards, not the right to be denied under clear and objective standards. Whether the 19 Lot Rule is clear or ambiguous, the City may not apply it to deny development.

The Commission should reverse the denial and approve the Tentative PUD.

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II. Summary of Issues

Three issues are raised in this appeal, and one precautionary issue:

1. **The 19 Lot Rule meaning in the Code:** The Hearings Official selected the wrong definition of “disperse.” Neither the code language nor the context for the code language requires that traffic be dispersed to any particular point or distance from the project.

2. **The 19 Lot Rule under State Law:** The Hearings Official erred in finding, at pages 14-15, that the 19 Lot Rule is a clear and objective standard because “disperse” has a plain meaning. The standard is ambiguous because “disperse” is not defined. There are at least two possible interpretations – one that the application would comply with, and one that it would not. The Needed Housing Statute prohibits applying standards that are not clear and objective. Therefore, the 19 Lot Rule may not be applied.

3. **The 30’ Landscape Buffer under State Law:** The Hearings Official erred in applying this standard at all. He interpreted the standard to include an exception as to where the buffer applies when the plain language does not allow any interpretation. His rationale is unexplained. He should have declined to apply the standard in its entirety because, if applied according to its plain terms, it would not allow any development, contrary to the Needed Housing Statute.

We raise this fourth assignment as a precaution:

4. Although the Hearings Official did not address this issue, it would be error for the City to direct the applicant to the Needed Housing Partition process as an alternative approach to developing this project. That approach, although it would not invoke the 19 Lot Rule, would unreasonably delay and increase the cost of needed housing, contrary to ORS 197.307(4).

III. Code provisions relevant to filing this appeal:

EC 9.7655 explains the contents of an appeal:

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.

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EC 9.7680 explains what the Commission may do with an appeal:

The planning commission shall affirm, reverse, or modify any decision, determination, or requirement of the hearings official or historic review board. In addition, upon concurrence of the applicant, including waiver of the right to a decision within 120 days, and with the payment of an additional fee, the decision can be remanded to the original decision-maker. Before reversing the decision, or before changing any of the conditions of the hearings official or historic review board, the planning commission shall make findings of fact as to why the hearings official or the historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The action must be agreed to by a majority of the members present at the hearing. A tie vote results in affirming the decision of the hearings official or the historic review board. The planning commission's action is final.

This appeal is filed by the applicant, on a city appeal form, in a timely fashion, with the listing above of issues on appeal, all of which were raised in the record before the Hearings Official.

IV. Discussion of the issues:

Issue 1: The 19 Lot Rule meaning in the Code: The Commission should find that the Hearings Official selected the wrong definition of “disperse.” Neither the code language nor the context for the code language requires that traffic be dispersed to any particular point or distance from the project.

The Hearings Official concluded that the 19 Lot Rule is clear and objective and has a plain meaning. Decision pages 14-15. That conclusion is patently wrong. The standard is ambiguous and must be interpreted.

Code language is ambiguous if it can be given more than one meaning. Whether it is ambiguous is a question of law, which LUBA will ask afresh. In other words, the Hearings Official saying it has a plain meaning does not make it so. To determine the meaning of ambiguous language the City must consider the text of the provision, the larger code context for the provision, and relevant legislative history.

Here there are two plausible interpretations: (1) Traffic must be able to leave the site in two directions on a “public local street” as defined in the code, which includes an unimproved street; this is the “get out” meaning; (2) Traffic must be able to leave the site in each direction and go around to the point of the beginning; this is the “go around” meaning; as explained by the staff and the Hearings Official, it is the same as having “secondary access.” As the Hearings Official said: “[T]raffic at a minimum must be able to go somewhere in two different directions that do not terminate in a dead end.” Decision at 15 para 4. The first meaning fits the text, context and legislative history. The second meaning, chosen by the Hearings Official, adds language to the

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code that is not there and is not supported by the context or legislative history. The “get out” interpretation is better than the “go around” interpretation.

Looking at the text, context, and legislative history of this standard, here is what can be said for sure:

Text:

As the Staff Report correctly explains at pages 8-9, a street that meets this standard may be unimproved at some point because “street” is defined to include “unimproved” right-of-way. EC 9.0050 says:

*Street. An improved or unimproved public or private way, other than an alley, that is created to provide ingress or egress for vehicular traffic to one or more lots or parcels, excluding a private way that is created to provide ingress or egress to land in conjunction with the use of land for forestry, mining, or agricultural purposes. * * * * [Emphasis added]*

Context:

“[D]isperse motor traffic onto more than one public local” street cannot have the same meaning as having “secondary access,” as the Staff and the Hearings Official believe, because the phrase “secondary access” is used elsewhere in the code. See EC 9.6870 Table; EC 9.6815(2)(d). Different terms in the code are presumed to have different meanings. If the City Council had intended that “disperse” traffic in the 19 Lot Rule meant the same thing as having secondary access, then it would have used the phrase “secondary access.” Thus, the “go around” or “secondary access” meaning must be wrong.

Also, this standard is not about fire safety, because it does not appear in the other approaches to developing land. For example, as staff explained, the applicant could get to this same development pattern, more slowly and expensively, by doing five partitions in three successive series under the standards for Needed Housing Partitions, or under any of the General Standards. Those alternative approaches would not invoke the 19 Lot Rule. So, it’s not about fire safety. This project meets the fire code by sprinkling the houses.

Legislative History:

The legislative history also shows that including the 19 Lot Rule for Needed Housing PUD was not about dealing with fire safety. See discussion in Final Argument beginning page 3 second last para, quoting legislative history from 1999-2001.

Summary:

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The Code says that traffic must be dispersed onto a street, including a street that is unimproved, because a “street” includes unimproved streets. A car turning right onto the street and proceeding about 1000 feet to where the street is unimproved is being dispersed in the meaning of the code.

The Hearings Official erroneously gave the 19 Lot Rule a wholly different meaning. He would require two independent ways into and out of site from anywhere. That would be “secondary access,” which is a different phrase used elsewhere in the code. The Rule could have been written to say secondary access, but it was not.

The Hearings Official summarized the position of the Fire Marshall as opposing the project, for lack of secondary access, even though he stated that “it is not directly relevant with respect to the applicable standard here.” Decision at 13 last para. He is correct that it is not relevant to the meaning of the standard. But he is wrong about the final position of the Fire Marshall. The record shows, with a Nov. 4 email from the Fire Marshall, that the development complies with the fire code if the dwellings have sprinklers, regardless of the number of units served by a single access. The applicant committed to sprinklers. Maybe the Hearings Officer missed this.

If the Commission agrees with the applicant’s reading of the 19 Lot Rule then it need not address Issue 2 below.

Issue 2: The 19 Lot Rule under State Law: The Hearings Official erred in finding, at pages 14-15, that the 19 Lot Rule is a clear and objective standard because “disperse” has a plain meaning. The standard is ambiguous because “disperse” is not defined. There are at least two possible interpretations – one that the application would comply with, and one that it would not. The Needed Housing Statute prohibits applying standards that are not clear and objective. Therefore, the 19 Lot Rule may not be applied.

The Applicant filed under the Needed Housing Track in the code because state law applies directly to require the City to apply only standards that are clear and objective on their face, and that can only be applied in a clear and objective way. The Hearings Official escaped this law by finding that the 19 Lot Rule is clear and objective when it plainly is not.

As a quick introduction, three statutes apply directly here:

When the application is for “needed housing” ORS 197.307 applies. It says in part:

(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

* * * *

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(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.

ORS 227.173(2) raises the bar for the City for when a standard can meet the statute. It says:

(2) When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.

Finally, there is a special burden of proof that the City will have to meet to defend its decision on appeal. ORS 197.831(1) says:

197.831 Appellate review of clear and objective approval standards, conditions and procedures for needed housing. In a proceeding before the Land Use Board of Appeals or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for needed housing, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner.

These statutes operate simply. If the City has not shown that a standard is clear and objective on its face, and that it can only be applied in a clear and objective manner, then the City may not apply it to make the decision. See *Parkview Terrace Dev't Inc. v. City of Grants Pass*, ___ Or LUBA ___ (No. 2014-024, July 23, 2014) (reversing city denial of apartments because seven standards were discretionary, thus “outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]”); *Rudell v. City of Bandon*, 62 Or LUBA 279 (LUBA No. 2010-037, November 29, 2010)(city could not apply several standards for a conditional use permit for a single dwelling because they were not clear and objective).

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For purposes of applying this statute, the question is whether the 19 Lot Rule is susceptible to alternative interpretations, including one that would approve the use and one that would deny the use. The issue under the statute is not about the right interpretation.

As discussed in the first assignment, we have that situation here. One interpretation is the “get out” interpretation, and the other is the “go around” interpretation. We think the “get out” meaning is right, but both are plausible. Both being plausible, however, is fatal to applying the standard at all, because it is not clear and objective.

The *Group B* decision from Corvallis is the most recent example of how this works. It is discussed more fully in the Final Argument, at pages 8-9, 11, 13. The essentials, however, are that a relevant standard there was ambiguous and could be interpreted to either allow or disallow the project. LUBA held, therefore, that it could not be applied at all. LUBA said:

However, because the proposal is needed housing located on inventoried buildable lands, ORS 197.307(4) prohibits the city from applying any unclear or subjective standards or conditions to approve or deny the proposed needed housing. [*Group B* at 15]

* * * *

A condition that requires such interpretation, to determine whether proposed needed housing is allowed at all, is not a “clear and objective” standard or condition within the meaning of ORS 197.307(4).” [*Group B* at 11 line 10]

* * * *

The city council found that Condition 12 is an approval standard for the proposed development, and that the applicant must either satisfy Condition 12 or demonstrate that a modification of Condition 12 is warranted under the compatibility standards at LDC 2.5.40.04. [*Group B* at 9 line 9]

* * * *

Petitioner argues that Condition 12 is not a “clear and objective” standard or condition within the meaning of ORS 197.307(4). [*Group B* at 9 line 19]

* * * *

We agree with petitioner that Condition 12 is ambiguous and requires interpretation as applied to the proposed development. Condition 12 unambiguously prohibits the location of The Regent building within 135 feet of the south property line of what is now Tract B. However, Condition 12 is ambiguous regarding whether other development is similarly precluded within the area that is now Tract B. [*Group B* at 10-11]

* * * *

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Because Condition 12 is ambiguous regarding whether any development (including needed housing) of Tract B is allowed at all, and is not clear and objective, the city cannot apply Condition 12 to prohibit the proposed needed housing, or as a vehicle to subject the proposal to subjective approval standards at LDC 10 2.5.40.04.” [*Group B* at 15 line 1.]

