

NATURE OF THE DECISION

Petitioners appeal a city land use hearings official’s decision that denies petitioners’ application for approval of a cluster subdivision.

FACTS

The subject property is an L-shaped 1.46 acre parcel zoned Low Density Residential. The parcel is in an area that is partially developed, largely for residential uses. To assist in describing the subject property and its surroundings, graphics have been included as Appendix A and B of this opinion. The top graphic on Appendix A is taken from Record 519 and shows the subject property as an inverted “L” located in an approximately 244-acre area bounded by W. 18th Avenue on the north, W. 28th Avenue on the south, Chambers Street on the east and City View Street on the west. W. 18th Avenue is a through east-west street, as is W. 28th Avenue. The only other through east-west street in the 244-acre area is W. 22nd Avenue, but short out-of-direction travel is required in a number of places to traverse the 244-acre area from west to east via W. 22nd Avenue. The central issue in this appeal is the city’s decision that a Eugene Code (EC) connectivity standard requires that petitioners provide a westerly extension of W. 25th Avenue through the subject property to City View to allow W. 25th Avenue to provide a direct east-west street through the 244-acre area.

The bottom graphic on Appendix A is reproduced from a graphic at Record 520, and shows more detail about the roads and parcelization in the immediate vicinity of the subject property. As shown in that graphic, street loops and cul-de-sacs complicate east-west travel in the 244-acre area. That graphic shows that a portion of W. 25th Avenue to the east of the subject property has not yet been constructed, and so even if petitioners are required to extend W. 25th Avenue west to connect with City View Street, it would not provide a direct east-west through street until that section of W. 25th Avenue is constructed. Therefore it is most accurate to say that requiring petitioners to extend W. 25th Avenue through the subject

1 property to connect with City View Street would provide a new outlet onto City View Street
2 and preserve the possibility of making W. 25th Avenue a direct east-west through street for
3 the 244-acre area in the future, when the missing section of W. 25th Avenue to the east is
4 constructed. W. 24th Avenue to the north is off-set from a largely undeveloped property that
5 adjoins the subject property, and that off-set apparently would prevent extending W. 24th
6 Avenue west through that adjoining property. The property immediately west of W. 24th
7 Avenue is heavily parcelized, although the graphic does not show that parcelization. That
8 parcelization apparently would make it difficult and more costly to extend 24th Avenue west
9 to provide a direct east-west through street.

10 Appendix B shows the subject property in more detail. The top graphic on Appendix
11 B is taken from Record page 522 and shows petitioners' proposal to complete a cul-de-sac at
12 the end of W. 25th Avenue to provide access to lots 6, 7 and 8. The remaining five lots
13 would have access via a shared driveway that connects with City View Street to the west. As
14 proposed by petitioners, W. 25th Avenue would not extend through the subject property and
15 therefore would not connect with City View Street. The bottom graphic on Appendix B is
16 taken from Record page 304 and shows a possible seven-lot subdivision that would extend
17 W. 25th Avenue through the subject property to connect with City View Street to the west.
18 Extending W. 25th Avenue would have to cross a depression that separates the east part of the
19 property from the west part. That would require constructing a bridge that petitioners
20 estimate would cost \$346,500. Record 303.

21 An earlier city decision concerning the proposed subdivision was appealed to LUBA
22 and withdrawn by the city for reconsideration under ORS 197.830(13)(b). In that earlier
23 decision, the hearings official interpreted a city connectivity standard not to require the
24 disputed extension of W. 25th Avenue through the property. In her decision following
25 withdrawal of that earlier decision, the hearings official interpreted the city connectivity
26 standard to require extension of W. 25th through the property to connect with City View

1 Street. The city hearings official’s new interpretation of the city connectivity standard is the
2 target of petitioners’ four assignments of error.

3 **INTRODUCTION**

4 EC 9.6815(2)(a)-(f) sets out city connectivity standards. This appeal concerns EC
5 9.6815(2)(b), which requires that a proposed subdivision include “street connections in the
6 direction of all existing or planned streets within 1/4 mile of the development site” and
7 “street connections” with adjoining and abutting streets.¹

8 In petitioners’ first assignment of error, petitioners contend the city hearings official
9 erred by failing to consider whether EC 9.6815(2)(b) might not apply at all. In their second
10 assignment of error, assuming EC 9.6815(2)(b) applies, petitioners contend the hearings
11 official erroneously interpreted EC 9.6815(2)(b) to require that petitioners extend W. 25th
12 Avenue through the subject property, rather than simply require that the lots in the proposed
13 subdivision connect to W. 25th Avenue and City View Street.

14 EC 9.6815(2)(g) sets out standards whereby the city may grant exceptions to the EC
15 9.6815(2)(b), (c) or (d) connectivity standards.² In their third assignment of error, petitioners

¹ The complete text of EC 9.6815(2)(b) is set out below:

“The proposed development shall include street connections in the direction of all existing or planned streets within 1/4 mile of the development site. The proposed development shall also include street connections to any streets that abut, are adjacent to, or terminate at the development site.”

