Eugene Hearings Official

AGENDA

Phone: 541-682-5377
www.eugene-or.gov/hearingsofficial

Meeting Location:
Harris Hall, Lane County Public Service Building
125 East 8th Avenue

The Eugene Hearings Official welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours' notice. To arrange for these services, contact the Planning Division at (541) 682-5481.

WEDNESDAY, JUNE 29, 2016
(5:30 p.m.)

I. PUBLIC HEARING

CATHEDRAL PARK (CU 02-4)

Request: Conditional use permit to construct 172 units of controlled income and rent housing, including 12 studio units, 36 one-bedroom flats, 92 two-bedroom flats, 20 two-bedroom townhouses, 12 three-bedroom townhouses and one community building.

Location: Southerly undeveloped portion of Rest Haven Memorial Park cemetery property, west of Willamette Street, north of Braeburn Drive (Assessor's Map/Tax Lot: 18-03-18-00-00300)

Applicant: Charles "Tim" Wiper

Representative: Carol Schirmer, Schirmer Satre Group

Lead City Staff: Gabe Flock, Senior Planner
Telephone: (541) 682-5697
E-mail:gabriel.flock@ci.eugene.or.us

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 Hearings Official.
7. Rebuttal testimony from applicant.
8. Closing of public hearing.

The Hearings Official will not make a decision at this hearing. The Eugene Code requires that a written decision must be made within 15 days of close of the public comment period. To be notified of the Hearings Official's decision, fill out a request form at the public hearing or contact the lead City staff as noted above. The decision will also be posted at www.eugene-or.us/hearingsofficial

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CONDITIONAL USE PERMIT STAFF REPORT

Application File Name (Number):
Cathedral Park (CU 02-4)

Applicant's Request:
Approval of a Conditional Use Permit for 172 units of Controlled Income and Rent Housing. The proposal consists of 12 studio units, 36 one-bedroom flats, 92 two-bedroom flats, 20 two-bedroom townhouses, 12 three-bedroom townhouses and one community building.

Applicant/Owner:
Charles (Tim) Wiper, (541) 345-8521

Applicant's Representative:
Carol Schirmer, Schirmer Satre Group, (541) 686-4540

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

Subject Property/Location/Size:
Located on the undeveloped southerly portion of the Rest Haven Memorial Park cemetery property at 3900 Willamette Street, encompassing an area of approximately 15.8 acres. Tax Lot 300 of Assessor's Map 18-03-18-00. See reduced site plan attached.

Current Zoning:
R-1/WR Low-Density Residential with a Water Resources Conservation Overlay. Note: The zoning of the subject property in effect at the time of the original request in 2002 was RA, Suburban Residential and did not include the /WR overlay zoning which was subsequently adopted and applied to the property in 2005. See below for more detail regarding the land use regulations applicable to this request.

Relevant Dates:
Application originally submitted April 8, 2002; application deemed incomplete as of April 23, 2002; supplemental materials submitted and application deemed complete at applicant's request on August 15, 2002; rejected by City on September 13, 2002; City's rejection appealed to LUBA on October 2, 2002; remanded by LUBA on March 3, 2003; applicant's written request to process the remanded application received on May 11, 2016. Initial staff report issued June 22, 2016; public hearing scheduled for June 29, 2016.

Purpose of Staff Report

Staff reports provide community members an opportunity to learn more about the land use request and to review staff analysis of the application. The staff report provides only preliminary information and recommendations. The Hearings Official will also consider public testimony and other materials presented at the public hearing before making a decision on the application. The Hearings Official's written decision on the application is generally made within 15 days following close of the public record, following the public hearing.

Present Request

The subject of this request is for approval of a Conditional Use Permit ("CUP") to build Controlled Income and Rent ("CIR") Housing, which is defined in the Eugene Code ("EC") at the time the application was originally submitted, as follows:

> **EC 9.015 Definitions**
> A housing project, or that portion of a larger project, consisting of any dwelling type or types exclusively for low-income individuals and/or families, sponsored by a public agency, a non-profit housing sponsor, a developer, a combination of the foregoing, or other alternatives as provided for in the Oregon Revised Statutes or Federal Statutes to undertake, construct, or operate housing for households that are low income. For the purposes of this definition, low-income means having income at or below 80 percent of the area median income.[1]

As noted above, the present request is for approval of a Conditional Use Permit for 172 units of Controlled Income and Rent Housing. The proposal consists of 12 studio units, 36 one-bedroom flats, 92 two-bedroom flats, 20 two-bedroom townhouses, 12 three-bedroom townhouses and one community building. According to the written statement, the applicant anticipates working cooperatively with an experienced developer of affordable housing to complete the project.

The area proposed for this development is outlined with a project boundary identified on the applicant's site plans, located on the undeveloped southerly portion of the Rest Haven Memorial Park cemetery property and encompassing an area of approximately 15.8 acres. The balance of the existing cemetery property is also owned by the applicant and subject to an existing CUP (see City File, CU 95-2). The area proposed for controlled income and rent housing is regulated by the existing CUP for the cemetery, including final approved site plans and a number of approval conditions including tree preservation requirements along the perimeter of the cemetery. As discussed in more detail as part of the staff evaluation below, portions of the 75-foot perimeter tree buffer overlap and would be impacted by the area proposed for development in this request.[2]

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[1] For more background information about the City's CIR regulations, including legislative history and relevant case law, see Memoranda and Attachments from Dan Terrell, Law Office of Bill Kloos, dated June 10, 2016, May 20, 2016 and May 17, 2002.

[2] Also see City File MDA 03-14 and LUBA No. 2004-016.

As shown on the applicant's plans, a variety of infrastructure improvements are also proposed including a 20-foot wide private street, "Cathedral Way," which would provide access to the proposed development with connections to Willamette Street as well as an unimproved stub of West 40th Avenue near its intersection with Braeburn Drive. Head-in parking is shown along portions of the private street, with additional off-street parking areas also proposed; a total of 197 parking spaces are proposed. The site plans also show proposed utilities including wastewater service, stormwater drainage facilities, water service lines, bike parking and trash/recycling areas.

Subsequent to the submittal of the CUP application for controlled income and rent housing, the property owner also submitted a separate permit application in 2007 for a Privately Engineered Public Improvement (PEPI) that would pipe an open stream near the southwest corner of the subject property and apparently include facilities to pump stormwater to a storage pond that would then be used for irrigation of the cemetery lawns.[3] While it is unclear whether the applicant is requesting consideration of that proposed infrastructure as part of the present CIR-CUP request due to the lack of discussion in the land use application materials to date, referral comments from Public Works staff note that the PEPI permit application has expired and the proposed work is not approved. Planning staff also notes that based on the date of submittal of the PEPI permit application, the City's adopted Goal 5 regulations (i.e. /WR overlay zoning) were in effect at the time and would have precluded approval of the proposed piping of the stream.

Procedural History/Background

The application for Cathedral Park was originally submitted on April 8, 2002. The City initially deemed the application incomplete and requested a variety of additional information and details in support of the request. The applicant provided a supplemental narrative and revised site plans on August 15, 2002, including an air photo of the existing trees on the site in relation to the proposed layout of the development at the time, a solid line demarcating the boundary of tree and vegetation removal, and proposed utilities which were not shown on the original plan set.

Upon submittal of the supplemental application materials, the applicant requested that the City deem the application complete for processing. The City's Planning Director then responded with a letter to the applicant rejecting the application, with an explanation of the City's reasoning (i.e. the inability to address the conflicts that it posed between the proposed development and the existing CUP for Rest Haven Memorial Park, such as the "existing buffer to remain", "future cemetery lawns" and "existing trees to remain").[4] The applicant appealed the City's decision to reject the application to the State's Land Use Board of Appeals ("LUBA"). LUBA remanded the City's decision to reject the application (LUBA No. 2002-131, see attached), meaning they returned it to the City to undertake the required land use application process for a CIR-CUP application. Following the remand, the applicant did not request that the City proceed with its review and decision on the application until recently, on May 11, 2016.

[3] See PEPI permit plans (#4069) and application materials included in the application file for reference.
[4] See letter from Jan Childs, Eugene Planning Director dated September 13, 2002.

As a result, under State statute the City has 120 days from the date of that request to process the application and reach a final local decision.[5] In addition, given the procedural history dating back to 2002 when the application was deemed complete, staff's review of the proposal is based exclusively on the applicable approval criteria that were in effect for CIR housing at the time the application was submitted (see EC 9.696-9.724). In other words, staff believes the Hearing Official's decision (to approve, approve with conditions or deny the proposal) must be based only on whether the proposal complies with these criteria. EC 9.386(13), in effect at that time, provides that "[w]here an application is processed under section 9.724, the provisions of that section are exclusive" and thus no other approval criteria apply. The applicable approval criteria from EC 9.724, are listed below in the following evaluation, with staff's findings regarding each.

A related application process involving the subject property is also a key part of the procedural history of this remanded CIR-CUP application, and thus worth briefly summarizing here. Following LUBA's remand of the present application for CIR housing, the applicant applied to the City for a modification of the cemetery CUP, to shrink the footprint of the approved cemetery use and thereby facilitate their ability to proceed with the CIR housing proposal on the southerly portion of the site (see MDA 03-14 and LUBA No. 2004-016). In short, that application was denied by the City's Hearings Official, and subsequently affirmed by LUBA. That LUBA decision provides a description of the relevant facts, as well as the relationship between the proposed CIR housing and the existing CUP for the approved cemetery uses.

In summary, LUBA agreed with the Hearings Official that the existing CUP includes conceptual approval for cemetery uses in "Zone 6" (see approved site plans for CU 95-2), subject to conditions of approval including a 75- foot vegetative buffer along the southern periphery of the site. Ultimately, LUBA concluded that the Hearings Official was correct to deny the CUP modification for lack of compliance with the approval criteria (i.e. regarding significance of change and compliance with approval conditions). As a result, the existing CUP for Rest Haven Memorial Park remains intact, including an executed performance agreement and approved site plans. As noted the prior LUBA decision (also see EC 9.8107), if an applicant cannot demonstrate compliance with the approval criteria for a modification, then the applicant may submit the requested modification as a new CUP application under Type III procedural requirements.

As a result of this history and related land use decisions, staff understands that the applicant intends to apply for a separate, new CUP that would seek to shrink the footprint of the approved cemetery use. Subject to the outcome of a subsequent and separate CUP approval, this would enable development of the proposed CIR housing within what is known as "Zone 6" of the currently approved cemetery CUP. That application has not yet been submitted to the City, but the applicant has begun preparing that application including the required pre-application conference under current code provision EC 9.7005 and the required neighborhood/applicant meeting under current code provisions at EC 9.7007. It is noted that as

[5] See HB 2830 (2015); recent revision to Oregon Revised Statutes (ORS) concerning remand procedures. Staff also understands from the City Attorney's reading of the legislation that the amended regulations do not allow for time extensions or waiver of the 120-day time limit in a remand process, even if the City or the applicant were inclined to grant such a request.

a new CUP application, it would be subject to current code requirements including land use application procedures beginning at 9.7300, and the CUP application requirements and approval criteria at beginning at EC 9.8075. Furthermore, in the event that the Hearings Official determines that the subject CIR-CUP meets the applicable criteria, staff believes the approval would need to be conditioned upon approval of a separate CUP that would make the subject property available for CIR housing.

Most recently, staff notes that the applicant also provided updated site plans on June 9, 2016 which have a more current (2008) aerial photo over which the development layout is shown. This submittal also included a site plans that show the area of tree removal whited-out or masked, as compared to the areas where trees would remain. The comparison with 2002 application materials shows that many of the trees north of the proposed alignment of the private street have since been removed, as approved by the original cemetery CUP. The newer image is also crisper and easier to read in color, but does show some differences from layout on the 2002 materials, such as a realignment of the proposed private street, near its intersection with Willamette Street. This change to the site plans is an aspect that staff would request the applicant clarify, so that all parties know more specifically what to evaluate under the applicable standards.