The very same rationale applies here. If the Commission agrees with the staff and the applicant, that the standard is ambiguous, then it will need to choose between two competing interpretations – one that allows the use and one that prohibits the use. In that event the Commission must find that the 19 Lot Rule may not be applied under the statute, as explained in *Group B*.

The Hearings Official attempts to distinguish the *Group B* LUBA opinion from this application. Decision at 16 para 2. There is no distinction; the holding of *Group B* is squarely on point. The key holdings from *Group B* are quoted above. Note that the Hearings Official distinguishes the case because it turned on an ambiguous 1981 condition that applied to the site. However, the City treated the 1981 condition as a “standard;” LUBA explained that the statute applies to both “standards and conditions;” and LUBA explained it is immaterial whether the standards and conditions are brought forward from previous decisions or are in the current code.

The Hearings Official, at page 15 second last para, also incorporates as findings the arguments of the City Attorney in Part II of her November 12 memo. We address those findings here.

In Part II.A. the City Attorney says that this application may be denied because it fails to comply with a clear and objective standard. As we have explained above, the standard is not clear and objective. The number 19, of course, is clear, but what it means to “disperse” is ambiguous. Does disperse mean a secondary access is required? Because disperse can have alternate meanings to approve or deny, it is not clear and objective and may not be applied.

In Part II.B. the City Attorney says that state law does not require that land in the BLI must be developable in all instances under clear and objective standards; this developer can always apply and take its chances under the general standards. The City Attorney has it backwards; completely backwards. The statute says that the City may only apply standards in a discretionary track if the applicant has the right to develop the site under clear and objective standards. See ORS 197.307(6)(a) quoted above. Here, the only way to allow development under clear and objective standards is to not apply the 19 Lot Rule, whether it is viewed as clear and objective or not. The rationale for this is simple. When the City submitted its Buildable Land Inventory for acknowledgment, it vouched to the state that the BLI lands included enough acres for 20 years of residential development. The City can’t tell the state that it is developable and later say that it is not developable. That is what the Hearings Official and the City Attorney are asking the Commission to say here.

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Issue 3: The 30' Landscape Buffer under State Law: The Hearings Official erred in applying this standard at all. He interpreted the standard to include an exception as to where the buffer applies when the plain language does not allow any interpretation. His rationale is unexplained. He should have declined to apply the standard in its entirety because, if applied according to its plain terms, it would not allow any development, contrary to the Needed Housing Statute.

The 30' Buffer Rule is:

EC 9.8325(3): The PUD provides a buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD according to EC 9.6210(7).

The Hearings Official was comfortable reading this standard to except out roads from “surrounding properties.” He explicitly declined to address our argument that this standard is clear and objective and does not allow interpretation to except out roads. See Decision at page 8.

Please see applicant’s argument on this issue that the Hearings Official ignored. Final Argument at pages 18-20. That also explains why the 30’ buffer is so troublesome for development.

To summarize our argument about this standard:

1. The plain language of this standard requires a landscape buffer around the entire perimeter. That would prohibit development.
2. A standard that is a prohibition on development, in the guise of a standard like this one, is contrary to the statute, which requires the City to allow development under clear and objective standards, not prohibit it. LUBA struck down a storm water standard in this code for the same reason in 2002 in the *Home Builders* decision. See our Final Argument at pages 12-13.
3. The staff rejected applying the 30’ Buffer Rule according to its plain terms because they say it would be an “absurd” reading of the Rule. LUBA and the courts will not let the City use an “absurd results” theory to change the meaning of the 30’ Buffer Rule. That is a highly disfavored approach; furthermore, the “absurd results” theory is only to be used in the last stage of statutory construction when trying to identify which of multiple interpretations is more plausible after review of the text and context of a provision. See, e.g., *Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 24, 806 P2d 162 (1991). The correct approach is to do what LUBA did with the storm water standard in *Home Builders* – recognize that the plain language is a prohibition of development in the guise of a clear and objective standard, and, therefore, decline to apply it, based on the Needed Housing Statute.

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Precautionary Issue 4. Although the Hearings Official did not address this issue, it would be error for the City to direct the applicant to the Needed Housing Partition process as an alternative approach to developing this project. That approach, although it would not invoke the 19 Lot Rule, would unreasonably delay and increase the cost of needed housing, contrary to ORS 197.307(4).

It was the staff's theory, raised in its Staff Hearing Memo, and elaborated upon in its Staff Post-Hearing Memo, that it is OK to deny under the 19 Lot Rule because this applicant could get to the same development approval through five discrete partition applications and approvals under the Needed Housing Partition process.

The Hearings Official declined to address this issue. "The fact that the applicant can potentially develop through partitions or the discretionary PUD track are not relevant to the findings set out below." Decision at 5.

Neither should the Commission address this issue. This theory is not an escape hatch for the Commission to apply the 19 Lot Rule when that rule is contrary to state law. The applicant explained that forcing the applicant into five discrete applications for minor partitions would greatly increase the cost of delivering housing and also greatly delay its delivery. The added costs and delay would not be reasonable. This is prohibited by the Needed Housing Statute.

See the discussion in our Final Argument at pages 14-18 discussing this issue in detail.

Sincerely,

Bill Kloos

Bill Kloos

Incl:

Applicant's Final Argument to Hearings Official (Nov. 23, 2015)
Group B LLC v. City of Corvallis __ Or LUBA __ (Aug. 25, 2015)

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December 16, 2015

Eugene Planning Commission
c/o Eugene Planning and Development
Atrium Building
99 West 10th Ave.
Eugene, OR 97401

Re: Chamotee Trails PUD (PDT 15-1/ARA 15-13);
Applicant's Appeal of Hearings Official Denial to Planning Commission

Dear Commissioners:

The major case the applicant is relying upon for its argument under the Needed Housing Statute is the recent opinion of LUBA in the *Group B, LLC* matter in the City of Corvallis. The legal issue is identical, notwithstanding the Hearings Official's attempt to distinguish it.

That LUBA opinion has now been affirmed by the Court of Appeals. The full citation is: *Group B, LLC v. City of Corvallis*, __ Or LUBA __ (August 25, 2015), *aff'd without opinion* 275 Or App 577 (Dec. 16, 2015).

The Court's decision does not add anything to the LUBA decision. It just says that LUBA got it right.

Sincerely,

Bill Kloos

Bill Kloos

**DECISION OF THE HEARINGS OFFICIAL
FOR THE CITY OF EUGENE, OREGON**

TENTATIVE PLANNED UNIT DEVELOPMENT

Application File Name (Number):

Chamotee Trails PUD (PDT 15-1; ARA 15-13)

Applicant's Request:

Tentative Planned Unit Development and Adjustment Review approvals for the creation of 10 buildable single-family lots and 1 common open space lot.

Applicant

Tom Walter, Walter Development, LLC

Subject Property/Location:

Tax Lot 1101 of Assessor's Map 18-03-20-23; Located south of Foxboro Lane and east of the intersection of Fox Hollow Road and West Amazon Drive.

Relevant Dates:

PUD application submitted on February 18, 2015; Adjustment Review application and supplemental materials for PUD submitted on August 10, 2015; application forced complete with an extra 30-day review period at applicant's request on August 12, 2015; public hearing held November 4, 2015. Written record closed on November 23, 2015.

Applicant's Representatives:

Renee Clough, Branch Engineering, Inc. (541) 746-0637
Bill Kloos, (541) 343-8596

Lead City Staff:

Erik Berg-Johansen, Assistant Planner, Eugene Planning Division, Phone: (541) 682-5437

Description of Planned Unit Development Request

The applicant requests Tentative Planned Unit Development (PUD) and Adjustment Review approvals for 11 lots (10 buildable residential lots and 1 open space parcel). The applicant proposes to develop single-family homes consistent with the R-1 Low-Density residential zone. The proposed density will be a total of 10 units on 5.19 gross acres, which equals a calculated density of 1.9 units per acre.

Site Context

The subject property is located in the south hills of Eugene, and is zoned R-1 Low-Density Residential. A "WR" Water Resources overlay zone was originally applied to the subject property, but it was removed by an Overlay Zone Correction application process (OC2 12-1) that was initiated by the current property owner in 2012. Through this process it was confirmed that no regulated Goal 5 water resources exist on the subject site.

The area generally consists of single-family residences zoned either R-1 or AG (Agriculture). All adjacent

properties are zoned either R-1 or R-1/WR. Directly north and abutting the subject property is West Amazon Drive, a partially improved right-of-way that provides access to the subject property. On the other side of West Amazon Drive are eight single-family homes built along Foxboro Lane (a cul-de-sac). Abutting and to the east is Vivian Drive, an unimproved right-of-way that ends at the southeast corner of the property. Directly west and at the corner of Fox Hollow Road and West Amazon Drive is a privately owned, undeveloped residential property.

To the south and southwest of the property is land owned by the City of Eugene. This land is partially adjacent to Fox Hollow Drive, runs parallel to the right-of-way and then wraps around the southern boundary of the subject property. That strip of land was originally intended to provide public access to a portion of the City's recreational trail system. According to a deed restriction for the property, the property "shall be used for park purposes" and is labeled as a "riding trail" on the Lane County Tax Assessor's maps.

As noted above, the site has access from West Amazon Drive. This street has only one connection to the City's transportation network, which exists at Fox Hollow Drive. While the West Amazon Drive right-of-way continues to the northeast (where it meets Martin Street and runs parallel to East Amazon Drive), no street has been constructed that would provide a through connection for motor vehicle access. The City of Eugene recently purchased the land abutting that unimproved right-of-way segment for park purposes, and plans to maintain the land as a natural area and part of the ridgeline trail system. For this reason, staff found that the street connection will likely never be made.