² As relevant, EC 9.6815(2)(g) provides:

“[T]he city shall grant an exception to the standards in subsections (2)(b), (c) or (d) if the applicant demonstrates that any proposed exceptions are consistent with either subsection 1. or 2. below:

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

“a. That the proposed street system meets the intent of street connectivity provisions of this land use code as expressed in EC 9.6815(1)[.]”

1 challenge the hearings official’s findings that petitioners failed to demonstrate that they
2 satisfy the standards for an exception to the EC 9.6815(2)(b) connectivity standard.

3 Finally, in their fourth assignment of error, petitioners contend the hearings official
4 erred by failing to consider whether a condition of approval that required petitioners to
5 extend W. 25th Avenue west through their property to provide a connection with City View
6 Street would violate the “rough proportionality” standard that applies to exactions under
7 *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 129 L Ed 2d 304 (1994), and therefore
8 would violate the takings clause of the Fifth Amendment of the U.S. Constitution.

9 **FIRST ASSIGNMENT OF ERROR**

10 In their first assignment of error, petitioners rely on LUBA’s decision in *Jefferson*
11 *Westside Neighbors v. City of Eugene*, 57 Or LUBA 421 (2008) (*Jefferson Westside*
12 *Neighbors*), to argue that the city erred by failing to consider whether EC 9.6815(2)(b)
13 applies to the disputed subdivision in the circumstance present in this appeal and failing to
14 conclude that it does not apply.

15 In *Jefferson Westside Neighbors*, the applicant proposed to divide an existing 10,715
16 square-foot lot to create two parcels. The existing 10,715 square-foot lot had frontage on W.
17 13th Avenue and W. 12th Alley, which are existing streets in a fully developed part of the city
18 with an established street grid system. Proposed parcel 1 would have been provided access
19 via W. 12th Alley and proposed parcel 2 would have been provided access via W. 13th
20 Avenue. Parcel 1 would also have been connected to W. 13th Avenue via a 20-foot wide flag
21 pole, to satisfy other EC requirements. Opponents argued that EC 9.6815(2)(b) required that
22 the applicant in *Jefferson Westside Neighbors* provide a new street through the lot to connect
23 W. 13th Avenue and W. 12th Alley. The city hearings official rejected that argument,
24 concluding that EC 9.6815(2)(b) does not require new connecting streets in developed areas
25 with fully established grid street systems. Our decision in *Jefferson Westside Neighbors*
26 affirmed the hearings official’s decision and explained:

1 “* * * EC 9.6815(2) street connectivity standards do not require that Parcel 1
2 include a street connection to West 13th Avenue. EC 9.6815(2) is part of a
3 code section providing standards for street and alley design. The purpose and
4 intent of the street connectivity standards are set out in EC 9.6815(1)(a)
5 through (j). None of those purposes suggest that infill development in a
6 developed area with a fully established street grid must create new streets on
7 the property to connect to every possible abutting street. Judging from the
8 purposes set out in EC 9.6815(1) and the other provisions of EC 9.6815(2),
9 the connectivity standard in EC 9.6815(2)(b) is clearly designed to require
10 new street connections in undeveloped or partially developed areas with an
11 incomplete street system. In the present case, applying EC 9.6815(2)(b)
12 would apparently require demolishing the existing house and constructing a
13 mid-block street connecting West 13th Avenue and West 12th Alley that would
14 serve no discernible purpose, much less any of the purposes set out in EC
15 9.6815(1). The hearings officer did not err in interpreting EC 9.6815(2) to not
16 require a new street connection in the present case.” 57 Or LUBA at 433.

17 In the decision that is before us in this appeal, the hearings official agreed with the
18 city’s argument that *Jefferson Westside Neighbors* is distinguishable and that EC
19 9.6815(2)(b) should be applied to require that W. 25th Avenue be extended to provide a
20 connection with City View Street:

21 “The city argues that the present situation is exactly the situation where street
22 connectivity is needed: the site is within a partially developed area with an
23 incomplete street system. The city notes that City View Street has eight street
24 intersections and one cul-de-sac along the west side between 18th Avenue and
25 27th Avenue, but the east side has only two intersections. Of those two
26 intersections, only one, W. 22nd Avenue, connects with north-south streets. If
27 W. 25th is extended to City View Street, residents to the east will have a
28 second access to City View Street, reducing the need to travel along
29 residential streets to reach City View Street, and reducing travel lengths for
30 those vehicles traveling from east of W. 25th Avenue to the southwest. In
31 addition, the city notes that W. 25th Avenue between Cleveland and Arthur
32 Streets has already been platted, so the extension of W. 25th Avenue through
33 this site will help to establish a gridded street system that better disperses
34 vehicular traffic through the area. The city argues that unlike the situation in
35 [*Jefferson Westside Neighbors*], where the creation of a street would serve no
36 discernable purpose, the creation of this street segment will allow for better
37 connectivity and access through and around the site.

