

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 PAUL CONTE,
5 *Petitioner,*
6

7 vs.
8

9 CITY OF EUGENE,
10 *Respondent,*
11

12 and
13

14 CAPSTONE COLLEGIATE
15 COMMUNITIES, LLC,
16 *Intervenor-Respondent.*
17

18 LUBA No. 2012-039
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Eugene.
24

25 William K. Kabeiseman, Portland, filed the petition for review and argued on behalf
26 of petitioner. With him on the brief were Jennifer Bragar and Garvey Schubert Barer.
27

28 Emily N. Jerome, City Attorney, Eugene, filed a response brief and argued on behalf
29 of respondent.
30

31 James W. Spickerman, Eugene, filed a response brief and argued on behalf of
32 intervenor-respondent. With him on the brief was Gleaves Swearingen, LLP.
33

34 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
35 participated in the decision.
36

37 REMANDED

10/11/2012
38

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

NATURE OF THE DECISION

Petitioner appeals a city council ordinance approving vacation of a right-of-way.

MOTION TO INTERVENE

Capstone Collegiate Communities, LLC (intervenor), moves to intervene on the side of the city. There is no opposition to the motion and it is allowed.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to address a jurisdictional issue and a waiver issue raised in intervenor’s response brief. The reply brief is allowed.

FACTS

Intervenor filed an application with the city requesting vacation of two rights-of-way: (1) West 12th Avenue, between Olive Street and Willamette Street, and (2) the northerly portion of Willamette Alley between West 12th Avenue and West 13th Avenue. Willamette Alley runs north-south, and its northern end terminates in a “T” intersection with West 12th Avenue, which runs east-west. Figure 1 at the end of this opinion illustrates the original proposal to vacate both rights-of-way. As discussed below, intervenor later withdrew the request to vacate the portion of Willamette Alley, and the application proceeded solely on the request to vacate West 12th Avenue between Olive Street and Willamette Street. Figure 2 illustrates the city’s final action.

As currently constructed, the portion of West 12th Avenue to be vacated has an angled alignment with a dog-leg, and uneven width of 16-20 feet. The portion to be vacated functions as an alley, and is heavily used by bicycles and pedestrians traveling east-west. The area proposed for vacation totals 13,478 square feet.

Intervenor seeks to vacate the West 12th Avenue right-of-way to facilitate construction of a proposed 230-unit apartment building with 725 bedrooms, intended for student housing. In a previous decision, the city council approved a multiple-unit property

1 tax exemption (MUPTE) for the proposed development. Petitioner appealed to LUBA the
2 city's MUPTE decision, but LUBA dismissed that appeal for lack of jurisdiction. *Conte v.*
3 *City of Eugene*, __ Or LUBA __ (LUBA No. 2012-041, August 14, 2012), *review pending*
4 CA 152352. In that MUPTE decision, the city conditioned approval on a requirement that
5 intervenor dedicate to the city a 20-foot right of way to replace the existing West 12th Avenue
6 right-of-way, and construct a new public bicycle and pedestrian pathway that is closed to
7 vehicles.

8 In the street vacation proceeding, the city council held a hearing on April 23, 2012, at
9 which petitioner and others appeared in opposition. The city council held the record open for
10 seven days, until April 30, 2012, to allow additional evidence, argument and testimony. The
11 record was then left open for an additional seven days, or until May 7, 2012, for any party to
12 submit written argument, but not new evidence, to respond to issues raised in the first open
13 record period. Finally, the record was left open an additional seven days for the applicant's
14 final written argument, which intervenor subsequently waived.

15 On May 1, 2012, one day after the evidentiary open record period closed, intervenor
16 informed the city by e-mail that it thereby withdraws the request to vacate Willamette Alley.
17 Petitioner objected that the withdrawal constituted new evidence, and argued that the city
18 was required to conduct new proceedings, with new notice and a new hearing, or a new
19 evidentiary open record period, to allow parties to submit additional evidence to respond to
20 intervenor's withdrawal of the Willamette Alley vacation request. City staff submitted a
21 memorandum to the city council taking the position that the two vacation requests are
22 separate, and that no new proceedings were necessary to consider the request to vacate West
23 12th Avenue.

24 On May 11, 2012, the city issued Ordinance No. 20491, supported by attached
25 findings, concluding that the vacation of West 12th Avenue is in the public interest, as

1 required by Eugene Code (EC) 9.8725.¹ Section 4 of Ordinance No. 20491 provides that the
2 vacation would become effective on the date the city issues a building permit for construction
3 of the structural shell of a “multi-story residential building proposed by [intervenor] located
4 north of the West 12th Avenue right-of-way to be vacated.” Record 3. This appeal followed.

5 **JURISDICTION**

6 In its response brief, intervenor disputes that the city’s decision is a “land use
7 decision” as defined at ORS 197.015(10)(a), which provides in relevant part that a land use
8 decision subject to LUBA’s jurisdiction is a final decision that concerns the application of,
9 among other things, a land use regulation. We understand intervenor to argue that EC
10 9.8725, the sole approval criterion applied in the city’s decision, is not a “land use
11 regulation.” The city does not join intervenor’s jurisdictional challenge, but states in its
12 response brief that the question is debatable.