Public Notice and Referrals

Public notice was mailed and posted on October 1, 2015, consistent with the requirements of EC 9.7315 Public Hearing Notice. The Planning Division received public testimony from neighbor Ross Williamson, who argued that three deficiencies exist with the original application: 1) the application does not demonstrate it is for needed housing as defined by state law; 2) no 5' interval topographic map was submitted; and 3) a tree protection plan to "insure maximum preservation of existing vegetation" was not submitted. He also argued that no documentation exists in the application in regards to certain Public Works issues that were brought up at the applicant's neighborhood meeting. These issues were related to paving width, sewer, and sidewalks.

Mr. Williamson also sent written testimony regarding the Adjustment Review application. He believes that while the applicant requested an adjustment to street paving standards, they are actually trying to adjust connectivity standards that might require a connection to Vivian Drive. Mr. Williamson also notes that connectivity standards are not subject to an adjustment.

Neighbor Richard Zeller also submitted written testimony regarding the proposed PUD. Mr. Zeller's letter discusses fire safety and egress issues, the proposed "detention facility" for stormwater, the Vivian Drive right-of-way, and the proposed pump system for sewage. He also stated that the applicant assured him that future homes on the lots adjacent to Vivian Drive will be constructed toward the uphill side of each lot, but that he would like further assurance that this will be implemented. Finally, he stated that he does not oppose the proposal in general, but believes there should be various conditions of approval to address the issues specified in his letter.

No other written testimony was received as of the publication of the staff report. However, on November 2, 2015, the applicant's attorney Mr. Kloos submitted a letter suggesting that the Hearings Official should

recuse himself from the hearing due to a potential separation of powers problem. That issue is discussed in more detail below. On November 3, 2015, Mr. Kloos submitted an additional letter summarizing the primary reasons why the staff recommendation of denial should be set aside.

The Planning Division also provided information concerning the application to other appropriate City and County departments, public agencies, service providers, and the affected neighborhood group. All referral comments received by the Planning Division on this application are included in the application file for reference, and addressed in the context of applicable tentative PUD approval criteria.

Consistent with EC 9.7005 Pre-application Conference, the applicant met with staff in April of 2014 (PC 14-20). The applicant held a neighborhood meeting on January 27, 2015, in compliance with EC 9.7007 Neighborhood/Applicant Meetings.

Summary of the Public Hearing

On November 4, 2015, the Hearings Official held a public hearing. The Hearings Official stated he had no conflicts of interests and had no *ex parte* communications to disclose. Mr. Kloos reiterated his position asking the Hearings Official to recuse himself, but did not offer further oral argument on the issue. I declined the request that I recuse myself because I disagree that a separation of powers problem exists in connection with my duties to the City of Eugene as an independent contractor providing hearings officer services. The origin of the applicant's recusal request is that the Hearings Official is currently a member of the Oregon House of Representatives, representing House District 34, which is in Beaverton, Oregon. The applicant's argument is that it might be possible for my legislative functions as a state representative to interfere with my quasi-judicial functions as a Hearings Official. My determination was that no potential conflict exists for two primary reasons: 1) the relative duties exist at different levels of government and do not intersect through the review of the applicant's request, and 2) that even if there were an intersection of duties, none of the legislation that I might have voted on in my first term in 2015 could have yet been adopted or enforced at the municipal level in the city. After those explanations, I continued with the public hearing.

Planner Erik Berg-Johansen provided an overview of the staff report and explained the nature of the proposed planned unit development. Staff recommended denial of the applications primarily for failure to comply with EC 9.8325(6)(c).

Mr. Kloos spoke on behalf of the applicant. His testimony generally followed the argument set forth in his November 3, 2015, letter. Mr. Kloos argued that because the site is over 5 acres in size, a PUD application is required. He explained that since the proposal qualified as "needed housing," it was entitled to be reviewed under the clear and objective standards set forth in EC 9.8310. As such, he argued that once the determination of needed housing is made, ORS 197.303-307, the "Needed Housing Statute," ensures the right to develop under those clear and objective standards. For this reason, he argued, EC 9.8325(6)(c) – the so called "19 lot rule," cannot be the basis upon which to deny the application. As support, Mr. Kloos offered the Land Use Board of Appeals' recent decision in *Group B, LLC v. City of Corvallis*, __Or LUBA__ (LUBA No. 2015-019, August 25, 2015). In addition, he argued that LUBA's decision in *Home Builders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370 (2002) forbid denial of a needed housing development when a particular clear and objective standard was near impossible to meet.

Mr. Kloos also argued that for similar reasons the application could not be denied for failure to comply with EC 9.8325(3) which required a buffer area between the proposed development and surrounding properties. He asserted that the plain language of the standard does not allow fences within the buffer or access roads to cross the buffer area. As a result, he stated that the standard could not be applied to a PUD proposal.

Two neutral parties testified. Mr. Richard Zeller, similar to his written comments, questioned whether the applicant adequately studied runoff potential since the related assessment was done during the dry months of the year. He also asserted that the 19 lot rule had the purpose of addressing fire danger for areas that did not have more than one ingress or egress route. Similarly, Mr. Larry Levinson argued that the 19 lot rule was a guard against the danger of wildfire. He also raised concerns about the need to pump sewage from the proposed home uphill to the line in West Amazon road.

Mr. Ross Williamson testified in opposition to the application. He made the following arguments:

- a. The application must be denied because under EC 9.8325(1) the project does not meet the state definition of “needed housing.” In particular, he argued that neither the applicant, nor the staff had determined that the single family homes proposed met the definition for housing at “particular price ranges or rent levels.” Further, he argued that the city’s recent Envision Eugene document states that no additional land for housing is necessary.
- b. The applicant can proceed under the discretionary PUD provisions because the project does not provide “needed housing.” The fact that other PUD applications on nearby properties have been denied (Deerbrook) is not relevant to the current application.
- c. The proposal violates EC 9.8325(5) regarding development on slopes over 20% because the applicant’s map shows areas within the development envelope that exceed 20%.
- d. The staff’s opinion that Vivian Way can be excluded from consideration under the city’s street connectivity standards (for topographic reasons) is not supported by substantial evidence in the record.
- e. The 19 lot rule implements a fire safety function. He provided information on a recent wildfire event at the intersection of West Amazon (Owl Rd.) and Fox Hollow Road that temporarily trapped residents on West Amazon.
- f. The adjustment requests are unnecessary and provide a means for the applicant to avoid various street connectivity standards.
- g. He argued that Mr. Kloos’s interpretation of the buffer requirement in EC 9.8325(3) is absurd and need not be applied so strictly.

The Hearing Official invited staff to respond to issues raised during public testimony. In response to the Hearings Official’s question, staff responded that the subject property could be developed through partition, or multiple partition, rather than just the PUD process as Mr. Kloos asserted. Staff also explained that the city’s Buildable Lands Inventory (“BLI”) included an assessment of “needed housing” as required by ORS 197.307 and Statewide Planning Goal 10. The BLI identified housing types for the

“particular prices ranges and rent levels” as the statute requires. Staff stated that the city had determined that all housing types were needed in the city pursuant to ORS 197.307 and Goal 10, and therefore, the proposal is for “needed housing.”

The applicant provided a brief rebuttal reiterating prior arguments and specifically asking the Hearings Official to make a finding that Vivian Way cannot be built due to steep slopes and that the adjustment request is unnecessary because the connectivity standard will be met.

At the end of the hearing, all parties agreed to an open record period as follows: 1) record open for argument and evidence on any issue from any party until November 12, 2015, 2) record open for responsive testimony and evidence until November 19, 2015, and 3) applicant’s final argument due November 25, 2015.

Mr. Williamson submitted argument by email on November 10, 2015. Staff submitted a memorandum with an attached letter from the city attorney’s office both dated November 12, 2015. Mr. Kloos submitted a final argument on November 23, 2015 and the record closed on that day. No objections were made to the argument and evidence submitted during the open record period.

Documents Considered by the Hearings Official

The Hearings Official has considered all the documents submitted into the record either in writing, during the public hearing, or during the open record period.

Summary of Decision

The Hearings Official finds that the application should be denied because it cannot comply with EC 9.8325(6)(c) – the 19 lot rule. The proposal is for “needed housing” as used in ORS 197.303-307. However, EC 9.8325(6)(c) is a clear and objective standard with which this particular application cannot comply.

Although I inquired during the public hearing about alternative application options for developing the property, the responses to those questions do not play a part in this decision. The fact that the applicant can potentially develop through partitions or the discretionary PUD track are not relevant to the findings set forth below.

As a Hearings Official it has been my practice to avoid making what might be viewed as a type of declaratory decision on contested provisions where I find the application must be denied for failure to comply with at least one substantive standards. I will follow that practice here with regard to the landscape and buffer standards in EC 9.8325(3). Although I want to be helpful to the Planning Commission if there is an appeal of this decision, responding to Mr. Kloos’s arguments in connection with this standard and wading into the past determinations of the Planning Director as part of this application appears more likely to muddy future analysis than to aid it. That is particularly true if the applicant decides to pursue a different type of application under the discretionary PUD standards in the future.

Evaluation of Tentative Planned Unit Development Request

EC 9.8325(1): The applicant has demonstrated that the proposed housing is needed housing as defined by State statutes.