38 “* * * * *

39 “In [my] initial decision, this hearings official concluded that [EC
40 9.6815(2)(b)] required only that the applicant’s lots have access to an existing

1 street system. I reached that conclusion partly because I believed the local
2 street system could not be further developed to achieve the connectivity the
3 city envisioned, and partly because I disagreed with staff that * * * by
4 terminating W. 25th Avenue at the property line, future developers would
5 assume that the street would have to be extended to the nearest collector street
6 to the west. However, after reconsidering the matter, I now conclude that the
7 street connectivity standards must be interpreted to implement the purposes
8 for those standards set out in the code.” Record 13-14.

9 Admittedly, our interpretation of EC 9.6815(2)(b) in *Jefferson Westside Neighbors*
10 not to require street extensions in “undeveloped or partially developed areas” with a “fully
11 established street grid” leaves some room to argue about what it means to be an
12 “undeveloped or partially developed” area or a “fully established street grid.” However,
13 whatever arguing room exists under our decision in *Jefferson Westside Neighbors*, we
14 believe the hearings official’s findings in this case are adequate to explain why the subject
15 property is not located in an “undeveloped or partially developed” area and is not served by a
16 “fully established street grid.” While much of the property surrounding the subject property
17 is developed, petitioners propose to divide the 1.46-acre subject property into eight lots. As
18 we have already noted, the property immediately north of the subject property is similarly
19 sized and presumably could be divided into additional residential lots as well. The hearings
20 officer did not err in concluding that the area where the subject property is located is only
21 partially developed. More importantly, while petitioners describe the existing street system
22 in the neighborhood of the subject property as a “fully established street grid,” it clearly is
23 not. There are gaps in the street system and there are loops and cul-de-sacs that make direct
24 through travel difficult or impossible and the 244-acre area currently lacks a direct,
25 continuous east-west through route except along its northern and southern border.
26 Petitioners’ requested subdivision, as proposed, would block what appears to be the most
27 likely candidate for an additional east-west continuous connection between City View Street
28 on the west and Chambers Street on the east. Those differences are adequate to distinguish
29 the different result under EC 9.6815(2)(b) in *Jefferson Westside Neighbors*. To the extent

1 petitioners argue additional interpretation or additional explanatory findings are required to
2 support the hearings official’s conclusion that applying EC 9.6815(2)(b) to require that W.
3 25th Avenue be extended through the proposed subdivision to provide a connection with City
4 View Street is not inconsistent with *Jefferson Westside Neighbors*, we reject the argument.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 **A. The Text of EC 9.6815(2)(b)**

8 The text of EC 9.6815(2)(b) was set out earlier at n 1 and is set out again below:

9 “The proposed development shall include street connections in the direction
10 of all existing or planned streets within 1/4 mile of the development site. The
11 proposed development shall also include street connections to any streets that
12 abut, are adjacent to, or terminate at the development site.”

13 Apparently as a result of our decision in *Jefferson Westside Neighbors*, the parties
14 frame the interpretive issue under this assignment of error as whether EC 9.6815(2)(b)
15 should be interpreted in this case to be a “plug into” standard or a “through street” standard.
16 Petition for Review 25. As we understand those shorthand descriptions, a “plug into”
17 standard would allow creation of new lots that simply connect to (plug into) an existing fully
18 developed street system without creating any new public streets, whereas a “through street”
19 standard would require a development to extend an existing street that terminates on one side
20 of the development site through the development to connect with an existing street that
21 adjoins the opposite side of the development. The hearings official’s findings are set out
22 below:

23 “[T]he hearings official agrees with the applicant that EC 9.6815(2)(b) is
24 ambiguous because it is not clear whether the phrase ‘include street
25 connections’ * * * means * * * the proposal must not only connect in some
26 way to the existing street system, but also must extend existing streets through

1 the site if the extension is needed to improve street connectivity throughout
2 the area.^{3]}

3 “* * * * *

4 “Ambiguous standards are subject to the interpretive analysis set out in *PGE*
5 *v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143
6 (1993)(Text and context are the first levels of analysis. Only when text and
7 context do not resolve the ambiguity may legislative history and maxims of
8 statutory construction be relied upon.) EC 9.6815(2)(b) is part of the city’s
9 street connectivity standards. The stated purpose of those standards is to
10 improve the functionality of the local street system. The standards are not
11 designed to address access from an individual lot to the existing street system,
12 although certainly one may assume that if a development connects to the local
13 street system, lots within the development will also have easy access to the
14 system.

15 “‘Include’ is not defined in the Eugene Code. In pertinent part, *Webster’s*
16 *Third New Int’l Dictionary*, (2001 ed.) 1143 defines include as: ‘to place * * *
17 as part of a component of a whole or of a larger group’ or ‘to comprise as a
18 discrete or subordinate part of a larger aggregate.’ * * * ‘Include’ connotes
19 the idea that the development is part of the local street system and roads
20 within the development should lead from one street to another in a way that
21 improves (or at least does not undermine) the distribution of local traffic.