Public Hearing Notice

Following the applicant's written request to re-start the remand process for the proposed CIR housing on May 11, 2016, the City provided early notice of the request to a list of interested parties via email on May 26, 2016. Formal public notice was also mailed to owners and occupants within 500 feet of the subject site, other interested parties of record, and to both the Southwest Hills Neighborhood Association ("SHiNA") and the Southeast Neighbors ("SEN"). The notice was also posted to the City's website where other application materials are also publicly available at http://pdd.eugene-or.gov/LandUse/SearchApplicationDocuments?file=CU-02-0004.

The formal public notice was mailed on May 27, 2016 and included a variety of required information including a list of the applicable approval criteria from the "old code" in effect at the time of the original application (April 8, 2002), and reference to the applicable "old code" procedures. The content of the notice included all required information as well as a copy of the applicant's original site plan, links to the City's website where all application materials could be viewed, how copies could be obtained, staff contact information for any further inquiries, instructions about the submittal of written testimony, and other procedural statements required under State law. The City also elected to install signage (5 signs) in key locations around the periphery of the site to help inform the public about this request and the upcoming hearing on June 29, 2016.

Staff also met with neighborhood association representatives from SEN and SHiNA on June 8, 2016 to provide information about the proposal, the applicable "old code" rules, related land use application history, and to field a variety of questions so that these representatives could help share information with other affected neighborhood residents.

As of the date of this staff report, written public testimony has been received by several individuals and will be provided to the Hearings Official for consideration. Staff anticipates that

additional testimony will be forthcoming. To the extent possible, staff will package these materials and provide them in advance of the public hearing. Public testimony, written or otherwise, may also be presented at the public hearing on this matter.

Conditional Use Permit Evaluation

As noted above, the City's decision on this CUP application for Controlled Income and Rent Housing will be based exclusively on the approval criteria that were in effect for CIR housing at the time the application was submitted in 2002. In other words, the Hearing Official's decision to approve, approve with conditions or deny the proposal will be based only on whether the proposal complies with these criteria. Under the listing of allowed uses at EC 9.386(13), the code in effect at that time provides that "[w]here an application is processed under section 9.724, the provisions of that section are exclusive" and that no other approval criteria apply. Unlike the criteria for other conditional use permits, the approval criteria for the proposed CIR do not include reference to adopted plan provisions such as the South Hills Study or Metro Plan.

On a related not, staff anticipates that the City Attorney will provide a memo as part of the hearing process addressing the applicability of various standards at the time of any subsequent permit applications (in the event of an approval of this CIR-CUP request) to help all the parties understand what the applicant's development will be held to in terms of newer regulations that have come into effect since 2002 such as the Multiple-Family Standards at EC 9.5500, Goal 5 (/WR overlay) standards at EC 9.4900, Traffic Impact Analysis Review at EC 9.8650, and Stormwater Standards at EC 9.6790.

To assist the Hearings Official in rendering a decision on the application, staff presents the applicable approval criteria below (shown below in **bold** typeface), with findings related to each, based on the evidence available as of June 17, 2016. Staff's evaluation is based on the applicant's original narrative and site plans set from April 8, 2002, supplemental materials provided August 15, 2002, and the site plans submitted June 9, 2016.

EC 9.724(1) Allowance of increased density. Subject to the standards contained in this section, the hearings official may increase density as follows:

(a) In RA and R-1 zoning districts, up to 75 percent of the allowable density for an R-2 development…

The applicant's original written statement addresses this standard on page 3, with a summary of the allowed residential density. Staff concurs with that analysis indicating that (at 75% of the maximum density of 20 units per acre allowed in R-2 zoning at that time) the CIR provisions would allow up to 15 dwelling units per acre based on the R-1 zoning of the subject property.

While the applicant's calculations indicate that 1.18 acres of dedicated right-of-way would be excluded from the overall calculation of net density, staff is unclear what if any public right-of-way is being proposed. Staff's understanding based on the applicant's site plans dated August 15, 2002 is that the proposed access road, "Cathedral Way" will be a private street.

With a total of approximately 15.8 acres, and 172 dwelling units, the proposed density would be roughly 11 units per acre (or 11.8 units per acre if the 1.18 acres of right-of-way is excluded). Either way, this is well within the maximum allowed density of 15 units per acre subject to Hearings Official approval under this standard.

Based on the findings above and the available information, staff concludes that the above standard is met.

<u>EC 9.724(2) Criteria for hearings official approval.</u> Applications for conditional use permits for controlled income and rent housing shall be processed and scheduled for public hearings in the same manner as other conditional use permit applications, except the following shall substitute for the required criteria listed in section 9.702:

(a) Public facilities and services are available to the site. If the public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to need by reason of:

1. Prior commitment of public funds or planning by the appropriate agencies, or

2. A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or

3. Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development.

This criteria requires the applicant to demonstrate that public facilities and services are available to levels sufficient to support the project. The applicant's original written statement addresses this standard on page 6, noting that the subject site is an urban infill site and that public facilities and services are either existing or will be provided for by the applicant consistent with subsection (2) of this standard. The applicant's supplemental narrative and site plans dated August 15, 2002 included more information about proposed and existing services and utilities. On page 8 of the supplemental narrative, the applicant states that a utilities plan is included on site plan Sheet CU-4 which "demonstrates that stormwater facilities and sanitary sewer requirements have been addressed and resolved." The applicant further notes the availability of a 20 inch water line on Willamette Street and an existing 10 inch water line on 40th Avenue, and states that adequate water supply is provided to the site. The applicant also notes the area as being served by area schools, transit service, natural gas, cable, etc.

Based on the applicant's submittals and relevant referral comments, Planning staff concludes that public facilities and services are available to the site. As further detailed below, staff recommends the imposition of conditions of approval to improve inadequate facilities and services that are available to levels sufficient to support the project.

Wastewater Service

Because public wastewater service is not currently available in Willamette Street adjacent to the site, the applicant proposes an extension of the public wastewater system from public manhole #321 located in 40th Avenue just east of Willamette Street. Public Works staff notes that prior to development, a Privately Engineered Public Improvement (PEPI) permit would be required for the construction of any public wastewater improvements. The applicant may also need to demonstrate capacity in the receiving system as part of the PEPI process.

The applicant also proposes connecting a portion of the development to the public wastewater system located within a public utility easement that crosses the southwest portion of the site. Staff notes that the connection to the public wastewater system at this location would appear to involve a crossing of North Braewood Creek. Under current regulations, that stream corridor is protected by the (Goal 5) /WR overlay standards. As noted previously, it is unclear how the /WR applies, and the City Attorney will be providing a memo on this topic. If the /WR does apply, then approval of a standards review would be required for construction of a new underground utility line within the /WR conservation area.

Streets & Sidewalks

The proposed development is adjacent to Willamette Street to the east and West 40th Avenue to the west. Willamette Street is classified as a minor arterial street, improved with variable width paving and gutters only, within the 80-foot-wide right-of-way prescribed on the Street Right-of-Way Map (figure 61). Sidewalks have not been constructed on this segment of Willamette Street. The street was resurfaced with new asphalt in 2011. West 40th Avenue adjacent to the site appears to be an unimproved dirt surface.

In regards to the existing public streets, Public Works staff notes that, as a condition of approval, West 40th Avenue (an existing, unimproved public right-of-way segment that extends from the subject site to the intersection with Braeburn Drive) will need to be improved prior to development to allow access to the site. Options for improvement would include a Privately Engineered Public Improvement (PEPI) or Temporary Surfacing Permit (TSP). Prior to or at the time of development, a permit to construct sidewalks on Willamette Street along the frontage of the area proposed for controlled income and rent housing would also be required.

The applicant proposes to construct a private street, “Cathedral Way” through the development, connecting to Willamette Street and to West 40th Avenue. The applicant’s written statement from 2002 indicates the private street is the same configuration as shown on Rest Haven (CU 95-2), and that it will meet local street standards. Supplemental site plans with 2008 aerial photo now show the proposed private street in a different configuration than originally proposed, and in a steeper alignment near its intersection with Willamette Street, which would appear to exceed the maximum grade allowed under private street standards. In the event this application is approved, staff recommends that final site plans shall be submitted that demonstrate that the proposed private street meets the local street standards as described in the Eugene Arterial & Collector Street Plan dated November, 1999 (also see Section M, Private Streets and Alleys, from adopted Resolution No. 4608), including but not limited to maximum grade requirements, sidewalk requirements, sight distance requirements and traffic controls that might be needed at the proposed intersections.

Stormwater Service

The site plans show a reference to a 30 inch pipe near North Braeburn Creek in the southwest corner of the subject property. The creek is also shown on the plans. A PEPI application was submitted in 2007 to pipe the creek at this location, but that application has expired and the proposed work is not approved. In the event the Hearings Official approves this application, Public Works staff recommends that the final site plans be revised remove any reference to a 30 inch pipe in this location.

A private storm drainage system is also shown to provide drainage for the private street and paved surfaces; however, it is not clear how the proposed dwelling units will be served by a storm drainage system. In the event the Hearings Official approves this application, staff recommends that the final site plans be revised to demonstrate how the structures are served with storm drainage system that provides an acceptable destination for stormwater runoff. Staff also notes the City's Stormwater Basin Master Plan identifies a capacity deficiency in the public system downstream from the development site that will need to be addressed through the permitting process.

Water and Electric Service

With respect to water and electric service, referral comments from Eugene Water and Electric Board (EWEB) indicate no objection to the request assuming their comments and conditions are addressed prior to obtaining water, electric, and/or fiber services from EWEB. The referral comments note that the cost of facility extension will be borne by the requesting customer and executed under EWEB policies and procedures at the time of request. The comments also note that EWEB does not allow facilities under stormwater treatment facilities or open drainage structures. In addition, various easements will be necessary and EWEB will require that the water service be connected between the 20 inch line in Willamette Street and the 10 inch line at the intersection of Densmore Road and West 40th Avenue. The full referral comments from EWEB, in a letter dated June 13, 2016 are included in the application file for reference.

Fire

With respect to fire, staff recommend that, if the Hearings Official approval this application, the final site plan be revised to address the following referral comments from Fire Department staff:

The original plans showed an 8 inch water line running along the proposed access road. Fire hydrants are not shown but shall be installed meeting the requirements of 2014 Eugene Fire Code and Eugene Water and Electric Board Standards.

Further information is needed to verify slope/grade of the proposed fire apparatus access road does not exceed 10 percent meeting 2014 EFC 503.2.7 requirements (or the 1997 City of Eugene adopted Uniform Fire Code Section 902.2.2.6-it's the same code language).

Further information is needed to verify the road surface is an all-weather surface capable of supporting an 80,000 lb. imposed load per EFC 503.2.3 (or Eugene UFC 902.2.2.2) and EFC Appendix D102.1.

"No Parking" signage shall be posted on both sides of the 20 foot wide fire apparatus access road per EFC 503.3 (or Eugene UFC 901.4) and EFC Appendix D103.6.

Based on the findings above, referral comments, and recommended conditions, Planning staff concludes that public facilities and services are available to the site.

(b) The proposed project is designed to:

1. Avoid unnecessary removal of attractive natural vegetation;

The applicant addresses this standard starting on page 7 of the original written statement and further, starting on page 9 of the supplemental narrative, and on the additional site plans submitted June 9, 2016. In summary, the applicant asserts that the site plans provided in the application materials are adequate to determine compliance with this standard.

The applicant specifically cites the Woodleaf Village decision (see CU 95-7) as providing relevant guidance on how the standard is to be interpreted for CIR housing applications. As such, relevant Woodleaf Village application materials have been included as part of the record for reference. In addition to a copy of the Planning Commission's Final Order provided by the applicant, staff has included the performance agreement and the approved final site plan set which shows the final outcome of the project as approved by the City.