Staff decision:

Oregon Revised Statutes define needed housing as follows:

197.303 "Needed housing" defined. (1) As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing" means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing" also means:

- (a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;*
- (b) Government assisted housing;*
- (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and,*
- (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions.*

With regard to ORS 197.303(1), the City's housing needs projection is embodied in the Eugene-Springfield Metropolitan Area Residential Lands and Housing Study 1999 Draft Supply and Demand Technical Analysis (ESRLS) and 1999 Draft Site Inventory Document. The City's housing needs projection identifies a need for:

- ✓ *Single-family detached housing, including manufactured dwellings on lots;*
- ✓ *Single family attached housing;*
- ✓ *Multi-family housing; and*
- ✓ *Manufactured dwelling parks.*

In order to establish that the type of housing proposed for development is "needed housing," an applicant must show that the proposed housing falls within one of the housing types identified in the City's housing needs projection or one of the types of housing identified in the statutes as "needed housing." The applicant states that the site is included in Subarea 6 Southeast Eugene, in the Eugene-Springfield Metropolitan Area Residential Lands and Housing Study Draft Site Inventory Document, but is not given a specific site number since it is less than 10 acres. The applicant also states that local documents identify a need for single-family housing which is an allowed needed housing type under the state definition. The applicant's written statement confirms that their request is for 10 single-family residential lots, which is identified as needed housing within the ESRLS and at ORS 197.303(1)(a), and consistent with this criterion.

No further analysis of the proposed housing type is necessary to demonstrate that the proposed housing falls within a needed housing category and therefore it is allowable for the proposed application to be reviewed under the needed housing criteria rather than the general criteria. If the Hearings Official ultimately approves the application, to ensure compliance with this criterion, the following condition of approval is recommended:

- The applicant shall submit a "Use Restriction" or "Codes, Covenants, and Restrictions" (CC&R's) to be recorded with the final plat that stipulates that the lots of the proposed

subdivision shall be developed only with needed housing and uses accessory to that housing. The document shall be subject to prior review and approval by the City's Planning Director during the final plat review process. The document shall stipulate that the use restriction is enforceable by the City of Eugene and that any amendment to, or removal of, the established use restriction is subject to prior review and approval by the City's Planning Director.

Based on these findings and the condition of approval noted above, this criterion is met.

Hearings Official Findings:

Mr. Williamson both at the November 4, 2015 hearing, and in more detail in his November 10, 2015 submission makes two related arguments: 1) that the staff decision does not directly comply with the definition of "needed housing" in ORS 197.303 and that term's use in ORS 197.307, and 2) to the extent that the city has accounted for needed housing in its BLI, it cannot sidestep the state statutes because ORS 197.304 requires that needed housing be satisfied within the City of Eugene alone and therefore, the joint Springfield/Eugene BLI cannot be relied upon to account for needed housing.

The November 12, 2015 staff memo and accompanying city attorney memo argue that ORS 197.303-307 are satisfied through the work that the city has already done, and has been acknowledged by the Land Conservation and Development Commission and the Department of Land Conservation and Development, with regard to housing in compliance with Goal 10. The city attorney argues that the BLI and the city's Housing Needs Analysis ("HNA") have already taken into account information on price ranges and rent levels. The BLI and HNA process is conducted in terms of "housing types" in order to comply with state statute and Goal 10. According to the city attorney, once the number of housing types that are needed are identified, future individual review of price ranges and rental levels for a particular quasi-judicial land use application are unnecessary. The applicant's final argument of November 23, 2015 generally concurs with the city attorney's analysis.

The Hearings Official agrees with the city attorney. The Court of Appeals in *Montgomery v. City of Dunes City*, 236 Or App 194 (2010) provides a useful history of the evolution of ORS 197.307. The city attorney and the applicant's recounting of the history of ORS 197.307 is consistent with court's understanding. Although the holding in *Montgomery* turns on a different subsection of ORS 197.307, the decision makes clear that accounting for needed housing is a process that occurs within the context of a jurisdiction complying with its comprehensive planning duties – and the related acknowledgement process. The court also reminds us that the rules of statutory construction allow for conclusions that can be made when the Legislature serially amends a statute. *Krieger v. Just*, 319 Or 328, 336 (1994). Although ORS 197.303-307 have changed over time, most recently in 2011, the requirement that housing need be assessed within an urban growth boundary has remained. So too have the "housing types" which must be analyzed as set forth in ORS 197.303.

That the assessment of housing need is a job connected with comprehensive plan development and amendment is further supported by the requirement in ORS 197.303(3). That provision states: "[w]hen a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need." This language provides context for interpreting both ORS 197.303 and EC 9.8325(1). The reference to "zoning districts" and "zones" described in a comprehensive plan demonstrates that the

assessment to be made is one of legislative nature and not one of a quasi-judicial nature. There is no indication in ORS 197.303 or 197.307 that a city must make an individualized assessment of needed housing at particular price ranges and rent levels for particular housing projects as proposed through a quasi-judicial land use process.

While the Hearings Official might agree with Mr. Williamson that EC 9.8325(1) and the related statutes could be more precisely worded, the city has shown how the present application adequately addresses “needed housing.” Importantly, Mr. Williamson did not argue, nor does the record suggest, that the city’s BLI or HNA, which are acknowledged, fail to comply with any applicable statutes including ORS 197.303-307. As to Mr. Williamson’s assertion that ORS 197.304(1) requires a separate and discreet BLI for Eugene in order to comply with ORS 197.307 and EC 9.8325(1) – that is not what the statute says. To the extent that it is relevant, what ORS 197.304(1) appears to forbid is one city within the joint UGB seeking to satisfy its needed housing obligations by shifting the provision of such housing to the adjacent jurisdiction.

This criterion is met.

EC 9.8325(2): The proposed land uses and densities within the PUD are consistent with the land use designation(s) shown on the Metro Plan Land Use Diagram, as refined in any applicable refinement plan.

The applicant correctly notes that the subject property is designated Low Density Residential on the Metro Plan, which establishes an allowed density “through 10 units per gross acres.” The South Hills Study is the applicable refinement plan, which further limits the allowable density to a maximum of 5 units per gross acre for the subject area. The applicant’s proposal for 10 single-family homes on 5.19 gross acres would result in a density of 1.9 units per acre, which is within the allowable limits.

The staff decision is not disputed. The criterion is met.

EC 9.8325(3): The PUD provides a buffer area between the proposed development and surrounding properties by providing at least a 30 foot wide landscape area along the perimeter of the PUD according to EC 9.6210(7).

Staff decision:

The applicant’s plans show the required 30-foot wide buffer around the perimeter of the property. The applicable landscape standard at EC 9.6210(7)(a)(5) Massed Landscape Standard (L-7) requires 70 percent of the 30-foot perimeter buffer to be covered by living plant material. The applicant asserts that this standard is met by existing vegetation along the perimeter of the subject property, and has provided evidence in the form of photo documentation. Based on the available evidence, this criterion is met.

Hearings Official Findings:

As noted above in the Summary of Decision, the plain wording of the text seeks a buffer from surrounding properties. The Hearings Official reads this standard to be achievable even where a road may need to pierce a section of the buffer to provide access to interior lots. However, I decline to

address Mr. Kloos's other arguments with regard to this criterion.

EC 9.8325(4): For areas not included on the city's acknowledged Goal 5 inventory, the PUD preserves existing natural resources by compliance with all of the following:

- (a) The provisions of EC 9.6880 to EC 9.6885 Tree Preservation and Removal Standards, (not subject to modifications set forth in subsection (11) below).**
- (b) Natural resource areas designated on the Metro Plan diagram as "Natural Resource" are protected.**

The subject site is located on the City's adopted Goal 5 inventory, which includes Figure H-2 of the 1978 Scenic Sites Working Paper according to Ordinance No. 20351. That figure shows the area of the subject property as a "Natural Site of Visual Prominence." As such, this criterion is not applicable.

The staff decision is not disputed. The criterion is met.

EC 9.8325(5): There shall be no proposed grading on portions of the development site that meet or exceed 20% slope.

Staff decision:

The applicant's site plan (Sheet 1), prepared by professional/licensed surveyor Renee Clough, shows areas on the subject site with slopes exceeding 20%. According to the application narrative, the slopes were calculated using computer software based on Triangulated Irregular Network (TIN) surface models. No development is proposed in areas with calculated slope exceeding 20%, and based on the applicant's evidence it appears this criterion is met.

If the Hearings Official ultimately approves the application, and to ensure compliance with this criterion, the following condition of approval is recommended:

- The final PUD site plan shall note that no grading is allowed on any portions of the development site that meet or exceed 20% slope. The applicant's final PUD plans shall clearly indicate those areas consistent with what it shown on the tentative PUD site plans.

Based on these findings and the condition noted above, this criterion is met.

Hearings Official Findings:

At the hearing, Mr. Williamson testified that he had reviewed the site map and found some areas that are proposed for development that exceed 20% slopes. He provided an annotated map to show the area at issue.

During the open record period the applicant submitted a revised map and additional evidence showing the areas of 20% slope. This information appears to resolve questions about where development may occur consistent with this criterion. This criterion is met.

EC 9.8325(6): The PUD provides safe and adequate transportation systems through compliance with all of 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).

EC 9.6805 Dedication of Public Ways

Pursuant to EC 9.6805, 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 with the adopted right-of-way map and EC Table 9.6870. As discussed in EC 9.6870 Street Width below, which is incorporated herein by reference, there is no requirement for additional right-of-way as a condition of this development.

EC 9.6810 Block Length

Block length standards are not applicable because no new local streets are proposed or required.

EC 9.6815 Connectivity for Streets

Staff decision:

In order to meet Street Connectivity standards, the proposed development must, at a minimum, provide extensions of the public way which are consistent with subsections (2)(b), (2)(c) and (2)(d). EC 9.6815(2)(b) requires street connections in the direction of any planned or existing streets within ¼ mile of the development site and connections to any streets that abut, are adjacent to, or terminate at the development site. EC 9.6815(2)(c) requires that the proposed development include streets that extend to undeveloped or partially developed land adjacent to the development site in locations that will enable adjoining properties to connect to the proposed development's street system. EC 9.6815(2)(d) requires secondary access for fire and emergency vehicles. EC 9.6815(2)(e) also requires that applications proposing needed housing shall show that the proposed street alignment shall minimize excavation and embankment and avoid impacts to natural resources, however, no streets are proposed or otherwise required within the PUD.