22 “Further, this interpretation is consistent with general transportation planning
23 concepts set out in the TPR [Transportation Planning Rule, OAR chapter 660,
24 division 12]. The city has adopted street design standards that allow for
25 narrower streets when wider streets are not needed, and permit adjustments
26 when it is shown that the intent of the standard is satisfied. The applicant’s
27 proposal does not satisfy the EC 9.6815(2)(b) because it * * * does not
28 include street connections to a street that terminates at the site. Therefore,
29 unless the applicant demonstrates that one of the two exception standards
30 [has] been met, the application must be denied.” Record 14-15 (footnote
31 omitted).

32 We can think of a number of circumstances where it would be very difficult to apply
33 EC 9.6815(2)(b) in any predictable way, and the city might be well advised to attempt to
34 rewrite EC 9.6815(2)(b) to eliminate some of its more obvious ambiguities and make EC

³ The hearings officer’s interpretive findings are complicated by the attention they devote to the first sentence of EC 9.6815(2)(b). Our quotation of the hearings officer’s findings leaves out findings that address the first sentence of EC 9.6815(2)(b) where possible, to focus attention on the second sentence, which is the controlling sentence in the circumstances presented in this case.

1 9.6815(2)(b) easier to apply in areas that have been partially platted and developed over time
2 with an irregular and disconnected road system. But this case is not one of those difficult
3 circumstances. We tend to agree with petitioners that the hearings official should have
4 focused more on the meaning of “street connection” and less on the meaning of the word
5 “include.” But whatever the proper focus, the hearings officer’s interpretation of EC
6 9.6815(2)(b) to require that the proposed development must include a “street” that connects
7 W. 25th with City View Street is clearly correct.

8 The second sentence of EC 9.6815(2)(b) requires that petitioners’ development must
9 “include street connections to any streets that abut, are adjacent to, or terminate at the
10 development site.” Looking at Appendix B, it cannot be disputed that W. 25th Avenue
11 terminates at the eastern property line of the subject property and that City View Street abuts
12 or is adjacent to the subject property’s western property line. The bottom graphic on
13 Appendix B shows a subdivision that “include[s] a street connection” between where W. 25th
14 Avenue now terminates and adjoining City View Street. The top graphic proposes to create
15 three lots that will have shared driveway access to W. 25th Avenue and five lots what will
16 have shared driveway access to City View Street. The top graphic may “include [driveway]
17 connections,” but it certainly does not “include street connections” to City View Street and
18 W. 25th Avenue. To the extent petitioners attempt to characterize the proposed shared
19 driveways as streets, we reject the attempt. The hearings official’s interpretation is
20 consistent with the text of EC 9.6815(2)(b) and petitioners’ interpretation is inconsistent with
21 the text of EC 9.6815(2)(b).

22 Even if it were possible to interpret EC 9.6815(2)(b) to allow petitioners to “include
23 street connections” for W. 25th Avenue and City View Street that travel a short distance onto
24 the subject property and then terminate, that is not what petitioners propose, and we would
25 reject that interpretation in any event. Where it is possible to provide a connection to an
26 adjoining street or a street that terminates at the development site in a way that connects

1 those streets with each other, and that connection would serve the purposes set out at EC
2 9.6815(1), EC 9.6815(2)(b) requires that the street connection be made.⁴ We understand the
3 hearings official to have interpreted EC 9.6815(2)(b) to impose that requirement, and we
4 agree with the hearings official.

5 **B. Context**

6 Under the first level of analysis under *PGE*, both the text of the law at issue and the
7 text of contextual laws are to be considered in determining the intended meaning of the law.
8 Petitioners contend OAR 660-012-0045 provides context that supports their interpretation of
9 the text of EC 9.6815(2)(b). First, petitioners contend that OAR 660-012-0045(3)(b)(D)
10 requires cities to adopt “standards for spacing of streets or accessways; and standards for
11 excessive out-of-direction travel,” and the city has not done so.⁵ Second, petitioners contend
12 that OAR 660-012-0045(7) requires that cities take steps to increase transportation efficiency
13 and reduce costs.⁶ Third, petitioners contend that the OAR 660-012-0045 expressly
14 envisions that cul-de-sacs and dead-end streets may be appropriate in some circumstances.⁷

⁴ We set out the EC 9.6815(1) purpose and intent statement later in this opinion at n 8.

⁵ OAR 660-012-0045(3)(b)(D) provides:

“Local governments shall establish their own standards or criteria for providing streets and accessways consistent with the purposes of this section. Such measures may include but are not limited to: standards for spacing of streets or accessways; and standards for excessive out-of-direction travel[.]”