In essence, the applicant makes the case that the City's regulations intentionally give priority to the construction of CIR housing and that any loss of vegetation to attain an increase in density for CIR projects is "necessary." Staff agrees with the applicant that the City Council's legislative intent at the time was to help facilitate affordable housing with a less rigorous and subjective set of standards than other application types. This intent is further reflected through the Planning Commission's interpretation in the Woodleaf Village case. Staff also generally agrees that compliance with this standard does not depend on evaluation of the health or significance of individual trees or other vegetation that must be removed in order to build the proposed project.

Staff notes that in Woodleaf Village, the Planning Commission required a detailed tree preservation plan to be prepared by a certified arborist, and that the plan included a full tree survey for the entire site. In addition, a variety of approval conditions were established to ensure that tree preservation measures would be employed (for the trees that would remain) during the construction process

Staff has previously requested that the applicant submit additional information to determine the necessity for vegetation removal due to the location of site improvements as proposed by the applicant. Staff appreciates the applicant's efforts to provide more details on the supplemental and more recent updated site plans, regarding the extent of construction and vegetation removal impacts; including the 2008 aerial photo provided on the site plans. In regards to the most recently submitted site plan, the applicant's attorney states in his email to

staff on June 8, 2016: "Here is the second graphic which masks the footprint of the project – the area that will be disturbed by site improvements, infrastructure, access and dwellings. The impact area has been whited out, so you can see what will be left untouched."

However, staff notes that the June 9, 2016 site plans show wastewater and stormwater lines and the proposed private street outside of the area identified for development, and in some areas extending through vegetated portions of the subject site. In addition, the site plans do not show the full extent to which grading and site disturbance will need to occur to accommodate the proposed private street, infrastructure and buildings. This means that areas identified as "left untouched" in the June 9, 2016 site plans cannot be verified as accurate.

Because the full extent of vegetation removal remains unclear, and the applicant has not justified the necessity of the proposed alignments, the necessity for vegetation removal in those areas is not clearly demonstrated. Without more precise information regarding the location of existing vegetation, and the area of necessary construction impact to accommodate the proposed facilities (serving the proposed CIR housing), an evaluation of the extent of necessary vegetation removal is not possible at this time.

Staff acknowledges that something less than a full tree inventory (as required for Woodleaf Village) would be adequate, subject to consideration and approval by the Hearings Official. For example, the applicant could still provide a more detailed plan showing the full extent of grading and site improvements, a more detailed look at the trees adjacent to the limits of proposed impact, along with an arborist report recommending proposed protection measures.

Additionally, conditions of approval could be imposed to ensure that a tree preservation plan is put in place to ensure protection of the trees indicated to remain over the long-term, and pending any additional evidence provided by the applicant, staff would request the opportunity to evaluate and recommend any appropriate conditions of approval in response to what is provided.

Based on these findings and the available information, Planning staff cannot conclude the above criterion is met.

2. Provide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas; and

The applicant addresses this standard beginning on page 7 of the original written statement dated April 8, 2002. The applicant notes that a generalized site plan is provided with the approach of clustering units to retain timbered areas and common open spaces where possible. The applicant states that the trees left standing will provide an "aesthetic natural buffer" between the surrounding properties and most of the proposed controlled income and rent housing. They state that in some areas, sight obscuring materials will be added to the wrought iron fencing, and newly planted trees will provide buffering.

The applicant's site plans, dated August 16, 2002 include a notation that states: "Proposed 6' chain link fence at property line" along the west and southern boundary of the site and "Proposed 6' wrought iron and/or brick fence" along the eastern boundary. In the applicant's recent letter dated June 10, 2016, it is also noted that: "Some CIR housing will abut the property line and screening may need to be through sight obscuring fencing, other areas will afford a vegetative buffer through undeveloped areas."

The applicant further states that the proposed dwellings are situated to provide the greatest setback possible from the surrounding properties, that trees and other landscaping will be planted along the private street and in the parking areas to improve the "natural aesthetics" and that main outdoor living areas are terraces and porches are strategically situated to ensure adjacent dwellers' privacy.

Based on the applicant's June 9, 2016 site plans, trees and vegetation generally provide adequate screening along the southern and southwestern property lines, assuming preservation of such areas is conditioned. However, along the western property line (just south of the proposed connection of the private street to W. 40th Avenue) high-impact/activity areas including parking areas and trash enclosures are shown located right on or adjacent the property line. No trees or vegetation is proposed to be retained or preserved in these areas, nor is any screening shown on the site plans. As apparent on the aerial photo, this area backs up to outdoor living areas of the adjacent residential uses. While staff believes that residential development is not necessarily or inherently incompatible with other adjacent, residential uses, the applicant's plans with regard to setbacks, fencing and screening are not entirely clear under this standard in terms of ensuring privacy to adjacent outdoor living areas. It may be that with additional information, clarification, and perhaps refinements to the proposed site plans that the applicant could demonstrate compliance under this standard.

As stated elsewhere in the applicant's written statement, the applicant wishes to retain maximum flexibility for the future developer in terms of unit floor plans, design and elevations to keep the ultimate cost of development low (see original written statement, page 2). They state that approximate building footprints for housing have been shown as rectangles on the site plan, and that the outline of those housing units accommodates an area for porches or patios attached the units as well as storage areas (see supplemental narrative, page 7).

Based on these statements, staff assumes that the outline of the proposed units is fixed, and in the event of an approval, that the project would be held to those boundaries at the time of future development and any subsequent permitting processes. A condition of approval would be needed to ensure compliance and help staff and all interested parties to understand what is conceptual versus fixed as part of this application.

Based on the findings above and available information, Planning staff cannot conclude that the above criterion is met.

3. Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress.

The applicant addresses this criterion beginning on page 8 of the original written statement dated April 8, 2002. The proposed alignment of the private street ("Cathedral Way") is shown on the site plans and therefore staff addresses it as a proposed private street subject to applicable standards in effect in 2002. This private street provides ingress and egress to the site, and connects to Willamette Street and West 40th Avenue. Parking for the housing units is either directly accessed via the private street or via drive aisles connected to the private street. As noted previously, the most current version of the applicant's site plans including a 2008 aerial photo, show a different and steeper alignment than shown on prior versions, in the area near where the new private street would intersect Willamette Street. The proposed private street does not appear to meet the applicable standards including maximum grades in some areas, and lacking any sidewalks. The application also does not include any information or proposal as to how the unimproved segment of West 40th Avenue would be upgraded to ensure safe ingress and egress. However, these issues can be resolved through conditions of approval.

With respect to parking, the applicant's site plans note that a total of 197 motor vehicle spaces will be provided, consistent with the code requirements in effect when the application was submitted. In accordance with EC 9.586(11)(e), 1¼ spaces are required per unit, which would amount to a total of 215 spaces. With a 25% reduction allowed outright, a minimum of 162 parking spaces are required. The applicant also notes that 260 bike parking spaces are provided, where a minimum of 215 spaces are required. They note that 172 of these spaces will be provided in the proposed dwelling units, with 88 spaces provided in bike lockers on site. The proposed community center (presumably for the dedicated purpose of serving residents of the housing project since it would otherwise require its own CUP if open to the public) has 5 parking spaces. Based on this information, it appears that the proposed amount of parking complies with the code requirements in effect in 2002. Walkways are shown connecting the housing units to the parking areas.

While it is not clear whether the proposed parking areas meet any of the related standards for design and improvements at EC 9.584, such as surfacing and lighting, striping, service drive standards that would require no backward movement within a street, and the parking area landscaping standards at EC 9.589, any subsequent permits would be subject to further review for compliance with applicable standards.

As noted previously, the approximate building footprints for housing have been shown as rectangles on the site plan, and that the outline of those housing units accommodates an area for outdoor living areas (porches or patios) attached the units (see supplemental narrative, page 7). Additionally, according to the August 2002 site plans, approximately 77 percent of the site will remain as open space, which presumably, will also be available for use by future residents.

Based on the findings above, and available information, Planning staff concludes that the above criterion is met.

(c) The increase in density shall not be permitted in areas that are unavailable for controlled income and rent (CIR) housing with increased density. Areas that are unavailable for increased density are shown on Figure 33 as shaded

areas. Those areas not shaded on Figure 33 are available for CIR housing with increased density.

The subject site is not included within any of the areas included on EC Figure 33 (see attached) as being unavailable for controlled income and rent housing. As such, this criterion is met.

Staff Recommendation

Based on the findings above, staff concludes that the application does not include sufficient information and evidence to demonstrate compliance with the applicable approval criteria at EC 9.724(2)(b).

Hearings Official Decision & Notice

As required by EC 9.706, the Hearings Official's decision on this application is due within 15 days following the close of the public hearing and the record. The Hearing's Official's decision shall be based upon findings and conclusions in response to the applicable criteria. Notice of the decision will be provided by the City within 5 days of the decision, to the applicant and interested parties. Unless appealed, the Hearings Official's decision is effective on the 11th day after notice of the decision is mailed.

Under EC 9.714, within 10 days of the date the notice of the Hearings Official's decision is mailed, it may be appealed to the Eugene Planning Commission by the owner, applicant, party, an adversely affected person, or a person entitled to notice under EC 9.706(1). The appeal shall be based on the record, shall state specifically how the Hearings Official failed to properly evaluate the proposed CUP application or make a decision consistent with applicable criteria, and shall be limited to the issues raised at the evidentiary hearing that are set out in the filed statement of issues.

Staff Report Attachments

The following items are attached for reference:

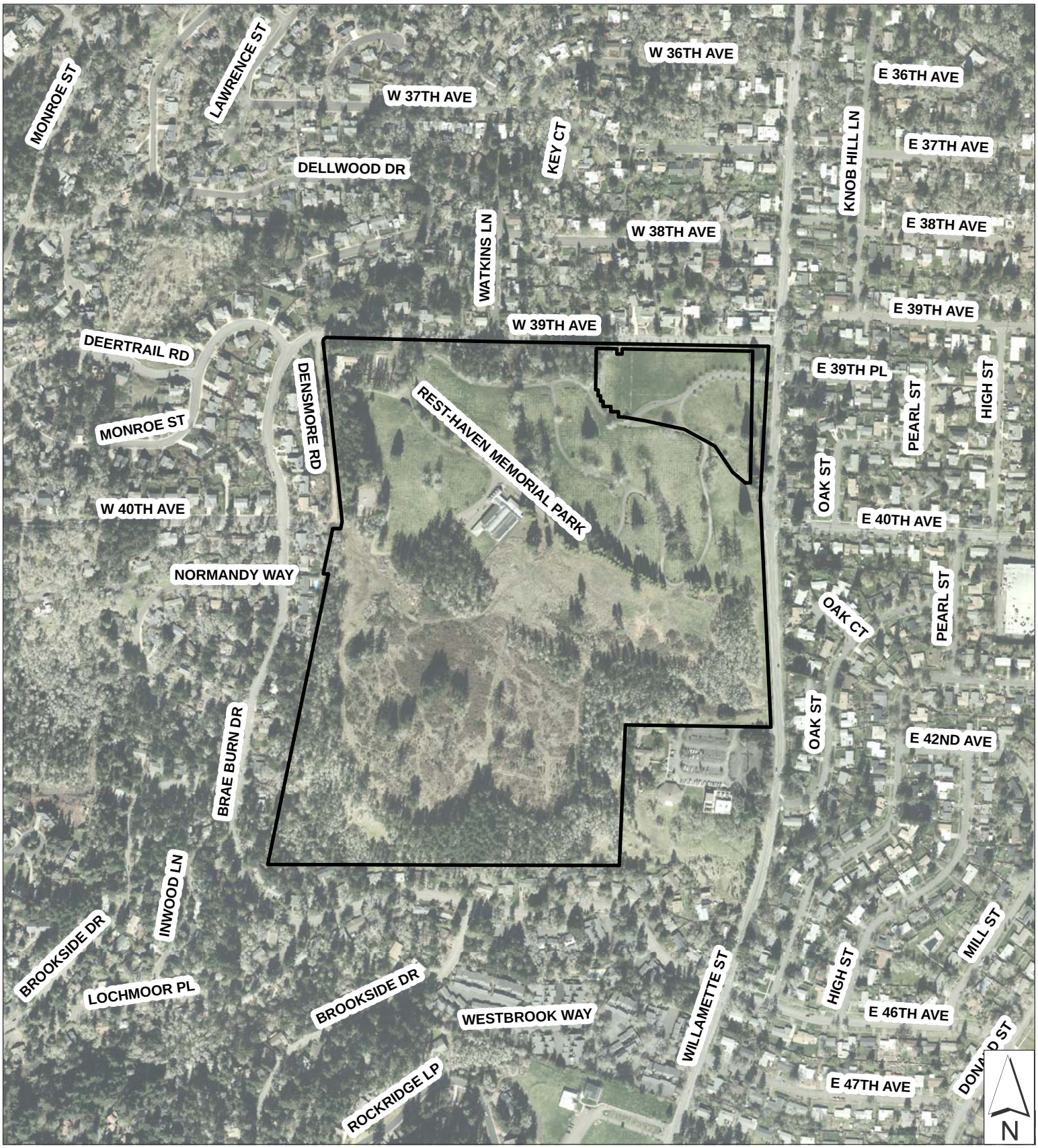
A. Vicinity Map
B. Reduced Site Plans
C. LUBA Final Opinion and Order (LUBA No. 2002-131)
D. LUBA Final Opinion and Order (LUBA No 2004-16)
E. Eugene Code Figure 33

The applicant's full-size site plans, and the entire application file, are available for review at the Eugene Planning Division offices. Copies of the materials are also available by visiting the City's website at http://pdd.eugene-or.gov/LandUse/SearchApplicationDocuments?file=CU-02-0004. The Hearings Official will also receive a full set of application materials for review prior to the public hearing. These materials will also be made available for review at the public hearing.