EC 9.6815(2)(g)2.a. allows for an exception to the street connectivity standards if the applicant demonstrates that a connection cannot be made because of physical conditions such as site topography. In this case, referral comments from Public Works staff note that the maximum street grade permitted in hillside developments is fifteen percent (15%), and as noted above, EC 9.8325(5) prohibits grading on portions of the development site that meet or exceed 20% slope. As such, an exception to the street connectivity standards is warranted with respect to EC 9.6815(2)(b), (2)(c) and (2)(d). The remaining street connectivity standards at (2)(a) and (2)(f) are not applicable.

Hearings Official Findings:

Mr. Williamson challenges the staff decision on substantial evidence grounds. Although a decision on this standard is academic because the application must be denied, referral comments from Public Works do constitute substantial evidence. Along with the maps in the record, the referral comments show that the southern portion of the property consists of slopes equal to or exceeding 20%. This is

sufficient to show that the PUD access way cannot be punched through to the southern portion of Fox Hollow Road. Vivian Way is similarly situated and appears to qualify for the exception as well.

EC 9.6820 Cul-de-Sacs and Turnarounds

These standards do not apply because no new public cul-de-sacs or streets are proposed or required.

EC 9.6830 Intersections of Streets and Alleys

These standards are not applicable because no new intersections are proposed or required.

EC 9.6835 Public Accessways

The applicant is requesting to adjust EC 9.6835(1), which requires accessways connecting to adjacent undeveloped or publicly owned sites, citing that access to the adjacent publicly owned Tax Lot 4500 can be accessed directly from Fox Hollow Road. Public Works staff also note that a connection to this adjacent publicly owned property would be in conflict with EC 9.8325(5) which prohibits grading on portions of the development site that meet or exceed 20% slope. The standards of EC 9.6835(2) do not apply, as there are no existing or potential accessways on adjacent sites that dictate the dedication or construction of a public access way.

EC 9.6840 Reserve Strips

These standards do not apply because no new public streets are proposed or required and none of these criteria specifically result in the need for a reserve strip.

EC 9.6845 Special Safety Requirements

These standards do not apply because no new public streets or alleys are proposed or required.

EC 9.6850 Street Classification Map

The proposal complies with this standard as discussed in EC9.6870 Street Width, which is incorporated herein by reference.

EC 9.6855 Street Names

These standards do not apply because no new streets are proposed or required.

EC 9.6860 Street Right-of-Way Map

The proposal does not amend the right-of-way map. This criterion is not applicable.

EC 9.6870 Street Width

Pursuant to EC 9.6870, the right-of-way and paving widths of streets shall conform to those widths designated on the adopted Street Right-of-Way map. 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, although a greater width can be required 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.

As noted previously, the site is abutted by two public rights-of-way, West Amazon Drive and Vivian Drive, neither of which are identified on the adopted Street Classification Map or adopted Right-of-

Way Map (Figs. 60-61 of the Arterial and Collector Street Plan (ACSP)). Vivian Drive, which has an existing 60-foot right-of-way that ends at the southeast corner of the subject property, is unimproved. The applicant is requesting an adjustment to the standards for street improvements at EC 9.6505(3)(b), which would require that the developer pave the street adjacent to the development site to the width specified in EC 9.6870 Street Width. That request is evaluated below, in the context of the applicable public improvement standards at EC 9.6505.

West Amazon Drive is classified as a local street, with a 60-foot right-of-way width and a variable paving width of approximately 18 feet. Paving width of West Amazon Drive is addressed in EC 9.6505 below.

Since the existing 60-foot rights-of-way in both streets meet the maximum right-of-way width identified for local streets in EC Table 9.6870, there is no requirement for additional right-of-way or a special setback in either street.

EC 9.6873 Slope Easements

This standard does not apply because no public streets are proposed or required.

EC 9.6875 Private Street Design Standards

This standard does not apply because no new private streets are proposed or required.

(b) Provision of pedestrian, bicycle and transit circulation among buildings located within 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.

There are no nearby or adjacent office or industrial parks; however, a bus stop exists north of the site near the intersection of Fox Hollow Road and Donald Street (LTD Bus #24), and a neighborhood commercial center (Edgewood Center) exists less than 2 miles from the subject property. These amenities are within 2 miles of the subject site, and could therefore be accessed by bicyclists. On the other hand, no amenities listed in the above criterion are within ¼ mile of the proposed PUD; therefore it would not be expected that these amenities are used by pedestrians.

(c) The street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street when the PUD exceeds 19 lots or when the sum of proposed PUD lots and the existing lots utilizing a local street as the single means of ingress and egress exceeds 19.

Staff decision:

In the applicant's original narrative, the only statement they provide under this standards is as follows:

"Under EC 9.0500, street includes both improved and unimproved right-of-way. The dedicated West Amazon right-of-way connects from Fox Hollow to Martin Street."

While staff agrees with the applicant that the unimproved section of West Amazon Drive is right-of-way and meets the definition of a “street” under EC 9.0500, staff expressed concern as part of completeness review that this standard could not be met since the street segment is unimproved and would not allow for motor vehicle use. See Attachment C for a graphical representation of West Amazon Drive and other streets in the vicinity. In response to the initial concerns raised by staff, the applicant stated the following:

“Needed housing applications are to be reviewed under clear and objective standards. As discussed in the Written Statement, EC 9.0500 clearly and objectively includes unimproved public rights-of-way within the definition of street. Therefore the entire length of West Amazon Drive from Fox Hollow Road to Martin Street must be included in the analysis of the “19 Lot Rule” (EC 9.8325(6)(c)).

At this location, the sum of proposed lots and the existing lots utilizing West Amazon Drive as the single means of ingress and egress exceeds 19 (see Attachment D), and the applicant does not appear to dispute or otherwise challenge that finding of fact. The proposal does not include any new streets within the PUD, and the unimproved segment of West Amazon Drive to the north precludes its use for dispersal of motor vehicle traffic onto more than one public local street. Yet, the applicant does not address the plain meaning of this requirement in consideration of the full text of the standard, except to assert that the unimproved segment “must be included in the analysis of the 19-Lot Rule” based on the definition of a street. Their application materials do not address the fact that motor vehicles cannot actually use this unimproved right-of-way as a means of secondary access, and the reality that there is only one way in or out, where West Amazon Drive connects to Fox Hollow Road. In other words, to satisfy this criterion, the proposal cannot simply rely on a line on a map. As a result, staff concludes that the standard is not met.

Serving as additional evidence of non-compliance is the Planning Commission’s Final Order for Deerbrook PUD (PDT 12-1), which provides some relevant case history under the Needed Housing criteria that the Hearings Official should consider. The Deerbrook PUD site (Tax Lots 101, 300 and 302 of Assessor’s Map 18-03-20-21) is located to the northeast of the subject property along West Amazon Drive and south of Martin Street. Staff notes that the Deerbrook PUD approval has expired, and the City has recently purchased the site for park purposes and protection as a natural area, but the Planning Commission’s findings on appeal stated the following regarding the “19-Lot Rule”:

This standard is really about dead-end streets, where there is only one way in or out. With the applicant’s improvement of West Amazon Drive, the site can be accessed from the north via Martin Street or from the south via Fox Hollow Road. The issue here would have been if West Amazon Drive did not connect to Fox Hollow Road. The Applicant’s improvements will complete the missing connecting link in the street system (Page 32; PC Final Order adopted 12-17-2012).

This finding was not further challenged on appeal to LUBA by any party, and thus became part of the City’s final local approval. Unlike the Deerbrook PUD, the subject proposal does not disperse vehicle traffic onto more than one local public street to provide more than “one way in or out.”

Further, and although it is not directly relevant with respect to the applicable standard here, referral comments from Fire Marshal staff (see Attachment E) note that Eugene Fire Code Appendix D, Section

D107.1 states that where the number of one and two-family dwellings exceed 30, there shall be provided two separate and approved fire apparatus access roads. The referral from Eugene-Springfield Fire states that they do not support the proposed development at this time until a fire apparatus access road meeting the requirements of EFC Appendix D, Section D104.3 and D107.1 is provided.

Based on the above findings above, this criterion is not met. As an aside, staff notes that the “19-Lot Rule” is not included in the PUD General Criteria. That is, the applicant could have reverted to applying the General Criteria when staff raised concerns in regard to this standard, yet they chose to proceed under the Needed Housing criteria anyway.

Hearings Official Findings:

Mr. Kloos makes two arguments in response to the staff decision.

First, he argues that EC 9.8325(6)(c) can be applied and met according to its terms if West Amazon is found to meet the definition of a “street” as defined in EC 9.0050. According to this argument, once it is conceded that West Amazon is a street, then the requirement of EC 9.8325(6)(c) to “disperse motor vehicle traffic onto more than one public local street” is met. He notes that nothing in the legislative history surrounding the adoption of the 19 lot standard requires a different result.

Staff and the city attorney respond that even though West Amazon may technically fit the definition of a “street,” the evidence in the record that the right of way is not improved, is blocked by a locked gate, and that prior land use decisions show that the section of West Amazon at issue will likely never be used as a street suitable for vehicular traffic, show that traffic cannot be dispersed in that direction to meet the standard.

Second, Mr. Kloos argues that the holding in the *Group B LLC* case requires that if the 19 lot rule can be applied in a way that allows the proposal, then it must be applied in that manner. In other words, once the type of housing applied for is determined to be “needed housing” all the clear and objective standards that apply may only do so in a way that approves development. Mr. Kloos likens the 19 lot standard to the city’s former stormwater standard that LUBA found to be impossible to comply with in *Homebuilders of Lane County v. City of Eugene*.

Staff and the city attorney respond that the 19 lot rule is not impossible to comply with because other applicants in other locations can meet the standard. That factual circumstance is different than the stormwater standard at issue in the *Homebuilders* case. They further respond that neither ORS 197.307 nor Goal 10 go so far as to require an approval for a needed housing application without regard to whether the applicant meets the clear and objective approval standards.

The Hearings Official agrees with staff and the city attorney.