⁶ OAR 660-012-0045(7) provides:

“Local governments shall establish standards for local streets and accessways that minimize pavement width and total right-of-way consistent with the operational needs of the facility. The intent of this requirement is that local governments consider and reduce excessive standards for local streets and accessways in order to reduce the cost of construction, provide for more efficient use of urban land, provide for emergency vehicle access while discouraging inappropriate traffic volumes and speeds, and which accommodate convenient pedestrian and bicycle circulation. * * *”

⁷ OAR 660-012-0045(3)(b) provides in part:

“On-site facilities shall be provided which accommodate safe and convenient pedestrian and bicycle access from within new subdivisions, multi-family developments, planned

1 Finally, petitioners contend that none of the city’s transportation plans show W. 25th Avenue
2 as a through street.

3 The city disputes petitioners’ first contention that the city has not adopted “standards
4 for spacing of streets or accessways; and standards for excessive out-of-direction travel,” as
5 required by OAR 660-012-0045(3)(b)(D). The city contends that the connectivity standards
6 now codified at EC 9.6815 were adopted to comply with OAR 660-012-0045(3). The
7 ordinance that adopted the connectivity standards adopted Sections I through VI of the
8 Eugene Local Street Plan as supporting findings for the ordinance. Respondent’s Brief
9 Appendix 34. While there apparently are no city numerical standards governing spacing of
10 streets or excessive out-of-direction travel, the Eugene Street Plan includes a planning
11 principle addressing out-of-direction travel and includes a diagram that illustrates “[a]
12 disconnected street pattern” and a diagram that illustrates “[a]n interconnected street
13 pattern.” Respondent’s Brief Appendix 49.

14 The city also contends that the fact that OAR 660-012-0045(7) requires that cities
15 take steps to increase transportation efficiency and reduce costs and recognizes that cul-de-
16 sacs may be appropriate in some circumstances has little or nothing to do with the meaning
17 of EC 9.6815(2)(b). Similarly, the city contends that the failure of the city to show W. 25th
18 Avenue as a through street in its comprehensive plan has no material bearing on the meaning
19 of EC 9.6815(2)(b).

developments, shopping centers, and commercial districts to adjacent residential areas and transit stops, and to neighborhood activity centers within one-half mile of the development. Single-family residential developments shall generally include streets and accessways. Pedestrian circulation through parking lots should generally be provided in the form of accessways.

“* * * * *

“(C) Cul-de-sacs and other dead-end streets may be used as part of a development plan, consistent with the purposes set forth in this section[.]”

1 We agree with the city that the cited context falls far short of compelling or
2 supporting petitioners' interpretation of EC 9.6815(2)(b). We have already concluded that
3 the hearings official's interpretation is consistent with the text of EC 9.6815(2)(b), and the
4 context cited by petitioners does not change our view.

5 The second assignment of error is denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 As we observed earlier, EC 9.6815(2) includes a built-in exception mechanism that
8 potentially allows development to deviate from some of the connectivity standards, including
9 EC 9.6815(2)(b). EC 9.6815(2)(g). *See* n 2. Petitioners sought an exception to the EC
10 9.6815(2)(b) connectivity standard under EC 9.6815(2)(g), which provides in pertinent part:

11 “[T]he city shall grant an exception to the standards in [EC 9.6815](2)(b), (c)
12 or (d) if the applicant demonstrates that any proposed exceptions are
13 consistent with either subsection 1. or 2. below:”

14 Subsection 2 of EC 9.6815(2)(g) authorizes exceptions to EC 9.6815(2)(b), (c) or (d)
15 connectivity standards where “[p]hysical conditions” or “[b]uildings or other existing
16 development” “preclude” street connections. Petitioners’ request for an exception under
17 Section 2 was denied, but petitioners do not assign error to that aspect of the city’s decision.
18 Subsection 1(a) of EC 9.6815(2)(g) authorizes an exception if the applicant supplies a street
19 connection study that establishes “[t]hat the proposed street system meets the intent of street
20 connectivity provisions of this land use code as expressed in EC 9.6815(1)”.⁸

⁸ EC 9.6815(1) provides:

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

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

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

1 EC 9.6815(1)(b) expresses the following purpose for street connectivity standards:

2 “The layout of a street system does not create excessive travel lengths.” *See n*
3 8.

4 The hearings officer found that petitioners’ proposed subdivision, which would not extend
5 W. 25th Avenue to connect with City View Street, is not consistent with EC 9.6815(1)(b).

6 Before turning to the hearings official’s findings and petitioners’ challenge to those
7 findings, we note that petitioners’ connectivity study established that extending W. 25th to the
8 west would not have a significant effect on the routes taken by most residents of the 244-acre
9 area bounded by W. 18th Avenue, Chambers Street, W. 28th Avenue, and City View Street.
10 According to that study, 95 percent of the morning peak hour traffic travels north and
11 northeast and returns by the same route in the evening peak hour. The disputed extension of

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

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

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

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

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

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

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

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

1 W. 25th Avenue would not shorten the morning and evening peak hour trips for 95 percent of
2 the residents of the 244-acre area. Petitioners’ connectivity study estimated that only
3 approximately 5 percent of the morning peak hour would use an extension of W. 25th Avenue
4 to go south on City View toward the residential area to the south of the subject property.