For More Information

Please contact Gabe Flock, Senior Planner, City of Eugene Planning Division, at:
(541) 682-5697; or by e-mail, at: gabriel.flock@ci.eugene.or.us

Cathedral Park - Vicinity Map (CU 02-4)

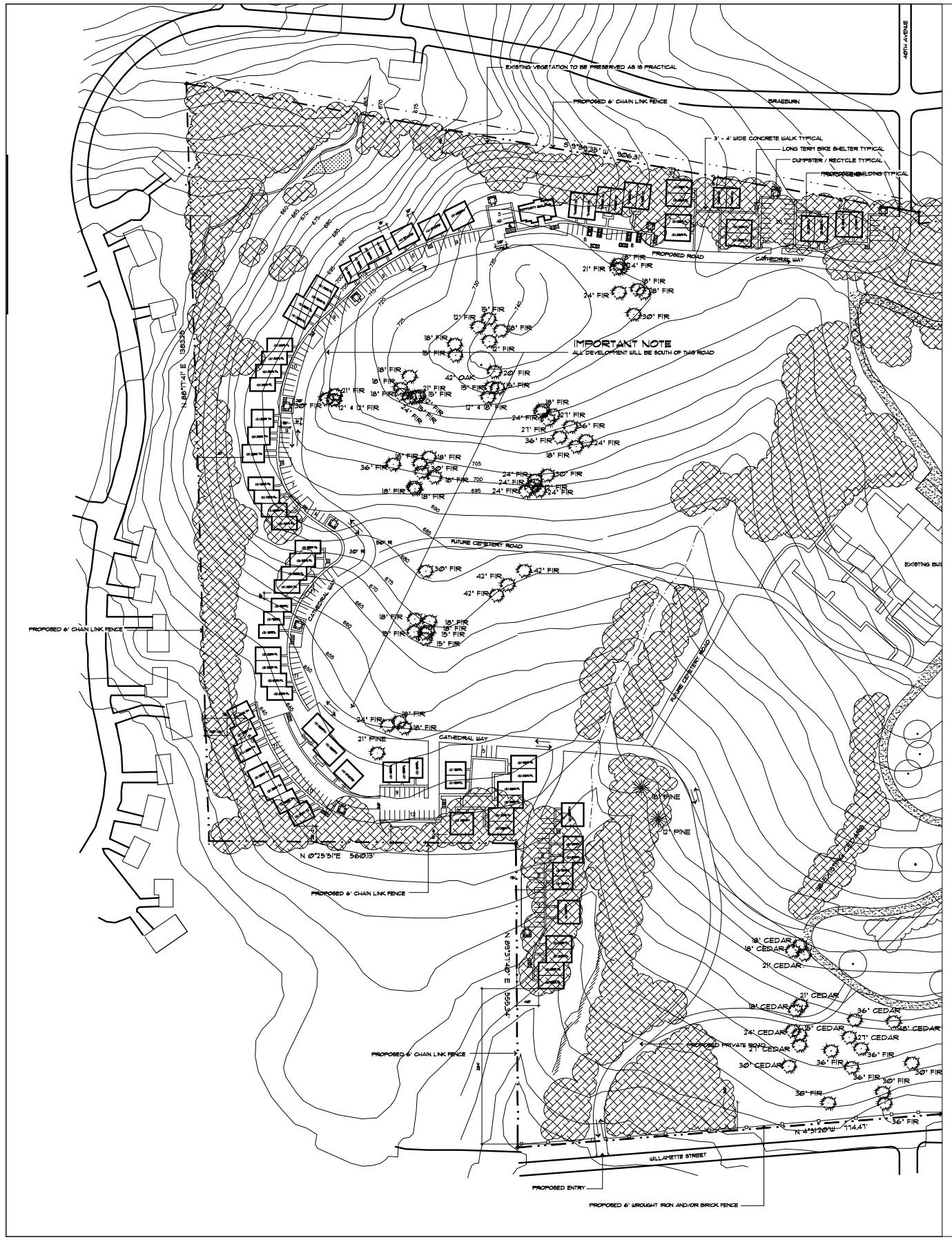


0 250 500 1000 Ft

Legend

Rest Haven Cemetery Property

Controlled income and rent housing proposed on southern portion of property (see site plan)



MAP and TAX LOT NUMBER

MAP : 18-03-18-00
TAX LOT # 300

SITE INFORMATION

ZONING : RA

TABULATION OF COVERAGE

BUILDINGS	95,595	SF	16%
PARKING	111,105	SF	14%
OPEN SPACE	481,615	SF	70%
TOTAL	688,315	SF	

BUILDING INFORMATION

GROSS BUILDING SIZE : 19,760 SF
TYPE OF CONSTRUCTION : 5N
OCCUPANCY CLASSIFICATION : R-1

LIGHTING

PEDESTRIAN SCALE LIGHTING NOT TO EXCEED 15' IN HEIGHT.
STREET LIGHTING NOT TO EXCEED 25 FEET IN HEIGHT.
EQUIPPED WITH FULL CUT OFF SHIELDS TO PREVENT GLARE ONTO ADJACENT PROPERTIES.

PARKING (AUTOMOBILE and BICYCLE)

TOTAL BUILDING UNITS 172 UNITS

TOTAL AUTOMOBILE PARKING REQUIRED

ECC 9.586, 11, (a) 1 1/4 SPACES PER UNIT
172 UNITS X 1.25 SPACES PER UNIT = 215 PARKING SPACES
215 PARKING SPACES LESS 25% DEVELOPMENT REDUCTION = 162 PARKING SPACES REQUIRED.
171 PARKING SPACES ARE PROVIDED

TOTAL BICYCLE PARKING REQUIRED

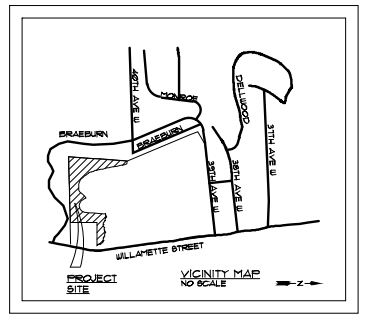
ECC 9.586, 11, (a) 1 1/2 SPACES PER UNIT
172 UNITS X 1.5 SPACES PER UNIT = 258 PARKING SPACES REQUIRED
260 ARE PROVIDED : 172 IN THE UNIT STORAGE AREAS AND 88 IN BIKE LOCKERS ON SITE

SHEET INDEX

SITE PLAN	SHEET CU-1
PLANTING PLAN	SHEET CU-2
ARCHITECTURAL ELEVATIONS	SHEET CU-3
ARCHITECTURAL ELEVATIONS	SHEET CU-4
ARCHITECTURAL ELEVATIONS	SHEET CU-5

LEGEND

- EXISTING DECIDUOUS TREE TO REMAIN
- EXISTING CONIFEROUS TREE TO REMAIN
- EXISTING TREES
- EXISTING CONTOUR
- WHEEL STOPS
- STREET LIGHTING HEIGHT NOT TO EXCEED 25'
- VEHICULAR CIRCULATION
- PROPOSED BIKE STORAGE 100% LONG TERM
- TRASH AND RECYCLE ENCLOSURE
- SITE LIGHTING PEDESTRIAN SCALE (12' - 15' MAX.)
- EXISTING FIRE HYDRANT
- PROPOSED CATCH BASIN
- EXISTING A/C/ ROAD



LANDSCAPE ARCHITECTS
SCHIRMER SATRE GROUP

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REGISTERED #326 CAROLE E. SCHIRMER OREGON 11-18-94 LANDSCAPE ARCHITECT

CATHEDRAL PARK

CONDITIONAL USE PERMIT

Scale: 1" = 100'-0"
0 50 100 200

Revisions

#	Date	Description

Project Number
Drawn By: ces
Checked: ces
Date: 8 April 2002
Phase

CU-1

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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES WIPER, INC.,
Petitioner,

vs.

CITY OF EUGENE,
Respondent.

LUBA Nos. 2002-131 and 2002-132

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos, PC.

Emily N. Jerome, Eugene, filed the response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick, PC.

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

REMANDED (LUBA No. 2002-131)	03/03/2003
DISMISSED (LUBA No. 2002-132)	03/03/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

In LUBA No. 2002-131, petitioner appeals a city decision that rejects petitioner's conditional use application to construct 172 housing units. In LUBA No. 2002-132, petitioner appeals a letter from a city planner that rejects his request to reconsider the decision appealed in LUBA No. 2002-131.

MOTION TO DISMISS

For the reasons explained in *Wiper v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2002-131, Order, December 10, 2002), LUBA No. 2002-132 is dismissed.

FACTS

The subject property is tax lot 300, a 72-acre parcel. The northern 700 feet of tax lot 300 is zoned Public Lands (PL) and the remainder is zoned Suburban Residential (RA). Much of the property is occupied by a cemetery and related facilities that were established in 1928. Cemeteries are allowed as a conditional use in all city zones. The subject property is generally surrounded by residential uses.

In 1995, petitioner sought and obtained a conditional use permit (CUP) masterplan that recognized various existing cemetery uses and facilities, and sought conceptual approval to expand certain other uses. The 1995 CUP masterplan was reduced to a conditional use agreement between petitioner and the city. The agreement includes an eight-sheet set of final approved plans.