As an initial matter, I find that EC 9.8325(6)(c) is a clear and objective standard. It represents a simple counting exercise and a determination of whether more than one point of ingress and egress is available to disperse motor vehicle traffic. The standard does not represent a “subjective, value laden analyses that are designed to balance or mitigate impacts.” *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158, *aff’d* 158 Or App 1 (1999). It is also my conclusion that the necessity to

determine the plain meaning of words such as “disperse” or “motor vehicle traffic” does not transform the clear and objective standard into a discretionary exercise. Nor does taking account of evidence in the record with regard to the current condition of West Amazon make application of the standard less clear and objective. In connection with these conclusions, I decline to delve into the offered legislative history of the 19 lot rule because it is my opinion that the text and context of EC 9.8325(6)(c) is sufficient to resolve the competing arguments.

At the heart of Mr. Kloos’s definitional argument is that the term “disperse” does not have a spacial aspect. He argues, based on the Webster’s Third New International Dictionary definition, that the potential to move in more than one direction from a given location is sufficient to “disperse” vehicular traffic. He specifically asserts that the Hearing Official should not make policy of the fly by making a determination about how far a vehicle must travel before it is dispersed enough to meet the 19 lot rule.

There are at least two problems with Mr. Kloos’s argument, one definitional, and one evidentiary. Although Mr. Kloos offers the “1a” part of the Webster’s definition in his argument, there is a second part to the primary definition that has been left out. That part is “1b” which states: “to cause to become spread widely.” Taking this part of the definition of “disperse” into account contradicts the argument that it is enough that traffic can move in both directions along West Amazon from the proposed PUD. Mr. Kloos concedes that such traffic could only travel 1000 feet to the barrier on West Amazon – but he urges that even such a short distance is enough to meet the standard. By this logic the standard could be met if traffic could travel even one block to an existing cul-de-sac. This interpretation is contrary to the both the “1a and 1b” definition of “disperse” as used in EC 9.8325(6)(c).

The Hearings Official agrees with the Planning Commission interpretation offered by staff above. Mr. Kloos would deem the standard to be met even though it sent future residents down the proverbial “Road to Nowhere.”¹ Here, where the “layout” of the PUD relies on only one public street to disperse motor vehicle traffic, that traffic at minimum must be able to go somewhere in two different directions that do not terminate in a dead end.

As to the evidentiary problem, the applicant does not provide any evidence to contradict that provided by staff showing that West Amazon to the west of the subject property is not likely to be developed to allow “motor vehicle traffic” at any time in the future if ever. Evidence of prior land use decisions and testimony that the barrier will remain to facilitate a park is unrebutted. Nor was reliable evidence submitted that any of the other local streets along West Amazon might be developed through to Fox Hollow Road to either the north or south of West Amazon.

In response to Mr. Kloos’s second argument, I agree with the city attorney’s analysis as set forth in the November 12, 2105 memo and adopt the reasoning on pages 5-6 (Section II, Subsections A and B) as my own by this reference. In addition, I add two reasons to reject the applicant’s position.

First, the record contains maps reflecting prior land use approvals on the section of West Amazon west of Fox Hollow Road. It appears that some of the lots created over time were done through the PUD process. In any case, all other factors being equal, the applicant could have developed the

¹ Talking Heads, Little Creatures (1985)

proposed PUD in compliance with the 19 lot rule at some point in the relatively recent past – before the area had exceeded the 19 lot threshold. I point this out not to somehow blame the applicant for not moving quicker, but to amplify the city attorney’s argument that the 19 lot rule has city wide application and is not applicant specific. The record simply shows that other land owners in the immediate vicinity developed lots to the available capacity before the applicant made the current proposal. This means the 19 lot rule has a temporal component. It does not mean that EC 9.8325(6)(c) is impossible for ANY applicant to comply with as discussed in the *Homebuilders* case.

Second, I disagree with Mr. Kloos’s assertion that the *Group B LLC* holding demands a lock step decision to approve a needed housing application once a given property is found on the BLI. The *Group B* case involved a unique outlier condition that was a peculiar historical appendage to the specific property at issue. That condition was not part of the city’s set of clear and objective standards. As I read the case, the applicant had met the city’s needed housing standards but the city determined that the property specific condition was not met. LUBA found that the condition could be interpreted to allow the proposed development, and that finding in combination with the property being identified on the BLI required approval. Those are starkly different facts than those at issue in the current application.

For all these reasons the Hearing Official finds that this criterion is not met.

EC 9.8325(7): The PUD complies with all of the following (an approved adjustment to a standard pursuant to the provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard):

- (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.**

Lot Dimensions: All proposed lots comply with the minimum lot area requirement of 4,500 feet in the R-1 zone. Lots #3 and #6 exceed the maximum allowable lot size of 13,500 square feet; however, these lots are impacted by criterion EC 9.8325(5), which restricts grading or any development on slopes greater than 20%. With implementation of this slope restriction, Lots #3 and #6 have a developable area of less than 13,500 square feet. Based on these findings, the proposed parcels meet lot dimension standards.

Flag Lots: While it is not clear on the submitted site plans, the applicant states that Lots #5 and #6 are proposed as flag lots. These lots appear to meet the 6,000 square feet lot area minimum for residential flag lots, as well as the minimum lot width of 50 feet. Consistent with flag lot standards, Lots #5 and #6 have a combined frontage (pole width) of 25 feet.

The proposal complies with all lot dimension and density requirements for the subject zone.

The second part of this criterion does not apply as the site is not within the /WR Water Resources Conservation Overlay Zone or /WQ Water Quality Overlay Zone.

(b) EC 9.6500 through 9.6505 Public Improvement Standards.

EC 9.6500 Easements

This section authorizes the City to require dedication of easements for public utilities and access under certain circumstances. The applicant proposes a 7' wide Public Utility Easement (PUE) adjacent to West Amazon Drive. The application does not propose any other public easement dedications nor are there any public improvements that would result in the need for additional public easements on the subject property. Based on these findings, the development complies with these standards.

EC 9.6505 Improvements – Specifications

This section requires that all public improvements be designed and constructed in accordance with adopted plans, policies, procedures and standards specified in EC Chapter 7. All developments are required to make and be served by the infrastructure improvements described below.

(1) Water

Water service for the proposed development must be provided in accordance with Eugene Water and Electric Board (EWEB) policies and procedures.

(2) Sewage

Staff decision:

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 extend the public wastewater system to the development site from existing public manhole #49670. The manhole is located in Foxboro Lane (a private street), which contains a PUE.

Referral comments from Public Work staff note that the proposed extension of the public system is conceptually acceptable, with the details of the system design to be evaluated during a subsequent Privately Engineered Public Improvement (PEPI) process. Details of the private service lines would be evaluated at the time of building permit.

Hearing Official Findings:

Mr. Levinson raised concerns about the potential need to pump sewage uphill and the concomitant noise that might bring to the neighborhood. This standard does not require an analysis of potential noise impacts and simply assesses whether services can be provided. As such the criterion is met.

(3) Streets and (4) Sidewalks

EC 9.6505(3), (a) & (b) requires all streets in and adjacent to the development site to be paved to the width specified in EC 9.6870, and improved according to adopted standards and specifications pursuant to EC Chapter 7, unless such streets have already been paved to that width. As noted above

with respect to EC 9.6870, West Amazon Drive, adjacent to the proposed development, is not fully improved to City standards including paving, curbs and gutters, storm drainage, sidewalks, street lights, and street trees.

The applicant's site plan, and Stormwater Management Plan and Drainage Study, reference additional paving and a setback sidewalk proposed in West Amazon Drive. Public Works staff notes that the construction of curb, sidewalk and storm system would be evaluated and constructed under the Privately Engineered Public Improvement (PEPI) process. Construction of additional paving to meet the 20-foot-width minimum under the Temporary Surface Permit process, in addition to an Irrevocable Petition for future improvements to West Amazon Drive, is also an acceptable option.

At the time of the subsequent subdivision review, the applicant would be responsible for completing improvements in West Amazon Drive along the frontage of the subject property, by either: 1) completing half-street improvements through the PEPI process; or 2) by indicating that additional paving which will result in a minimum 20-foot surface will be constructed through a Temporary Surfacing Permit, in which case an Irrevocable Petition for future improvements will be required.

The applicant has also requested an adjustment to EC 9.6505(3)(b), for the paving requirement of Vivian Drive, citing that Lots 7-10 will not take access to Vivian Drive, and therefore Vivian Drive will not be impacted by the development. In the event the Hearings Official approves the request, and to ensure compliance with the Adjustment Review approval criteria at EC 9.8030(19)(b), the following condition is warranted:

- The Final PUD plans shall note that access connections from Vivian Drive are not permitted.

With this condition of approval, and future permitting requirements as noted above, the applicable standards would be met.

5) Bicycle Paths and Accessways

No bicycle paths or public access ways are required per the previous findings at EC 9.6835, which are incorporated by reference.

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

This standard does not apply as the site is not located within a Special Flood Hazard Area per Flood Insurance Rate Map 41039C-1627-F.

(d) EC 9.6710(6) Geological and Geotechnical Analysis.

The applicant has stated this standard does not apply due to the exemption listed in EC 9.6710(3)(f). As confirmed above, the property is included on the City's acknowledged Goal 5 inventory and therefore qualifies for the exception. While not required with the PUD application, Public Works staff notes that a geotechnical analysis will be required as part of the Privately Engineered Public Improvement (PEPI) process for public wastewater improvements.

(e) EC 9.6730 Pedestrian Circulation On-Site.

These standards do not apply to single-family residential development.

(f) EC 9.6735 Public Access Required.

(1) Except as otherwise provided in this land use code, no building or structure shall be erected or altered except on a lot fronting or abutting on a public street or having access to a public street over a private street or easement of record approved in accordance with provisions contained in this land use code.

The development site has frontage along West Amazon Drive and Vivian Drive right-of-way. All lots will be restricted to access from West Amazon Drive, either directly or via a private easement. The proposed PUD complies with this criterion.

(2) Access from a public street to a development site shall be located in accordance with EC 7.420 Access Connections – Location. If a development will increase the development site’s peak hour trip generation by less than 50% and will generate less than 20 additional peak hour trips, the development site’s existing access connections are exempt from this standard.