5 The hearings official’s findings explaining why she found that petitioners’ proposal is
6 not consistent with the EC 9.6815(1)(b) are set out below:

7 “The planning director found that EC 9.6815(2)(g)1 was not satisfied, because
8 the street connectivity study failed to show that the proposed street system
9 meets the intent of the street connectivity standards as expressed in EC
10 9.6815(1). [See n 8] The hearings official finds that the site is an
11 underdeveloped lot located within a partially developed residential area with
12 an inadequate street system. The local street system relies on one east-west
13 street, W. 22nd Avenue, to connect to the nearest western collector street. W.
14 25th Avenue has been platted from Chambers Street to the east, and the only
15 remaining segment to be platted lies within the boundaries of the subject
16 property.

17 “Access to the proposed lots within the eastern portion of the property and
18 lots to the east and south of the site is hampered by the lack of a second
19 connection to City View Street. While it may be true that only a small portion
20 of those residents may presently have cause to travel to the south and west,
21 the number of vehicles is not relevant. Overall, the evidence shows that
22 without the W. 25th Avenue connection, drivers from the east of the site will
23 have to travel almost ¼ mile out of direction to reach City View Street. The
24 hearings official concludes that this out of direction travel creates ‘an
25 excessive travel length’ within the meaning of EC 9.6815(1)(b).” Record 15-
26 16.

27 Petitioners offer four discrete challenges to the above findings, which we address separately
28 below.

29 **A. EC 9.6815(2)(g)(1)(a) and EC 9.6815(1)(b) do not Require That**
30 **Petitioners’ Development Shorten Travel Distances**

31 Again, the purpose stated by EC 9.6815(1)(b) is that “[t]he layout of a street system
32 does not create excessive travel lengths.” Petitioners contend that a relatively small number
33 of residents who now live to the east and south of the subject property currently must drive
34 north to W. 22nd Avenue to travel west to City View Street and then continue south on City

1 View Street to make trips to and from the residential area to the south. If petitioners are
2 allowed to develop the subject property as they propose, those same residents will continue
3 to have to make that same out-of-direction trip to travel south. Petitioners argue “[t]his
4 project creates no new travel lengths. It plugs into the existing street network.” Petition for
5 Review 35. Petitioners argue the hearings official improperly relied on EC 9.6815(1)(b) to
6 require that petitioners’ proposal “improve” travel lengths for these existing residents.

7 Even if petitioners’ literal and narrow interpretation of EC 9.6815(1)(b) is possible, it
8 is clear the hearings official did not adopt that interpretation and we conclude that
9 petitioners’ interpretation is not compelled by the words of EC 9.6815(1)(b). Petitioners are
10 seeking an exception from the EC 9.6815(2)(b) requirement that the subject property’s street
11 system must extend W. 25th Avenue to City View Street. EC 9.6815(2)(b) presumably
12 imposes that requirement, in part, to further the purpose stated in EC 9.6815(1)(b), which is
13 to ensure that “[t]he layout of the street system does not create excessive travel lengths.”
14 The “street system” that EC 9.6815(1)(b) is concerned with is not limited to the street system
15 within the subject property, it is concerned with both the street system within the subject
16 property and the larger street system that the subject property’s street system will become a
17 part of. The hearings official did not err by concluding that petitioners’ proposal is
18 inconsistent with EC 9.6815(1)(b) because, as compared with a street system for the subject
19 property that complies with EC 9.6815(2)(b), it will “create excessive travel lengths.”

20 This subassignment of error is denied.

21 **B. The Hearings Official’s Interpretation Defeats the Possibility of Ever**
22 **Justifying an Exception**

23 Petitioners argue:

24 “The Hearings Official’s interpretation morphed a standard prohibiting
25 creation of ‘excessive travel lengths’ into an affirmative mandate to shorten
26 existing travel lengths. In addition to being contrary to the plain text, this
27 interpretation defeats the possibility of anyone ever getting relief under the
28 standard.” Petition for Review 35.

1 We agree with petitioners that as the city interprets and applies EC
2 9.6815(2)(g)(1)(a), EC 9.6815(1)(b) and EC 9.6815(2)(b) it will be exceedingly difficult for
3 an applicant to receive an exception to EC 9.6815(2)(b). As we explain later, we believe the
4 evidence in this case might well constitute substantial evidence that an exception is
5 warranted in this case under a more permissive interpretation of EC 9.6815(1)(b). However,
6 petitioners have not shown that the city’s stricter interpretation makes obtaining an exception
7 impossible.