The 1995 plans depict the main cemetery structures and burial areas occupying the northern and middle portions of the property. The plans also depict a 15-acre area at the southern periphery of the property, south of an internal road (Cathedral Way). The southern 15-acre area is currently wooded and undeveloped. The 1995 CUP plan contemplates removal of most of the trees in the 15-acre southern area, with the exception of isolated stands and a vegetative buffer along the southern property line. The 1995 CUP plan also

contains the notation "future cemetery lawn" and "proposed irrigation" for the 15-acre southern area. In approving the 1995 CUP masterplan, the hearings officer discussed the proposed use of this area:

> "This proposal involves developing the wooded southern area of the site into cemetery lawns with relatively few trees. A finding can be made at this point, conceptually, that [the proposal] can be accomplished * * * in a manner that is compatible with the existing surrounding residential uses. * * * The area requiring further study is the southwest corner of the site and along the entire southern periphery of the site. The applicant proposes a vegetative buffer of varying widths and preservation of certain trees. Also proposed, however, is a fence and the location of tombs within this buffer area. Additionally, there is the complication of the wetlands area in the southwest corner of this site. One approach might be to require as a condition of approval the retention of a 100 foot buffer area along the entire southern boundary but this may not be necessary with more detail made available concerning the vegetation that exists and will be retained in the buffer area and proposed location of the tombs and fence. Without that information, if the buffer is to be less than 100 feet in depth, it is impossible to determine whether the proposed use will be compatible with the adjacent residences.
>
> "It is acknowledged that the cemetery use proposed, open lawns and tombs, do not have substantial adverse operating characteristics. At the same time, to be reasonably compatible, the cemetery use must be designed to recognize the existing wooded character of this area of Eugene to the extent of allowing a meaningful buffer area between the cemetery use and the residential uses.
>
> "In that the approval is for a two phased development, with the southern portion being developed only after development of the area of the cemetery within the proposed roads, there will be adequate time to address the details of the buffer area and for the applicant to seek approval of a plan in that regard." Record 435.

On April 8, 2002, petitioner filed the subject application with the city for a conditional use permit to construct a 172-unit Controlled Income and Rent (CIR-CUP) residential development on the 15-acre portion of the property south of Cathedral Way. The accompanying narrative takes the position that that portion of the property is not master planned for cemetery use under the 1995 CUP. On April 23, 2002, the city notified petitioner that the application was incomplete, and provided petitioner with a list of requested information, including a revised legal description that includes only the affected

15-acre portion. By August 15, 2002, petitioner had submitted the requested information. Petitioner indicated a willingness to submit additional information as the city's review moved forward; however, petitioner requested that with the material submitted the city consider the application complete.

On September 13, 2002, the city planning director sent a letter to petitioner rejecting the CIR-CUP application, and refunding a portion of the application fee. The September 13, 2002 letter takes the position that the area on which petitioner proposes to construct housing is subject to the 1995 CUP. The letter states, in relevant part:

> "The City cannot address the conflicts between your proposed CIR-CUP application and the existing CUP for the site through the completeness review process because the City is not in a position to notify you of 'exactly what information is missing' from your application. There are numerous options for addressing the conflict between an existing CUP and a proposed new use on the same site. The City cannot presume that you would pursue any one option and the option chosen would dictate what additional information is needed. Further, the completeness review process is not designed to allow an applicant to submit what amounts to a new application. To establish a CIR development on the Rest-Haven site, you would need to submit a very different plan, application and narrative statement that would constitute a new application. Therefore, your application has been rejected by the City to allow you to reformulate your approach to your proposal in a way that addresses the existing CUP for the site." Record 4.

The city's September 13, 2002 letter advised petitioner that the letter is the city's final land use decision, appealable to LUBA. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that the city violated its code and applicable statutes in rejecting petitioner's CIR-CUP application without completing the conditional use hearing process. According to petitioner, nothing in the city's code authorizes the planning director to reject or refuse to process a conditional use permit application for any of the reasons stated in the September 13, 2002 letter. Petitioner cites to *Doumani v. City of Eugene*, 35 Or LUBA 388

(1999), for the proposition that a local government cannot require, as a condition for processing an application, something that is not expressly provided for under the local code.[1]

Petitioner also argues that the city's action is inconsistent with ORS 227.178(2), which prescribes the manner in which permit applications are deemed complete.[2] According to petitioner, under ORS 227.178(2)

> "[the] City must evaluate an application upon receipt and, within 30 days, inform the applicant of exactly what information is missing. The applicant then has two options. The first is that the applicant can provide the missing information to the City. If the applicant does that, then the City is to deem the application complete when it receives the missing information. Alternatively, the second option is that the applicant can refuse to submit the missing information. In that instance, the City is to deem the application 'complete' on the thirty-first day after the City received the application. The choice of whether or not to submit additional information is entirely up to the applicant. Regardless of which route an applicant decides to take, ORS 227.178(2)

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[1] In *Doumani*, the city rejected a site review application because it was signed by the prospective purchaser of the property rather than the owner. Nothing in the city's code required that the owner sign the application. Instead, the city relied on a code provision that allowed the city prescribe the manner of application, and the fact that signature line on its site review application form asked for the signature of the "owner," as a basis to reject the application. LUBA disagreed that the city's code provided a sufficient basis for the city to reject the application, simply because it was not signed by the owner.

[2] ORS 227.178 provides, in relevant part:

> "(1) Except as provided in subsections (3) and (4) of this section, the governing body of a city or its designee shall take final action on an application for a permit * * * including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.
>
> "(2) If an application for a permit * * * is incomplete, the governing body or its designee shall notify the applicant of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section upon receipt by the governing body or its designee of the missing information. If the applicant refuses to submit the missing information, the application shall be deemed complete for the purpose of subsection (1) of this section on the 31st day after the governing body first received the application.
>
> "(3) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

> directs the City to deem the application complete (regardless of whether or it is in fact complete) and then to process the application." Petition for Review 17-18.

Petitioner contends that ORS 227.178(2) mandates an interactive process whereby the applicant attempts to submit a complete application, and if the local government feels it needs additional information to make a decision, it may request that information. According to petitioner, the statute does not authorize the city to reject an application it believes to be incomplete. On the contrary, petitioner argues, the statute contemplates that the city must make a decision on the application, even if the applicant refuses to supply information the city has requested, and even if as a result of the missing information the city decides to deny the application. Petitioner contends that the city misunderstands its role under ORS 227.178(2), in apparently believing that it needs to have before it all information it deems necessary to *approve* the application.

Further, petitioner argues that the city's summary termination of the statutory process deprived petitioner of the opportunity to address the city's concerns. Petitioner notes that the planning director suggested in her September 13, 2002 letter that petitioner has a number of options for addressing the alleged conflict between the 1995 CUP and the CIR-CUP. Petitioner agrees, and notes that such options would potentially include (1) demonstrating that there is no conflict and thus no need to amend the 1995 CUP, or (2) amending the 1995 CUP to allow the proposed housing, either by shrinking the footprint of the CUP masterplan or by changing the text and plans to allowing housing. Petitioner argues that the second option might be done as a separate application to amend the 1995 CUP, or by combining it with the CIR-CUP application. A third option, petitioner argues, is the one apparently preferred by the planning director: to abandon the CIR-CUP application and start over with a new combined application to amend the 1995 CUP and to approve the requested CIR

housing.[3] Petitioner argues that the planning director's decision effectively forces petitioner to exercise the third option discussed above, without giving petitioner the opportunity to make a case for any of the other options. Further, petitioner argues, the planning director's decision essentially prejudges the merits of the CIR-CUP application, without any opportunity for hearing or to address the planning director's views of the merits. Petitioner notes in this regard that, under the city's code, the decision maker on a conditional use application is the hearings officer, not the planning director.

Finally, petitioner argues that the planning director's decision is inconsistent with ORS 197.307(6), which requires that:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

According to petitioner, the procedure the planning director followed, in summarily rejecting petitioner's CIR application without allowing a decision on the merits of the application, is unclear and subjective, and has the effect of discouraging needed housing through unreasonable cost or delay. Petitioner contends that the planning director's decision is based on no code provisions or standards at all, and therefore reflects the height of discretion.

The city responds that it has implicit authority under its code to reject a permit application that would require a modification to an approved CUP, and that its decision to reject the CIR-CUP application is consistent with ORS 227.178(2). According to the city, Eugene Code (EC) 9.718 requires adherence to approved CUP plans. EC 9.772(2) provides a specific procedure for modifying approved CUP plans, and requires that "modifications to

---

[3] Petitioner notes that any new application would be governed by the code standards in effect at the time the application is submitted. ORS 227.178(3). *See* n 2. According to petitioner, shortly after petitioner filed its CIR-CUP application the city amended its CIR regulations to impose more difficult standards for CIR development.

the approved final plans shall be governed by the following procedures."[4] In the city's view, the CIR-CUP application clearly proposes development that requires modification to the 1995 CUP final plans. The city argues that its code implicitly prohibits a CUP holder from circumventing the required CUP modification process by requesting city approval of an application to establish a different use on the CUP site. Therefore, the city argues, its code implicitly authorizes rejection of an application that seeks to modify a CUP by means other than the CUP modification process.

With respect to *Doumani*, the city argues that careful consideration of that case supports the city's action. According to the city, *Doumani* stands for the proposition that the city may reject an application for reasons authorized by its code. The city argues that because EC 9.772 implicitly prohibits applications that in effect seek to circumvent the prescribed CUP modification process, the city's rejection is authorized by its code.

With respect to ORS 227.178(2), the city agrees with petitioners that that statute does not authorize the city to reject a permit application. However, the city argues, it relied not on

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[4] EC 9.722(2) provides in relevant part:

> "a. By Planning Director. Applications for modifications shall be submitted by the property owner or applicant. * * * If a modification is minor, *i.e.* it results in insignificant changes in the outward appearance of the development and impact on surrounding properties, it may be considered by the planning director. These modifications * * * may be approved by the planning director upon a finding that the changes:
>
> > "1. Are consistent with the conditions of the original approval, and
> >
> > "2. Result in insignificant changes in the outward appearance of the development and impact on the surrounding properties, and
> >
> > "3. Remain consistent with applicant permit criteria. * * *
>
> "b. By Hearings Official. Modifications that are major in nature and do not meet the standards for a minor modification shall require approval of the hearings official. * * * The hearings official may deny, modify, or approve the modification request. Approval of a major modification shall require a finding by the hearings official that the proposal and modification meet the applicable criteria [for conditional use permits] set out in [EC] 9.702 of this code. * * *"

the statute but on its code as the basis for rejecting petitioner's CIR-CUP application. Further, the city argues that its action is consistent with the statute. The problem with the CIR-CUP application, the city contends, is not that it was incomplete, but that it requested something the city could not consider: approval of a new CUP for a portion of a site already subject to an approved CUP. In order to review that request, the city contends, petitioner must file an application to modify the 1995 CUP in some way. The city agrees with petitioner that the requisite modification could take a number of different forms, but argues that it was in no position to inform the applicant "exactly what information was missing," as ORS 227.178(2) requires. Under these circumstances, the city argues, rejecting the CIR-CUP application was consistent with ORS 227.178(2).

Questions regarding what types of applications a development proposal requires are often resolved at a pre-application conference. We are informed that the city has a voluntary process for pre-application conferences, but petitioner did not request such a conference. That point aside, the disagreement between the parties boils down a dispute over the permissible range of responses under the city's code and applicable statutes, when the city official who receives a permit application believes that development proposed in the application requires an additional or a different type of application than the one submitted. We disagree with the city that the city's code answers that question. The city may or may not be correct that approval of the proposed development requires prior modification of the 1995 CUP pursuant to EC 9.718 and 9.772; however, neither of those code provisions purport to authorize the city to reject a permit application for failure to seek such a modification.