The proposed development site is subject to this standard. The shared access proposed for lots 4-10 meets the standards at EC 7.420 Access Connections – Location. Access for Lots 1-3 will be further evaluated during the building permit process.

(3) The standard at (2) may be adjusted if consistent with the criteria of EC 9.030(28).

Based on the foregoing findings, the development complies with these standards and no adjustment is necessary.

(g) EC 9.6750 Special Setback Standards.

As discussed previously at EC 9.6805 and EC 9.6870, which is incorporated herein by reference, adjacent streets comply with applicable right-of-way width requirements. No special setbacks are required for future right-of-way or public utility easements.

(h) EC 9.6775 Underground Utilities.

All utilities will be required to be underground, consistent with this standard.

(i) EC 9.6780 Vision Clearance Area.

No encroachments within a regulatory Vision Clearance Area are shown. Should Vivian Drive be improved in the future, Lot 7 would be subject to these standards, and analysis of potential Vision Clearance Area encroachments would be evaluated at the time of building permit.

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

The applicant has provided a Stormwater Management Plan and Drainage Study prepared by Branch Engineering detailing how runoff from the development will be managed. Stormwater runoff from roofs, driveways, and other impervious surfaces of the development site will be collected in a shared private storm drainage system that will be located within private easements or shared common areas. The runoff from the private development will be detained and released to mimic existing flows and drainage patterns. A stormwater quality facility is proposed to treat the shared driveway.

Staff notes that a maintenance agreement for the shared system will be required at the time of the subsequent subdivision review. Additionally, if the private storm system is not addressed in CC&R's, they will need to be covered by private easements.

EC 9.6791 Stormwater Flood Control – Existing drainage patterns will be maintained by discharging stormwater runoff created by the PUD through a shared, private spreader system to the unimproved Vivian Drive right-of-way.

EC 9.6792 Stormwater Quality – The applicant's proposal to treat the runoff from the proposed shared driveway with a water quality treatment swale is conceptually acceptable, subject to more detailed review for compliance with applicable standards during the building permit process. Treatment for individual lots will be evaluated at the time of building permit review for each lot.

EC 9.6793 Stormwater Flow Control (Headwaters) applies to the site given its proximity to a Headwaters stream located on the east side of Vivian Drive. The applicant proposes a detention facility and spreader system, as detailed in the Stormwater Management Plan and Drainage Study, to restrict post-development flows to pre-development rates.

EC 9.6794 Stormwater Oil Control does not apply because the development will not trigger any of the applicability standards of EC 9.6794(2).

EC 9.6795 Stormwater Source Control does not apply because the proposed development does not include any of the pollution sources specified in EC 9.6793(2).

EC 9.6796 Dedication of Stormwater Easements, does not apply because the proposed storm drainage system will be privately operated and maintained.

EC 9.6797 Stormwater Operations 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 functional 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 recommended in the event the Hearings Official approves the proposal:

- Final PUD plans shall include the 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, this criterion is met.

EC 9.8325(8): The applicant has demonstrated that wastewater service, transportation service, stormwater service, water service, and electrical service will be provided to the site prior to the need for those facilities and services. Where the facility or service is not already serving the site, this demonstration 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.**

Public Works staff concurs with the applicant's statement that adequate public utilities and services, including wastewater and stormwater service, are presently available to the site. Findings at EC 9.8325(7)(b) and (j), regarding public improvements and stormwater respectively, are incorporated herein by reference as further evidence that these services are available to the site. Given these findings, the proposal is in compliance with this criterion.

The provision of water and electric services and other utilities is subject to review by EWEB or other utility providers.

Based on the above findings, this criterion is met.

EC 9.8325(9): All proposed dwellings within the PUD are within 1/4 mile radius (measured from any point along the perimeter of the development site) of an accessible recreation area or open space that is at least 1 acre in size and will be available to residents.

This criterion is met by the proposed common open space within the development site and by the City-owned parkland located to the north of the dead-end of West Amazon Drive.

EC 9.8325(10): Lots proposed for development with one-family detached dwellings shall comply with EC 9.2790 Solar Lot Standards (these standards may be modified as set forth in subsection (11) below).

EC 9.2790(3)(b) allows an exception to EC 9.2790(2) if compliance with street standards requires a configuration that prevents lots from being oriented for solar access. Additionally, an exception can be granted if natural features prevent the lots from being oriented for solar access. Lots 1-3 comply with solar lot standards as they have a north-south dimension greater than 75 feet and a front lot line orientation within 30 degrees of east-west. The applicant asserts that Lots 4-10 are exempt from these standards because the alignment of West Amazon Drive and Vivian Drive prevent a front line orientation within 30 degrees of east-west. Therefore, in the event that the Hearings Official approves the tentative PUD, an exception to EC 9.2790 is recommended for Lots 4-10.

As an informational item, staff notes this exception does not apply to solar setback requirements at EC 9.2795, which would be subsequently addressed as part of the building permit process for future development of the proposed lots.

Based on these findings, this criterion is met.

EC 9.8325(11): The PUD complies with all applicable development standards explicitly addressed in the application except where the applicant has shown that a modification is consistent with the purposes as set out in EC 9.8300 Purpose of Planned Unit Development.

The applicant's written statement references a paving width for the shared access easement of 28 feet to allow for fire access and parking on both sides. As an informational item, staff notes that on-site fire access and the proposed parking along the private driveway would be subject to further review for compliance with applicable standards at the time of future permitting processes. Otherwise, there appear to be no other development standards explicitly addressed in the application, nor any requests for "modification" to standards under this criterion.

Based on these findings, this criterion is met.

EC 9.8325(12): For any PUD located within or partially within the boundaries of the South Hills Study, the following additional approval criteria apply:

(a) No development shall occur on land above an elevation of 900 feet except that one dwelling may be built on any lot in existence as of August 1, 2001.

The subject property is below 900 feet in elevation (the highest elevation is 842 feet).

(b) Development shall be setback at least 300 feet from the ridgeline unless there is a determination by the city manager that the area is not needed as a connection to the city's ridgeline trail system. For purposes of this section, the ridgeline trail shall be considered as the line indicated as being the urban growth boundary within the South Hills Study plan area.

The subject property is located more than 300 feet from the south hills ridgeline and thus complies with this standard.

(c) Development shall cluster buildings in an arrangement that results in at least 40% of the development site being retained in 3 or fewer contiguous common open space areas. For purposes of this section, the term contiguous open space means open space that is uninterrupted by buildings, structures, streets, or other improvements.

The development provides contiguous common open space which is configured consistent with the above approval criterion. The applicant notes that the common open space constitutes 2.18 acres of the 4.45-acre property. This results in 49% of the development site shown as common open space. Staff notes that this figure of 4.45 acres is not consistent with the 5.19 gross acres noted elsewhere in the application materials. Using the larger "gross acres" figure, the development site includes 42% of

the total area provided as common open space. However, regardless of which total area figure is used in the calculation, the proposed layout complies with this standard.

(d) Residential density is limited as follows:

- 1. In the area west of Friendly Street, the maximum level of new development per gross acre shall be 8 units per acre.**
- 2. In the area east of Friendly Street, the maximum level of new development per gross acre shall be limited to 5 units per acre.**
- 3. Housing developed as Controlled Income and Rent Housing shall be exempt from the density limitations in subsections 1 and 2 above, but are subject to the other applicable development standards and review procedures.**

The development proposed by the applicant (10 units on 5.19 acres) would result in a residential density of about 1.9 units per acre, which is below the limitation of five units per acre required by the property's location being east of Friendly Street.

Based on the above findings, this criterion is met.

Decision

Based upon the available evidence and preceding findings, the Hearings Official DENIES the applicant's request for a Tentative Planned Unit Development.

Dated this 3rd day of December, 2015.

Mailed this 4th day of December, 2015.



Kenneth D. Helm
Hearings Official

SEE NOTICE OF HEARINGS OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS



Eugene City Attorney's Office

Memorandum

Date: November 12, 2015

To: Ken Helm, Eugene Hearings Official

From: Anne C. Davies

Subject: Chamotee Trails PUD (PDT 15-1 / ARA 15-13)

The city attorney's office provides the following memorandum in response to the Hearings Official's request for assistance regarding the "needed housing" issues raised during the public hearing.

Applicant requests approval of an 11-lot (10 buildable lots and one open space parcel) planned unit development (PUD). This memorandum addresses two issues related to the "needed housing" requirements that were raised by parties during the initial evidentiary hearing. First, Ross Williamson, a neighbor/opponent of the proposed PUD, contends that the applicant has not demonstrated that the proposal qualifies as "needed housing." Second, the applicant asserts that it is entitled to an approval of its needed housing proposal, and that the 19-lot rule, which staff asserts is not satisfied in this case, cannot be applied if it will result in denial of the proposal.

I. Does Proposal Qualify as Needed Housing?

Under EC 9.8325(1), an applicant for a needed housing proposal must first demonstrate that the proposed housing qualifies as "needed housing" as defined by state statute. Mr. Williamson argues that the statute, Goal 10 and the administrative rule implementing Goal 10 require a "needed housing" applicant to demonstrate that there is a special need in the community for dwellings at the particular price range and rent levels of the target population of the proposed development. This is simply not how the statutes, rules or Goal work.

A. Historical Perspective.

The state's involvement in local governments' obligation to provide housing for the state's residents at all income levels dates back to 1979. In that year, LCDC adopted an informal policy statement, the "St. Helen's Policy." That policy was meant to ensure that a city had enough land with appropriate zoning to meet the city's need for different housing types and housing at different costs. The policy also required that standards, conditions and procedures for needed housing be "clear and objective." The rationale behind this latter requirement was to eliminate the practice of local governments using wishy-washy, discretionary standards as a way of rejecting unwanted, low-income housing proposals. The St. Helen's Policy was codified in statute in 1981. *See* ORS

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197.303 and 197.307. Since 1981, the “needed housing” statutes have been amended several times and LUBA and the courts have ruled on a number of “needed housing” cases.