8 This subassignment of error is denied.

9 **C. The City Lacks an Excessive Travel Length Standard**

10 The hearings official concluded that the quarter mile out-of-direction travel that the
11 proposed development will cause the eleven existing residents and the residents of the three
12 lots that petitioners’ propose to provide access via W. 25th Avenue is excessive. Petitioners
13 complain that the city picked the quarter mile distance out of thin air: “Why a quarter mile
14 and not an eighth?” Petition for Review 37. Petitioners contend that OAR 660-012-
15 0045(3)(b)(D) specifically authorizes the city to adopt “standards for excessive out of
16 direction travel,” and since the city has not done so it should not be allowed to make case-by-
17 case decisions about what is excessive. *See* n 5. Petitioners argue:

18 “[I]f the city wants to impose threshold lengths for unacceptable out-of-
19 direction travel in connection with applying its connectivity standards, the
20 TPR anticipates that the city will put those standards into the code and apply
21 them prospectively. Here the city is making up new, unacknowledged stuff
22 on the run, in the process of driving over the applicant.” Petition for Review
23 37.

24 We agree with petitioners that the task that exception applicants face in considering
25 EC 9.6815(1)(b) would be made considerably more certain if the city adopted a numerical
26 “out-of-direction” standard or provided more guidance in the EC for determining whether
27 out-of-direction travel is excessive. But petitioners do not argue that EC 9.6815(2)(g)(1)(a)
28 exceptions are subject to any of the statutory requirements for “clear and objective” approval

1 standards.⁹ The question therefore becomes whether EC 9.6815(2)(b), 9.6815(2)(g)(1)(a)
2 and EC 9.6815(1)(b) collectively are sufficient to constitute a “standard,” as required by
3 ORS 227.173(1).¹⁰ The test that the Court of Appeals applies to determine whether standards
4 are sufficient to comply with ORS 227.173(1) does not require the numerical precision or
5 predictability that petitioners suggest should be required. *BCT Partnership v. City of*
6 *Portland*, 130 Or App 271, 276, 881 P2d 176 (1994); *Oswego Properties, Inc. v. City of Lake*
7 *Oswego*, 108 Or App 113, 119, 814 P2d 539 (1991); *Lee v. City of Portland*, 57 Or App 798,
8 802, 646 P2d 662 (1982).

9 It is also worth noting that the quarter mile distance that the hearings official found to
10 be excessive in this case was not adopted as a threshold standard and is a distance that
11 appears throughout the city’s connectivity standards. As the city argues:

12 “[T]he quarter mile distance is used throughout the street connectivity
13 provisions, including the exception criteria with which Petitioners must
14 demonstrate compliance. Specifically, EC 6815(2)(g)1.b requires Petitioners
15 to demonstrate ‘how undeveloped and partially developed properties within a
16 **quarter mile** can be adequately served by alternative street layouts.’ * * *
17 Further, the street connectivity standard at issue in this matter (EC
18 96815(2)(b)) requires developments to include street connection ‘in the
19 direction of all existing or planned streets within ¼ mile of the development
20 site’” Respondent’s Brief 30-31 (bold lettering in original).

21 What may constitute “excessive travel lengths” under EC 9.6815(1)(b) presumably could
22 vary depending on a number of factors. However, we agree with the city that it certainly was

⁹ For example, ORS 197.307(6) requires that “[a]ny approval standards, special conditions and the procedures for approval” that are adopted by the city and applied to needed housing as defined by ORS 197.303 must be “clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

¹⁰ ORS 227.173(1) provides:

“Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.”

1 foreseeable that the city might conclude that the quarter mile out-of-direction travel in this
2 case is excessive.

3 Finally, the city argues, and we agree, that although OAR 660-012-0045(3)(b)(D)
4 authorizes the city to adopt standards regarding excessive out-of-direction travel, the rule
5 does not require that the city do so.

6 This subassignment of error is denied.

7 **D. The Hearings Official’s Excessive Travel Length Finding is not**
8 **Supported by Substantial Evidence**

9 Petitioners repeat here some of the arguments they made under the previous
10 subassignment of error, and we do not consider those arguments again. Although
11 petitioners’ assignment of error includes an allegation that the hearings official’s “excessive
12 travel” finding is not supported by substantial evidence, petitioners do not really develop an
13 argument to that effect. Neither do petitioners assign error to the hearings official’s finding
14 that it does not matter how few residents will face out of direction travel if the exception is
15 granted. While it is “travel length” that EC 9.6815(1)(b) provides should not be “excessive,”
16 it seems to us that the number of trips that will require excessive travel lengths if the
17 exception is granted certainly could be a relevant consideration. Here that number is
18 relatively small.