More importantly, we agree with petitioner that the city's summary rejection of the permit application is inconsistent with ORS 227.178(3). That statutory provision is part of a larger set of provisions beginning at ORS 227.160 prescribing standards for processing permit applications. In relevant part, ORS 227.175 provides that the city must establish a

consolidated procedure by which an applicant may, at the applicant's option, apply at one time for all permits or zone changes needed for a development project.[5] Further, the hearings officer or the appropriate review body must hold at least one public hearing on the application, or render a decision on the application without holding a hearing, pursuant to ORS 227.175(10). In turn, ORS 227.178(1) and (2) specify the process by which the application is deemed complete, and requires that, with limited exceptions, the city must make a decision on the application within 120 days from the date the application is deemed complete. Under ORS 227.178(2), even if the city believes it needs more information to render a decision, the applicant can effectively force the city to render a decision based on the information submitted. Here, there is no dispute that applicant invoked that option, and the application became "complete" for purposes of the statute. Having a "complete" application before it, the city was required by ORS 227.175 and 227.178 to render a decision approving or denying the application within the prescribed period. Under the statute, that decision must be made by the hearings officer or a designate, either after a public hearing or after following the procedures for a decision without a hearing. Nowhere does that statutory

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[5] ORS 227.175 provides, in relevant part:

> "(1) When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. * * *.
>
> "(2) The governing body of the city shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 227.178. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.
>
> "(3) Except as provided in [ORS 227.175(10)], the hearings officer shall hold at least one public hearing on the application.
>
> "(4) The application shall not be approved unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation."

scheme suggest that city planning staff may reject an application because it believes more information is necessary or because it believes approval of the proposal requires that the applicant file an additional or different application. On the contrary, it is reasonably clear under that statutory scheme that, once a permit application is filed "upon such forms and in such a manner as the city council prescribes" and that application becomes "complete," the city *must* follow the procedures prescribed in ORS 227.175 and render a decision on the merits of that application.[6]

It may well be, of course, that under the present circumstances the hearings officer will find that the information submitted does not support approval and the hearings officer will deny the application. We understand the city to argue that there is no point in expending additional time and money on the required statutory procedures, once the city has determined that the permit application cannot be approved in its current state. The problem with that argument is that both the statute and code require that a hearings officer, not the planning director, render a decision on a permit application, after a hearing or other procedure that affords the applicant and others the opportunity to present evidence and argument to the hearings officer. It might be that if the planning director had allowed the present application to come before the hearings officer, the hearings officer would have disagreed with the planning director's view of the code, or with the planning director's view that the proposed development can only be approved if the applicant submits a new application that includes an application to modify the 1995 CUP. We do not know, because the planning director's decision effectively denied petitioner the opportunity to argue that point before the only person who, under the statute and code, can make a decision on the permit application.

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[6] We do not understand the city to argue that it rejected the CIR-CUP application because it was not filed "upon such forms and in such a manner as the city council prescribes" or because the application was incomplete.

In sum, we agree with petitioner that the city's action in rejecting the CIR-CUP application is not authorized by its code and is inconsistent with the city's statutory obligations under ORS 227.175 and 227.178.

The first assignment of error is sustained, in part.[7]

SECOND ASSIGNMENT OF ERROR

In a December 10, 2002 order, the Board resolved petitioner's record objections, sustaining some of those objections and denying others. The order also denied a contingent motion to take evidence outside the record, in order to establish by deposition exactly what documents were placed before the planning director. Petitioner's overarching record objection was that the city had failed to establish that any document in the record, other than the September 13, 2002 letter, was "placed before" the planning director, and thus properly in the record. OAR 661-010-0025(1)(b). We rejected that overarching argument, but sustained petitioner's objection with respect to certain documents that the city made no effort to show were placed before the planning director.

In the second assignment of error, petitioner renews its objections to the record, and argues that the Board should reconsider the portion of our December 10, 2002 order that denied petitioner's objections. Petitioner also renews its contingent motion to take evidence outside the record. Petitioner argues that, if the Board reconsiders its order and sustains petitioner's overarching objection, then there is no evidence at all supporting the planning director's decision, and thus that decision must be remanded for that additional reason.

Even assuming that petitioner's request for reconsideration of our December 10, 2002 order is timely and properly asserted in an assignment of error, petitioner offers no substantial reason to reconsider our ruling. Accordingly, we reject that request, as well as

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[7] The city's brief does not respond to petitioner's arguments under ORS 197.307(6). Given our disposition of the first assignment of error on other grounds, we do not reach or resolve those arguments.

1 petitioner's contingent motion to take evidence, for the reasons expressed in our order.[8]
2 Petitioner's evidentiary challenge under this assignment of error is premised on our granting
3 petitioner's request for reconsideration and striking nearly all documents from the record.
4 With elimination of that premise, this assignment of error provides no basis for reversal or
5 remand.

6 The city's decision in LUBA No. 2002-131 is remanded.

7 LUBA No. 2002-132 is dismissed.

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[8] On February 5, 2003, one day prior to oral argument, petitioner filed its second motion to take evidence not in the record, pursuant to OAR 661-010-0045. The motion requests that the Board consider an e-mail between petitioner's attorney and the city's attorney, if the Board deems the content of the e-mail relevant to resolving the second assignment of error. The e-mail purports to establish that petitioner's attorney conferred with the city's attorney regarding the content of the record, prior to filing record objections, a point that the city apparently disputed in its response brief. Given our disposition of the second assignment of error, petitioner's second motion to take evidence is denied as moot.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES WIPER, III
and REST-HAVEN MEMORIAL PARK,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

THOMAS G. EAGAN, DIANA K. EAGAN,
DAVID BERG, JUDITH BERG, LINDA ROE,
TOM ROE, RICHARD STEERS, SHEILA STEERS,
MIKE CURTIS, FRAN CURTIS,
JOHN C. SIHLER, DENE H. SIHLER,
JOHN BENNINGTON and ALLISON HASSLER,
Intervenors-Respondent.

LUBA No. 2004-016

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Dan Terrell and Bill Kloos, Eugene, filed the petition for review. Bill Kloos argued on behalf of petitioners. With them on the brief was the Law Office of Bill Kloos, PC.

Emily N. Jerome, Eugene, filed a response brief on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick, PC.

Douglas M. DuPriest, Eugene, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Hutchinson, Anderson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

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

AFFIRMED 05/10/2004

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

1 provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision denying petitioners' request to modify an existing conditional use permit.

MOTION TO INTERVENE

Thomas G. Eagan, Diana K. Eagan, David Berg, Judith Berg, Linda Roe, Tom Roe, Richard Steers, Sheila Steers, Mike Curtis, Fran Curtis, John C. Sihler, Dene H. Sihler, John Bennington and Allison Hassler (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

On April 20, 2004, two days prior to oral argument, petitioners filed an 11-page reply brief, to address alleged "new matters" raised in intervenors' response brief, which was filed April 9, 2004. Intervenors oppose the reply brief, on the grounds that it (1) is not limited to "new matters," (2) exceeds the five page limit authorized by OAR 661-010-0039, and (3) was not filed "as soon as possible" after the response brief was filed, as required by OAR 661-010-0039.[1] Petitioners respond to intervenors' objection, arguing that the reply brief is limited to "new matters," and the inadvertent failure to request permission to file an 11-page reply brief and the timing of filing the brief caused no prejudice and should not warrant denial of the reply brief.

We agree with petitioners that the reply brief is properly limited to "new matters." However, the matters addressed in the reply brief have little bearing on the issues we find to be dispositive in this appeal. Given that, we do not see that resolution of the parties' remaining disputes

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[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

over the reply brief would benefit either Board or bar, and we allow the reply brief without further discussion.

FACTS

The subject property is a 72-acre parcel zoned Low Density Residential (R-1) and partially developed with an existing cemetery. Those portions of the property not already developed as a cemetery are generally wooded. Adjacent properties are generally developed with single family dwellings.

In 1995, petitioners applied for and received a conditional use permit (1995 CUP) approving a masterplan for future development of the subject property. The 1995 CUP approved development in two phases. Phase I proposes cemetery uses on the bulk of the property from the north property line south to the southernmost internal road shown on the masterplan. Phase II involves the southernmost area, consisting of 15.8 acres between the road and the south property line, also known as Zone 6. The 1995 CUP conceptually approved cemetery uses in Zone 6, subject to conditions including a 75-foot buffer along the southern periphery of the CUP site, but did not approve a specific development plan. Instead, the 1995 CUP required future submission and approval of a specific development plan for Zone 6.

In 1998, the city and petitioners entered into a conditional use agreement (1998 CUP agreement), a contract between the parties as to how the 1995 CUP would be implemented. The site plans approved in the 1998 agreement include the notations "Future Cemetery Lawns" and "Proposed Irrigation" in Zone 6, and also depict a vegetative buffer along the southern periphery.

In April 2002, petitioners applied to the city for a conditional use permit to develop a Controlled Income and Rental Housing project (CIR-CUP) in the 15.8-acre Zone 6 area. The city refused to process the application, because the city perceived conflicts between the 1995 CUP and the CIR-CUP application that the city believed prevented approval of the CIR-CUP application. The city's refusal to process the CIR-CUP application was appealed to this Board, which remanded the decision to the city to process the application and render a decision. *Wiper v. City*

of Eugene, 44 Or LUBA 127 (2003). On remand, the city requested that petitioners first modify the 1995 CUP, to remove the 15.8-acre Zone 6 area from the footprint of the CUP masterplan, before proceeding with the CIR-CUP application. The petitioners requested that the city suspend consideration of the CIR-CUP application, and subsequently filed the instant application to modify the 1995 CUP to excise the Zone 6 area from the footprint of the CUP masterplan.

Staff accepted the modification application as complete, but recommended that the scope of the application be expanded to include modifications necessary to allow new uses in Zone 6 to access roads and utilities in other parts of the property that would remain subject to the 1995 CUP. Petitioners revised the application in accordance with the staff recommendation. The city planning director approved the modification application on October 31, 2003.

Intervenors, among others, appealed the planning director's decision to the city hearings officer, who held a public hearing on December 17, 2003. Two days prior to the public hearing, on December 15, 2003, petitioners requested in writing that the hearings officer include in her decision a determination as to whether Zone 6 could be developed with uses otherwise allowed in the R-1 zone, such as residential uses, without modifying the 1995 CUP. On January 16, 2004, the hearings officer issued a decision that (1) determined that modification of the 1995 CUP is necessary, but (2) denied the requested modification to excise Zone 6 from the CUP masterplan footprint and the related request to allow uses in Zone 6 to access roads and utilities in other CUP areas under the masterplan.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer failed to adequately address or resolve petitioners' request for a determination as to whether Zone 6 could be developed with uses allowed in the R-1 zone without a modification of the 1995 CUP. To the extent the hearings officer adequately resolved that issue, petitioners argue, the hearings officer incorrectly concluded that modification of the 1995 CUP was necessary.

Petitioners took the position before the hearings officer that because the 1995 CUP did not approve any particular development in Zone 6, no modification of the 1995 CUP to excise Zone 6 from the masterplan was necessary in order to develop Zone 6 with uses otherwise allowed under the R-1 zone. The hearings officer considered that argument and, after quoting and reviewing portions of the 1995 CUP, concluded as follows:

> "[N]otwithstanding the applicant's present position, the 1995 CUP clearly included the Zone 6 area as part of the CUP, and the [1995] Hearings Official relied upon the applicant's proposed use of that property, *i.e.*, the buffer proposed for that zone, in his description of the site and his evaluation of the use as applied to the approval criteria. The applicant also relied on that zone as part of the CUP in order to comply with Condition 17, which required a 75-foot buffer zone on the site's southern periphery. To argue now that the Zone 6 portion of the use was not a part of the 1995 CUP approval is inconsistent with the applicant's previous representations and proposals regarding the use of that site, the 1995 CUP approval and the applicant's final approved master plan. * * *
>
> "Further, the fact that additional review was required prior to further development beyond the conceptual plan provided for Zone 6 in the 1995 application does not exempt that portion of the site from the CUP. Rather, as the Hearings Official explained, the applicant had conceptually proposed tombs and fencing in addition to a proposed vegetative buffer [in Zone 6]. The Hearings Official found that, since further development of this portion of the site—beyond its approved use as a buffer—was proposed for a future phase, conceptual approval at that time was adequate, provided that additional review was completed prior to development 'in that regard.' This does not exempt [Zone 6] from the CUP, or allow the applicant to remove that portion of the property without a modification to the CUP.
>
> "Condition 16 of the 1995 CUP decision states that 'if the timing, location or size of any of the proposed improvements included in the master development plan are changed, a minor modification to this CUP shall be required. If there are substantial changes to the timing, location or size of these improvements, a major modification of this CUP may be required.' The request to remove Zone 6 from the CUP changes the location and size of improvements included in the master development plan within the meaning of Condition 16.
>
> "* * * [In addition], all modifications to approved CUPs must be evaluated for compliance with the criteria at EC [Eugene Code] 9.8110. As the Planning Director's decision correctly determined, 'as clearly established on the approved site plans, and within the CUP performance agreement, the subject area was conceptually approved for cemetery use with several requirements such as a 75-foot wide buffer zone along its periphery. As such, the applicant's request to

> remove the subject area from the cemetery master plan is correctly submitted as an application for CUP modification.'
>
> "The applicant's request for a determination that no modification is required to remove the Zone 6 property from the Rest Haven CUP is denied." Record 8-9 (quoting from portions of the planning director's decision at Record 308-09).