While most would agree that the St. Helen’s Policy was intended to provide protections for “unwanted” residential development, the statutes, administrative rules and caselaw have evolved in such a way that almost all housing qualifies as “needed housing.” See *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).¹ In *Rogue Valley*, LUBA questioned whether a city could exclude high-cost or luxury housing as a needed housing type. Although LUBA did not directly decide the issue, it did point to language in OAR 660-008-0005(5)(a), which directs that housing needs projections include housing types that are commensurate with all income levels.

B. Eugene’s BLI and HNA are acknowledged as in compliance with Goal 10.

Mr. Williamson is correct that the term “needed housing” is defined by statute as “housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels.” ORS 197.303. However, that definition does not dictate that an applicant for a particular needed housing development must demonstrate, in a quasi-judicial proceeding, that there is a specific need for the dwelling type and price range being proposed. First, an applicant for residential development is generally not required to identify the price range of housing being proposed. Accordingly, as a practical matter, that information may not even be available.

Further, it is the city’s Buildable Lands Inventory (BLI) and Housing Needs Analysis (HNA) that determines what “housing types,” and how many of each housing type, are needed. That analysis is based on background information addressing housing price ranges and rent levels. The price ranges and rent levels, during the creation of the HNA, are translated into particular housing types and the number of those housing types that will be needed to serve the projected demand at different price points. As Mr. Williamson himself asserts, the term “needed housing” is defined in terms of “housing types”:

¹ “The initial purpose behind that policy appears to have been to foreclose local government attempts to exclude certain housing types that traditionally satisfied lower, moderate or ‘least cost’ housing needs.¹⁰ However, OAR chapter 660, division 8, which was adopted in part to ‘implement ORS 197.303 through 197.307,’ appears to take an all-inclusive approach to ‘needed housing.’

¹⁰ This purpose is reflected in ORS 197.307(1), which provides “[t]he availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for seasonable and year-round farmworkers, is a matter statewide concern.”

35 Or LUBA at 148.

“As used in ORS 197.307, needed housing means *housing types* determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following *housing types*:

- (a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
- (b) Government assisted housing;
- (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
- (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
- (e) Housing for farmworkers.”

Once the HNA determines the number of housing types that are needed to meet the demand for housing at different price ranges and rent levels, the price ranges and rent levels fall away. That is why the city’s HNA addresses “housing types.”²

² See Residential Lands and Housing Study, Draft Supply and Demand Technical Analysis, February 1999 (RLS):

“To identify the *long-run* market for housing in the Eugene-Springfield UGB, two Oregon consultants, ECONorthwest and Leland Consulting Group, conducted an analysis. These consultants identified and projected the relevant factors and projected the residential demand for housing units by housing type. (See Appendix B, *What Is the Market Demand for Residential Real Estate in Eugene-Springfield?*) [Appendix B, the Market Demand analysis referenced above, identifies that income affects the type of housing that is financially attainable, projecting that the lower-middle and low income populations will likely inhabit garden apartments and higher density housing. See pages 18-19 of Appendix B.] * * *

“In summary, the Market Demand Study analysis indicates that there is a relationship between household characteristics and housing demand and that household characteristics are expected to change. * * * It is also projected that there will be an increase in the proportion of lower- to middle-income households. These new households will increase the demand for smaller and alternative housing products.

“For the purposes of this analysis, the results of the Market Demand Study were translated into a range.” RLS Page 16.

On page 18 of the Residential Lands Study is the table that depicts the 1990-2015 Housing Unit Demand by housing type.

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Goal 10 tracks the statutory definition of “needed housing,” and provides: “Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.” The RLS was adopted by Ordinance No. 20159 and was acknowledged to be in compliance with Goal 10. The RLS was adopted by Ordinance No. 20159 and was acknowledged to be in compliance with Goal 10. Mr. Williamson disagrees, however, that the acknowledgment of the RLS means anything in this analysis. He relies on ORS 197.304(1), which provides that Eugene must meet its obligations under ORS 197.295 to 197.314 separately from the City of Springfield. Because the 1999 BLI was a joint inventory with Springfield, he contends, it cannot provide the basis for the applicant’s compliance with the needed housing statutes.

Mr. Williamson’s argument does not survive deeper analysis. First, his theory would result in a *de facto* moratorium of needed housing. The only adopted, acknowledged BLI the City has to work with is the 1999 RLS. While the City is working on a new housing analysis, it has not yet been adopted, and may not be adopted for some time. If the City cannot rely on the 1999 RLS to identify needed housing types, then there is a void and no needed housing could be built until a new housing analysis is adopted. That certainly was not the legislature’s intent when it adopted ORS 197.304.

Second, the language of the statute itself disproves Mr. Williamson’s theory. ORS 197.304(2) provides: “Except as provided in subsection (1) of this section, this section does not alter or affect an intergovernmental agreement pursuant to ORS 190.003 to 190.130 or acknowledged comprehensive plan provisions adopted by Lane County or local governments in Lane County.” Accordingly, unless or until the City adopts its own urban growth boundary with its own BLI and HNA, it can and must rely on the existing comprehensive plan. *See also D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000); *1000 Friends of Oregon v. City of Dundee*, 203 Or App 27, 216, 124 P3d 1249 (2005) (under Goal 2, a BLI that has not been adopted as part of the comprehensive plan and acknowledged cannot be used as the basis for future planning decisions). Finally, the fact that the City must rely on the 1999 RLS to determine what “housing types” are needed does not mean that it does not “meet its obligation under [ORS 197.303 and 197.307] separately from any other city within Lane County,” in violation of ORS 197.304(1).

All that Goal 10 and the needed housing statutes require is that Eugene plan for housing that will accommodate the projected need for housing at different price points. That directive does not require analysis beyond what was done in 1999 to accommodate needed housing types at different price ranges and rent levels. The acknowledged RLS demonstrates that Eugene has satisfied that directive. A previous Hearings Official so found when this issue was raised in a previous case. *See* Hearings Official decision in Deerbrook, page 9.³

³ The Deerbrook decisions (Court of Appeals, LUBA, Planning Commission and Hearings Official) were submitted into the record by the applicant on November 3, 2015.

- II. Is the HO authorized to deny the proposed needed housing application if he determines that the applicant has failed to demonstrate compliance with one or more of the applicable clear and objective criteria?

State statute requires that proposals for “needed housing” be measured only against clear and objective criteria. In 1997, the legislature added a provision that allowed a local government to provide for an alternative, discretionary (*i.e.*, not clear and objective) process so long as there remains a procedural track available that contains only clear and objective criteria. Eugene has such a two-track system. EC 9.8325 provides the clear and objective track; EC 9.8320 provides the alternative, discretionary approval track.

The applicant in this case has sought approval under the clear and objective track. One of the applicable clear and objective criteria is the 19-lot rule. EC 9.8325(6)(c). It requires that the proposed PUD disperse motor vehicle traffic onto more than one public local street. Staff recommends denial based on this criterion because traffic will not be dispersed onto more than one public local street. (West Amazon Drive to the north of the proposed PUD is not improved and will almost certainly never provide access for the traffic generated by the proposal because the land has been sold to the City for use as a park.) The applicant counters that the City cannot deny the proposal based on this clear and objective standard. Applicant states: “The 19-lot standard may not be applied to deny development.” Applicant’s argument appears to be that the City cannot deny a proposal for needed housing based on clear and objective standards, so long as the property on which the proposal is sought is on the City’s acknowledged BLI. As far as we can tell, the applicant’s argument is two-fold. First, an applicant for needed housing is entitled to an approval based on clear and objective standards; a clear and objective standard may not be the basis for an outright denial. And second, the 19-lot rule cannot be applied to deny the proposed PUD because it is a “prohibition in the guise of a standard.”

- A: The City can deny the proposal based on failure to comply with an applicable clear and objective standard.

Applicant is not entitled to an approval. The filing of an application, and review of that application through the adopted city procedures, is the process the City uses to determine whether to approve the proposed development, approve it with conditions, or deny the application altogether. All of those outcomes are an option, whether the proposal is for needed housing or not. As explained above, the practice that the legislature meant to curtail when it codified the St. Helen’s Policy was, the use of discretionary standards as the basis to deny unwanted housing development. The goal was not to create a universe where all needed housing must be approved. Rather, it was to provide clear and objective criteria so that the applicant would know ahead of time whether it could expect approval and to preclude decision makers from relying on discretionary standards to deny unwanted housing. In Eugene, where an applicant cannot comply with a clear and objective approval criterion, it can take its chances and apply for approval under the alternative, discretionary track. Goal 10 and the needed housing statutes do not go so far as to require approval of any and all needed housing proposals.

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B: The 19-lot rule is not impossible to comply with in every instance.

The applicant relies on a 2002 LUBA case to argue that the 19-lot rule is illusory and cannot be relied upon as a basis for denial. *See Homebuilders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370, 419 (2002). Applicant's reliance on that case is misplaced. *Homebuilders* involved an approval criterion that a proposed PUD will not "create negative impacts on natural drainage courses" such as erosion, turbidity or sediment transport "due to increased peak flows or velocity." *Homebuilders* argued in that case that "rain falls on all development, and all water moving across ground carries some sediment, creates some turbidity, and has some erosional component, no matter how minute, and therefore no PUD could possibly comply with LUCU 9.8325(10)." LUBA agreed with the petitioner that, with regard to that approval criterion, "imposing a clear and objective standard that is impossible or virtually impossible to meet is a prohibition in the guise of a standard."

The 19-lot rule in this case is not like the stormwater standard at issue in *Homebuilders*. The stormwater standard was impossible or virtually impossible for ANY applicant to satisfy. That is not the case here. The applicant in this case is unable to satisfy the 19-lot rule. However, that does not mean that the criterion itself is "a prohibition on development under the guise of a clear and objective standard." The 19-lot rule is not impossible to satisfy in all cases, as the stormwater standard was in *Homebuilders*. In fact, the Hearings Official and the Eugene Planning Commission held that a previous needed housing proposal just up the road from this one satisfied that criterion. *See Deerbrook HO decision*, page 20; *Deerbrook PC decision*, pages 31-32; and LUBA opinion at slip op. 19-21.

ACD:abm

Attachment: Excerpt of RLS