19 In this case the hearings official strictly interpreted and applied EC 9.6815(2)(g)(1)(a)
20 and EC 9.6815(1)(b) and concluded that the quarter mile out of direction travel that eleven
21 existing residents and the residents of three of the proposed new lots would incur if the
22 exception is granted and W. 25th Avenue is not extended to City View Street is not consistent
23 with EC 9.6815(1)(b). The standard imposed by EC 9.6815(1)(b) is sufficiently subjective
24 that the hearing official likely could have adopted a more permissive view of whether the
25 quarter mile out of direction travel is “excessive” and likely could have factored in the
26 relatively small number of such trips as a percentage of the total trips and concluded that the
27 exception is justified. But the question for us is not whether the hearings official could have

1 adopted a more permissive reading of EC 9.6815(1)(b) and granted the exception. The
2 question is whether the hearings official erred by adopting a stricter, less permissive reading
3 of EC 9.6815(1)(b) and on the basis of that stricter, less permissive reading finding that the
4 exception is not warranted. We conclude that she did not err in adopting the stricter, less
5 permissive reading of EC 9.6815(1)(b) and that the hearings official’s decision is supported
6 by substantial evidence.

7 The third assignment of error is denied.¹¹

8 **FOURTH ASSIGNMENT OF ERROR**

9 In their fourth assignment of error, petitioners argue the hearings official was
10 obligated under ORS 197.522 to impose reasonable conditions of approval and approve the
11 subdivision if possible.¹² Petitioners contend it was error for the hearings official to refuse
12 their invitation that she: (1) impose a condition of approval requiring petitioners to construct
13 the city’s desired extension of W. 25th Avenue and (2) find that such a condition of approval
14 is unenforceable because it would constitute an unconstitutional taking of petitioners’
15 property under *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 129 L Ed 2d 304 (1994).

16 In their final legal argument to the hearings official before she rendered her initial
17 decision in this matter, petitioners made the following argument:

¹¹ Because we reject petitioners’ challenges to the hearings officials’ finding that the proposed exception must be denied because it is inconsistent with EC 9.6815(1)(b), we need not and do not consider petitioners’ challenges to the hearings officer’s findings that the proposed exception is also inconsistent with EC 9.6815(1)(d). *See* n 8.

¹² ORS 197.522 is codified with the statutes governing moratoria, and 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.”

1 “* * * ORS 197.522 provides that the local government shall impose
2 reasonable conditions on a subdivision application proposal to make it
3 consistent with the applicable land use regulations. However, case law has
4 established that the applicant carries the burden of identifying and proposing
5 such conditions that might allow for approval under this statute. *Oien v. City*
6 *of Beaverton*, 46 Or LUBA 109, 126-27 (2003). Here, the applicant is willing
7 to propose that the city condition building a through road * * * provided the
8 [hearings official] concludes that the city has failed to carry its burden of
9 justifying the exaction under *Dolan*.” Record 165-66.

10 In *Oien*, we assumed without deciding “that ORS 197.522 is applicable outside the
11 context of a moratorium or a de facto moratorium.” 46 Or LUBA at 126 n 6. However, in a
12 recent decision, *Reeder v. Multnomah County*, ___ Or LUBA ___ (LUBA 2009-015, July 24,
13 2009), *review pending* (A143050), we concluded that ORS 197.522 “does not apply outside
14 the context of a declared or *de facto* moratorium under ORS 197.520 to 197.524.” Slip op at
15 17. Since the challenged decision was not rendered in the context of a declared or *de facto*
16 moratorium, the hearings official was not obligated by ORS 197.522 to consider whether the
17 proposal could be made consistent with the city’s connectivity standards by imposing
18 reasonable conditions of approval.

19 The record includes a sketch that roughly illustrates a seven-lot subdivision of the
20 subject property with an extension of W. 25th Avenue to make a connection with City View
21 Street. *See* Appendix B, bottom graphic. Petitioners contend that sketch was sufficient to
22 allow the hearings official to determine whether a seven-lot subdivision could be approved
23 and whether requiring the extension of W. 25th Avenue would constitute an unconstitutional
24 taking under *Dolan*. But the subdivision that petitioners proposed is an eight-lot subdivision
25 with a significantly different design. *See* Appendix B, top graphic. Many of the details that
26 are included on petitioners’ eight-lot subdivision application are missing on the seven-lot
27 sketch. The city contends that granting subdivision approval based on that sketch would
28 have required the city to approve “a tentative subdivision that was highly speculative and
29 only potentially consistent with the City’s other code provisions * * *.” Respondent’s Brief
30 41. As noted, petitioners’ proposed condition was also contingent on the hearings official

1 finding the condition would be unconstitutional. The city contends that such a contingent
2 and speculative condition of approval is therefore not a “reasonable” condition, even if ORS
3 197.522 does apply to the hearings official’s decision. We agree with the city. *See Vista*
4 *Construction LLC v. City of Grants Pass*, 55 Or LUBA 590, 607 (“speculative and
5 contingent nature of petitioner’s proposed condition was insufficient to constitute a
6 ‘reasonable condition’ that would ‘make the proposed activity consistent with the plan and
7 applicable regulations’”).

8 The fourth assignment of error is denied.

9 The city’s decision is affirmed.