Petitioners argue first that the hearings officer mischaracterized the issue as whether (1) Zone 6 *is* part of the 1995 CUP or (2) a proposal to *remove Zone 6* from the 1995 CUP required a modification of the 1995 CUP. According to petitioners, the actual issue petitioners presented was whether a proposal to *develop Zone 6* with uses otherwise allowed in the R-1 zone required modification of the 1995 CUP to remove Zone 6. Petitioners contend that the hearings officer never resolved the actual question presented.

Although portions of the hearings officer's decision appear to mischaracterize the issue in the manner petitioners contend, we believe that the hearings officer understood the question presented and that the adopted findings adequately resolve that issue. Fairly read in the context of other findings in the decision, the hearings officer essentially concluded that the 1995 CUP approved conceptual uses and imposed conditions such that modification of the 1995 CUP is necessary in order to approve development that is different from that conceptually approved (*i.e.*, cemetery uses) or that affects compliance with conditions imposed on development of Zone 6, such as the requirement for a 75-buffer along the southern periphery. The hearings officer's conclusion to that effect is adequate for review.

Turning to petitioners' challenge to that conclusion, petitioners argue that the hearings officer's misconstrued the 1995 CUP. According to petitioners, the 1995 CUP simply required that *if* petitioners want to develop Zone 6 with cemetery uses, petitioners must submit a more detailed development plan for approval and that plan must require a 75-foot buffer between cemetery uses and the residences adjoining the southern property line. Petitioners contend that nothing in the 1995 CUP prohibits a non-cemetery use in Zone 6. Further, petitioners argue that the sole purpose of the condition requiring the 75-foot buffer is to separate cemetery uses in Zone 6

from the residential uses adjoining the southern property boundary. That buffer becomes unnecessary if Zone 6 is developed with non-cemetery uses, petitioners argue, and to the extent some kind of buffer is still desirable to protect residences adjoining the southern property line the entirety of Zone 6 will act as a buffer between cemetery uses elsewhere on the property and those residential uses.

We disagree with petitioners that the hearings officer misconstrued the 1995 CUP. The 1995 CUP applicant proposed, and the city conceptually approved, cemetery uses in Zone 6. The conditions and uses approved under the 1995 CUP were predicated on an assumption that Zone 6 would be developed with cemetery uses. For whatever reason, the 1995 hearings official was clearly concerned with buffering residential uses and cemetery uses, and petitioners offer no reason to believe the hearings official's concern was limited to the specific residences adjoining the southern property boundary. Had the city known in 1995 that petitioners would change their mind and propose non-cemetery development in Zone 6, such as the residential development proposed in the pending CIR-CUP application, the city might well have imposed different or additional conditions to buffer those uses from cemetery uses elsewhere on the subject property, in deciding to approve or deny the 1995 CUP. In short, the hearings officer correctly concluded that development of Zone 6 with uses other than those uses contemplated by the 1995 CUP requires modification of or amendment to the 1995 CUP.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

As discussed, the particular modification petitioners proposed was to remove Zone 6 from the footprint of the 1995 CUP. Modifications to an existing CUP are governed by the standards at EC 9.8110, which require a finding that the proposed modification is not "materially inconsistent with the conditions of the original approval," and that it will "result in insignificant changes" in

physical development, use of the site, and impacts on surrounding properties.[2] The hearings officer concluded that the proposed removal of Zone 6 from the 1995 CUP satisfied neither criterion. In addition, the hearings officer concluded that the additional modification suggested by city staff—to allow development in Zone 6 to use roads and utilities within the remaining CUP area—was inconsistent with EC 9.8110(2).

A. EC 9.8110(1)

Petitioners first challenge the hearings officer's conclusion that removal of Zone 6 from the 1995 CUP footprint is "materially inconsistent with the conditions of the original approval." The hearings officer determined that the proposed modification was inconsistent with Condition 17, which the hearings officer understood to require a 75-foot vegetative buffer along the southern periphery of the CUP site.[3]

---

[2] EC 9.8110 provides:

> "After the effective date of the approval of the conditional use permit, modifications to the approved conditional use permit may be considered in accordance with the Type II application procedures contained in EC 9.7200 through 9.7230, Type II Application Procedures. The planning director shall approve the request only if it complies with the following criteria:
>
> "(1) The proposed modification is not materially inconsistent with the conditions of the original approval; and
>
> "(2) The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties.
>
> "If the requested modification does not meet the criteria for approval, the application will be denied. The applicant may submit the requested modification as a new conditional use permit application based on Type III procedural requirements. Nothing in this land use code shall preclude the applicant from initially submitting the requested modification as a new conditional use permit application."

[3] The hearings officer's decision state, in relevant part:

> "[T]he question that must be addressed here is what impact the removal of this property from the CUP will have on compliance with Condition 17. That condition requires that the buffer along the southern periphery of the CUP be at least 75 feet wide. The applicant proposed that buffer, using the property it now proposes to remove from the CUP, in order to ensure compatibility, as required by former EC 9.702(a). Removal of that property will remove the existing 75-foot buffer. Removal of that buffer, however, does not remove the condition, which was found necessary, in Conditions 7 and 17, to establish compatibility and thus compliance

1 Petitioners repeat their argument that the only purpose of the 75-foot buffer requirement is
2 to ensure compatibility between cemetery uses in Zone 6 and *existing* residential uses adjoining the
3 southern property line. The proposed modification is consistent with that purpose, petitioners argue,
4 because all of Zone 6 would buffer residential uses along the southern property line from cemetery
5 uses elsewhere on the subject property. Petitioners also dispute the hearings officer's conclusion
6 that the required buffer must be "vegetative." Finally, petitioners argue that the hearings officer
7 erred in finding that petitioners had already removed most of the vegetation along what would
8 become the southern periphery of the CUP site, if the proposed modification were approved.
9 According to petitioners, although petitioners did obtain tree cutting permits for that area, the
10 permits expired, and no tree-cutting in that area has in fact occurred. *See Rest Haven Memorial*
11 *Park v. City of Eugene*, 44 Or LUBA 231, *aff'd* 189 Or App 90, 74 P3d 1107 (2003)
12 (dismissing petitioners' appeal of tree-cutting permits as moot).

---

with EC 9.702(a). In order to be compatible, Condition 17 requires that the buffer along the southern periphery must be at least 75 feet wide. The applicant has not established how it will continue to comply with that condition after the Zone 6 property is removed from the CUP. In fact, in reliance on the approved Master Plan, the applicant has removed most of the vegetative buffer along what it now proposes to be the southern periphery of the CUP site.

"The applicant argues that there is no requirement that the 75-foot buffer between the cemetery and adjacent properties be vegetative. However, [Condition 7 of the 1995 CUP] approval, quoted above, clearly establishes that the compatibility was dependent upon a vegetative buffer. Moreover, regardless of whether it is vegetative, in this modification application, applicant has not established how it proposes to provide a 75 foot buffer of any kind along the CUP's southern periphery. The applicant argues that the land it proposes to remove from the CUP will be a buffer between the cemetery and the existing adjacent residential neighborhood. However, if the Zone 6 property is removed from the CUP, it cannot be relied upon as the buffer required by the CUP. Condition 17 requires that the buffer along the cemetery's southern boundary be 75 feet. That condition cannot be satisfied by a 'buffer' outside the property subject to the CUP.

"* * * * *

"The applicant has not established how removal of the Zone 6 property can be achieved while continuing to comply with Condition 17 of the 1995 CUP approval. Removal of that property without compensating with a comparable buffer along the CUP's southern periphery results in a CUP that is materially inconsistent with Condition 17 of the original approval." Record 11-12.

1. Vegetative Buffer

With respect to whether the required buffer must be vegetative, we agree with intervenors and the hearings officer that the site plan and other conditions imposed in the 1995 CUP and the 1998 CUP agreement make it reasonably clear that the buffer was intended to be vegetative in character.

2. Consistency with Condition 17

With respect to whether removal of Zone 6 from the CUP footprint, and hence elimination of the requirement for a vegetative buffer in Zone 6, would be consistent with condition 17, the hearings officer's decision implicitly rejects petitioners' argument that the sole purpose of condition 17 is to buffer *existing* residential uses south of the property line. Instead, the hearings officer appears to view condition 17 more broadly as intended to ensure compatibility between cemetery uses within the CUP footprint and adjoining non-cemetery uses outside the CUP footprint. According to the hearings officer, condition 17 does so by requiring a buffer along the southern periphery of the CUP area, which as proposed and approved in 1995 was in Zone 6. Therefore, the hearings officer concluded, consistency with condition 17 requires a similar buffer within the southern periphery of the CUP area, once Zone 6 is removed from the CUP footprint. Because petitioners did not propose *any* buffer within the southern periphery of the CUP area after Zone 6 is removed, the hearings officer rejected the proposed modification as inconsistent with condition 17 and therefore not compliant with EC 9.8110(1).

The hearings officer's understanding of the purpose of condition 17, and hence what consistency with condition 17 means for purposes of EC 9.8110(1), is plausible and supported by the record. Petitioners' different view of the purpose of condition 17 is also plausible and has support in the record. However, petitioners' disagreement with the hearings officer on this point does not establish that the hearings officer misconstrued condition 17 or committed reversible error in concluding that the proposed modification was inconsistent with condition 17.

1 **B. EC 9.8110(2)**

2 The hearings officer also concluded that the proposed modification failed to comply with
3 EC 9.8110(2), which requires in relevant part a finding that the modification will have insignificant
4 impacts on the surrounding properties. *See* n 2. The hearings officer relied on testimony from
5 adjoining landowners that the preservation of the existing vegetative buffer in Zone 6 was necessary
6 to prevent adverse impacts to their properties, specifically to prevent "windthrow" of downed trees
7 and increased runoff onto their properties.[4]

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[4] The hearings officer's decision states, in relevant part:

> "* * * [W]hile the modification will not change the use of the remaining property as a cemetery, the use of the Zone 6 portion of the cemetery as a buffer necessary to ensure compatibility for purposes of drainage and windthrow, and the impact to the surrounding properties when that buffer is removed from the CUP protections, must be evaluated. While the applicant states that the removal of the Zone 6 area from the CUP in itself will not alter the appearance of that property, it will remove the condition that the Zone 6 area remain as a buffer. As one concerned neighbor with a Forestry degree explained:
>
>> "'Anyone who has ever viewed a clear cut in a west-side Cascade Douglas Fir forest knows that for the first few years after the clear cut Douglas Fir trees will blow down around the edge * * * Doug fir trees are very shallow rooted and prone to blow down when suddenly exposed to wind by the removal of trees around them.
>>
>> "'Most of the properties surrounding Rest Haven have large Doug fir trees in the back yards. I have two; one about 20 inches in diameter and one about 24 inches in diameter. Both are uphill from my house, close to the property line. If these trees blew down, they would land downhill and are tall enough to hit my house. Cutting trees in the buffer would directly impact my property. If trees were cut in the buffer next to my property, I would have the choice between taking a chance of these trees blowing down and doing serious damage to my house or removing the trees. The buffer contemplated by the original conditional use permit protects my property from harm.'
>
> "Other nearby residents testified regarding the increased run-off that could occur without the protection of the buffer provided by the 1995 CUP and the impacts of that run-off on their properties.
>
> "The applicant is correct that removal of the Zone 6 property from the CUP does not guarantee that the trees will be removed. However, removal of that property from the CUP will remove the protections afforded by that CUP, and the removal of those protections could have a significant adverse impact on the surrounding properties. Accordingly, before a conclusion can be made that the modification will have no impact on the surrounding properties or the use of the site, the effect of the removal of the protections of the CUP Master Plan condition requiring a 75-foot buffer must be considered. The applicant has not sustained its burden to establish that there will be an insignificant change in the use or surrounding area as a result of this proposed modification." Record 13 (ellipses in the internal quote in original).

1 Petitioners argued to the city that any development within Zone 6 that might involve removal
2 of trees within the 75-foot vegetative buffer would be subject to city regulations governing tree-
3 cutting, and therefore will be consistent with city code. Record 216, 349.[5] According to
4 petitioners, the city's tree-cutting and stormwater regulations require evaluation of any adverse
5 impacts on adjoining properties, including windthrow and drainage impacts. Petitioners contend that
6 the existence and potential applicability of such regulations is highly relevant to whether the
7 proposed modification, which effectively voids the 1995 CUP conditions requiring a vegetative
8 buffer in Zone 6, will impact adjoining properties. Citing *Norvell v. Portland Area LGBC*, 43 Or
9 App 849, 852-53, 604 P2d 896 (1979) for the proposition that the decision maker must address
10 focused evidence and concerns raised below regarding compliance with applicable standards,
11 petitioners contend that the hearings officer failed to consider petitioners' arguments on this point,
12 and remand is necessary to adopt findings addressing the issue of whether the city's tree cutting and
13 stormwater regulations suffice to ensure that the proposed modification will not result in significant
14 impacts to surrounding properties, for purposes of EC 9.8110(2).
15 Intervenors respond that mere citation to the city's tree cutting ordinances is insufficient to
16 obligate the hearings officer to address whether those ordinances (1) provide equivalent protection

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[5] Petitioners cite to the following portions of the application and written argument to the hearings officer, respectively:

> "* * * [A]ny tree removal that will take place on the excised Zone 6 area will continue to be subject to the tree removal provisions of the Eugene Code (EC) either under EC Chapter 6, if tree removal is done without a related land use approval, or under EC Chapter 9, if tree removal is done as part of an associated land use approval. Consequently, any tree removal done in the excised Zone 6 following approval of this modification application will be done subject to the criteria in the Eugene Code, which is what [1995 CUP condition of approval no. 8] requires. Therefore the proposed modification is not materially inconsistent with the conditions of the original approval." Record 349.

> "[Opponents'] fourth objection * * * is directed towards the 'buffer' that they argue will be removed by the decision. The buffer between the cemetery and existing residential uses will remain as a result of this decision. Cemetery uses will not extend south of the proposed roads. Likewise, the on site vegetation will remain. This decision does not authorize any tree removal from the subject property. Any future tree removal will have to be consistent with the provisions of the Eugene Code. That is what was required by the CUP, and that is what continues to be required by the current code." Record 216.

as the 1995 CUP, or (2) provide a basis to conclude under EC 9.8110(2) that the proposed modification will result in insignificant impacts on adjoining properties. Intervenors contend that petitioners bear the burden of demonstrating compliance with EC 9.8110(2), and that petitioners failed to submit any evidence or even focused argument that the city's tree cutting ordinances provide the same protections as the 75-foot vegetative buffer required by the 1995 CUP.

We agree with intervenors that petitioners did not adequately raise the issue that they fault the hearings officer for failing to address. The testimony petitioners cite to is not directed at EC 9.8110(2) and at best presents an argument that the city's tree cutting ordinance will ensure that any tree removal that occurs will be consistent with the city's tree cutting ordinance. *See* n 5. That argument falls far short of alerting the hearings officer that petitioners believe the city's tree cutting ordinance requires evaluation of impacts to adjoining properties, and further offers protection equivalent to the vegetative buffer imposed by the 1995 CUP, for purposes of complying with EC 9.8110(2). Petitioners do not argue they raised any issue below regarding whether the city's stormwater regulations are sufficient to protect adjoining properties against increased runoff that might result from loss of the vegetative buffer, for purposes of EC 9.8110(2). Having failed to raise these issues below, petitioners' argument that the hearings officer erred in failing to address them does not provide a basis for reversal or remand.

C. Modifications to Access and Utilities

Having rejected the proposed modification to remove Zone 6 from the 1995 CUP footprint, the hearings officer proceeded also to reject the proposed modification to the 1995 CUP to allow future development in Zone 6 to access and use roads and utilities within the remaining CUP area.[6]

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[6] The hearings officer's decision states, in relevant part:

> "Likewise, the applicant has proposed changes to access and utility installation, yet has not provided any evaluation as to how the change in access or installation could impact the surrounding properties or the use of the site. While any change may be insignificant, without that evaluation, and a statement of the purpose of the changes, that evaluation cannot be made." Record 14.

Although not entirely clear, the hearings officer appeared to conclude that petitioners failed to present enough information or analysis to conclude that the proposed modification complied with EC 9.8110(2).

Petitioners contend that the findings quoted at n 6 are unacceptably conclusory, in that the findings fail to explain what evidence or evaluation is missing. Alternatively, petitioners contend that, pursuant to ORS 197.522, even if the proposed modification is inconsistent with EC 9.8110(2), the city was obligated to approve petitioners' application under reasonable conditions that make the proposed modification consistent with applicable regulations.[7]

Intervenors cite to testimony that use of roads and utilities within the CUP area by non-cemetery development in Zone 6, such as residential uses proposed in the pending CIR-CUP application, could have significantly greater adverse impacts on surrounding properties than the cemetery uses conceptually approved in Zone 6 under the 1995 CUP. According to intervenors, petitioners failed to recognize or address those impacts, and instead took the position that any impacts from use of roads and utilities by future development in Zone 6 are speculative and beyond the scope of consideration under EC 9.8110(2). Intervenors argue that the hearings officer disagreed with that position, and rejected the proposed modification because petitioners failed to present any evidence or evaluation of the impacts of the proposed modification on surrounding properties or the CUP site. With respect to ORS 197.522, intervenors argue that the city is under no obligation to present evidence on petitioners' behalf or provide the evaluation necessary to determine compliance with EC 9.8110(2). Further, intervenors contend that petitioners did not

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[7] ORS 197.522 provides:

> "A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval."

suggest any conditions below that would allow approval of the proposed modification under EC 9.8110(2).

While brief, the hearings officer's findings adequately explain the basis for denial. The hearings officer apparently believed that the proposed modification—to allow unspecified future development in Zone 6 to use roads and utilities within the remaining CUP site—could impact surrounding uses or the use of the site, and faulted petitioners for failing to present *any* evaluation or evidence regarding potential impacts. Petitioners took the position below that the proposed modification itself causes no impacts, and any impacts related to use of roads and utilities by future development in Zone 6 are too speculative to evaluate. The hearings officer clearly disagreed with that position, and viewed EC 9.8110(2) as requiring at least some evidence and evaluation regarding the potential impacts of allowing future development in Zone 6 to use roads and utilities in the CUP area. Petitioners have not demonstrated that the hearings officer erred in so viewing EC 9.8110(2) or in rejecting the proposed modification for failure to provide the required evidence and evaluation.

With respect to ORS 197.522, even assuming that statute is applicable in the present instance, as we explained in *Oien v. City of Beaverton*, ___ Or LUBA ___ (LUBA Nos. 2002-075/076, December 30, 2003, slip op 16-17), the applicant, and not the local government, has the obligation under that statute to identify and propose "reasonable conditions" that might allow approval. Here, petitioners did not identify or propose any conditions that would allow the city to find that the proposed modification complies with EC 9.8110(2). The hearings officer was under no obligation to attempt to craft such conditions on her own.

The second and third assignments of error are denied.

The city's decision is affirmed.

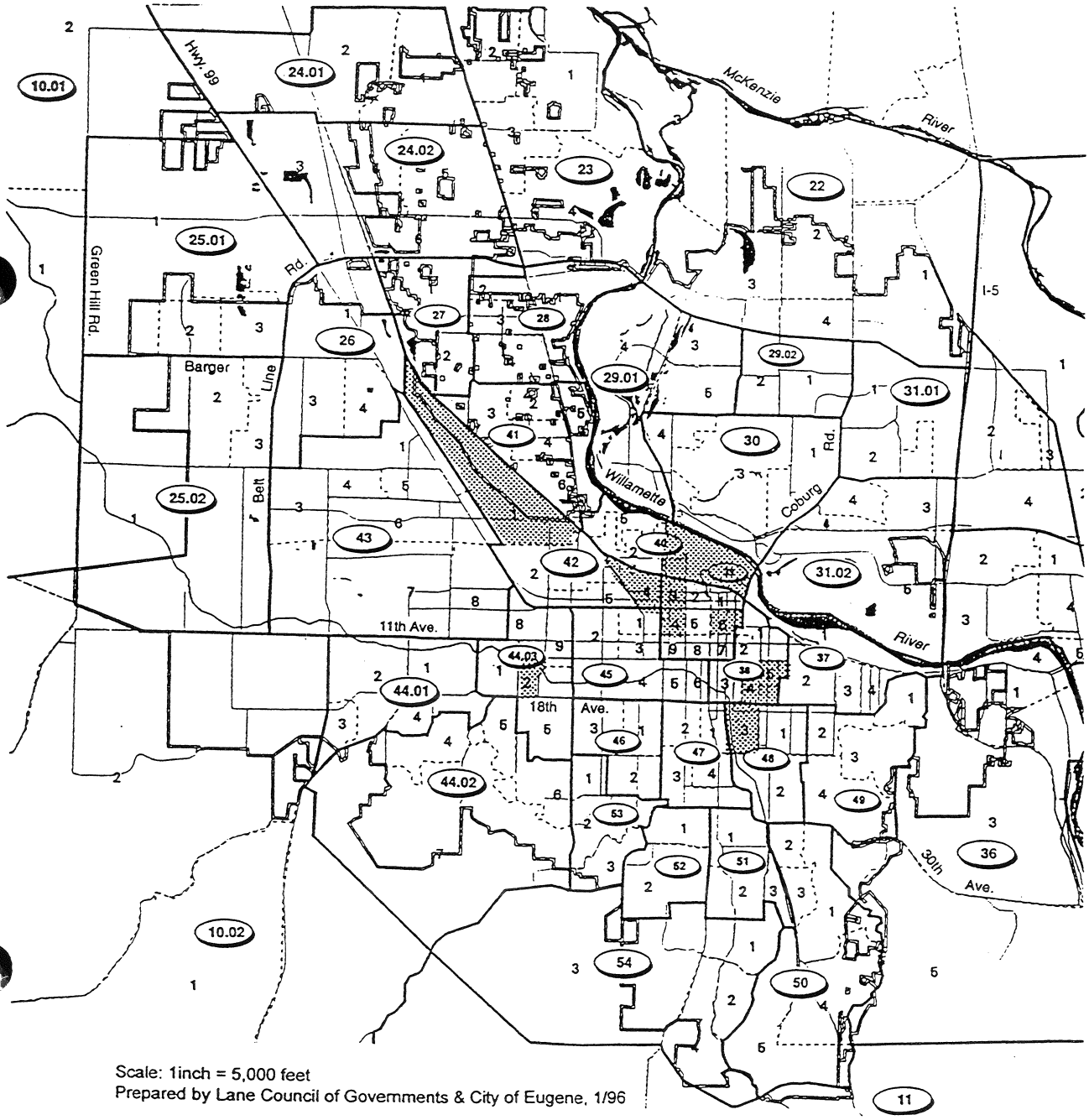
FIGURE 33

AREAS UNAVAILABLE FOR CONTROLLED INCOME & RENT (CIR) HOUSING WITH INCREASED DENSITY
(Shown as Shaded Areas)

LEGEND

Boundaries of areas based on Eugene Census Tracts & Block Groups
1990 Census

- Major Arterials
- Census Tracts
- City Limits
- Block Groups
- Census Tract Number
- Shaded areas are unavailable for CIR housing with increased density. Areas not shaded are available for CIR housing with increased density.



Scale: 1inch = 5,000 feet
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