13 Petitioner replies, and we agree, that EC 9.8725 is a land use regulation as defined at
14 ORS 197.015(11), because it is an approval standard included within a “local government
15 zoning ordinance * * * or similar general ordinance establishing standards for implementing
16 a comprehensive plan.” EC 9.8725 is part of Chapter 9 of the Eugene Code, which is the
17 city’s land use and zoning code. See EC 9.8700 (“This land use code and state law provide
18 procedures, requirements, and criteria for vacating public ways”). It is not debatable whether
19 EC.9.8725 is a land use regulation.

20 Because Chapter 9 of the Eugene Code is a land use regulation, the case intervenor
21 cites, *Bohnenkemp v. Clackamas County*, 56 Or LUBA 17 (2008), is distinguishable. In

¹ EC 9.8725 supplies the only approval criterion for vacation of a city right-of-way, and provides in relevant part:

“The city council shall approve, or approve with conditions and reservations of easements, the vacation of improved public right-of-way * * * only if the city council finds that approval of the vacation is in the public interest.”

1 *Bohnenkemp*, the county’s road vacation regulations were codified in the Clackamas County
2 Code and were not part of the county’s land use regulations. The Clackamas County Code
3 expressly treated road vacations as something other than land use decisions. LUBA
4 concluded that the county’s road vacation standards were not land use regulations and
5 therefore LUBA lacked jurisdiction. In the present case, EC 9.8725 is codified in the city’s
6 land use code and under that land use code vacations are processed, as the city did here, as
7 land use decisions. LUBA has jurisdiction over the challenged decision.

8 **THIRD ASSIGNMENT OF ERROR**

9 Because the third assignment of error alleges procedural error that could require a
10 remand that would change the evidentiary record, we address the third assignment of error
11 first.

12 One day after the evidentiary record in this matter closed on April 30, 2012, in a May
13 1, 2012 e-mail message, intervenor withdrew the Willamette Alley portion of its vacation
14 request. Petitioner contends that e-mail message constitutes “new evidence” that petitioner
15 had a right to rebut with evidence and argument. Petitioner argues that the city committed
16 procedural error by refusing to provide an opportunity for petitioner to respond to
17 intervenor’s withdrawal of the request to vacate Willamette Alley.

18 Petitioner contends that intervenor’s withdrawal of the Willamette Alley vacation
19 request constituted “new evidence,” because it was a substantive modification to a single
20 application to vacate a T-shaped intersection that could affect whether the remaining portion
21 to be vacated complies with the EC 9.8725 “public interest” approval standard.² Because

² The e-mail consists of four sentences, stating in full:

“I have reviewed the materials relative to the two requested vacations and discussed with representatives of my client the manner in which we wish to proceed. [Intervenor] hereby withdraws its present application for vacation of the north/south Willamette Alley right-of-way.

1 that “new evidence” was submitted during the rebuttal period, when no new evidence was
2 allowed, petitioner argues that the city had two choices: either (1) reject the new evidence or
3 (2) re-open the evidentiary record to allow other parties an opportunity to respond to that new
4 evidence. Petitioner contends that the city erred in accepting the new evidence without
5 providing that opportunity.

6 The city and intervenor respond that the withdrawal of the request to vacate
7 Willamette Alley was not “evidence” at all. Further, respondents argue that, as city staff
8 noted in its memorandum to the city council, the application sought to vacate two separate
9 rights-of-way, not a single T-shaped right-of-way. According to respondents, the withdrawal
10 of the request to vacate Willamette Alley did not have any bearing on the evidence or
11 arguments supporting or contravening the vacation of West 12th Avenue.

12 We agree with respondents that the withdrawal of the request to vacate Willamette
13 Alley did not constitute “evidence.” ORS 197.763(9)(b) defines “evidence” for purpose of
14 quasi-judicial land use hearings as “facts, documents, data or other information offered to
15 demonstrate compliance or noncompliance with the standards believed by the proponent to
16 be relevant to the decision.” Intervenor’s May 1, 2012 e-mail includes nothing that qualifies
17 under that definition. We see nothing in that e-mail that is “offered to demonstrate
18 compliance or noncompliance” with the public interest standard, or any other standard, either
19 for the Willamette Alley vacation or the West 12th Avenue vacation.

20 Although most of the third assignment of error is based on the erroneous premise that
21 the withdrawal constitutes “new evidence,” on page 15 of the petition for review we
22 understand petitioner to argue that the change in the application triggered the obligation on

“[Intervenor] does wish to proceed with the vacation of the east/west 12th Avenue right-of-way.

“We would ask the City Council be so advised.” Record 137.

1 the city's part to provide an opportunity for the parties to testify or provide evidence on how
2 the replacement pathway would operate without the vacation of Willamette Alley, regardless
3 of whether that change in the application constitutes "new evidence." Petitioner argues that
4 the change in application "may have significant impacts on pedestrian and bicycle use" of
5 the replacement pathway. Petition for Review 15.

6 We generally agree with petitioner that the parties to a land use proceeding have the
7 right to review and respond to any formal changes in the application that occurs during the
8 proceedings below, including the opportunity to submit responsive testimony and,
9 potentially, new evidence, regarding whether given the nature of the change the remaining
10 elements of the application continue to comply with applicable approval criteria. If such a
11 change in the application occurs late in the proceedings, the local government may be
12 required to re-open the record to allow other parties a reasonable opportunity to submit
13 responsive testimony and evidence. *See Baker v. City of Garibaldi*, 49 Or LUBA 437, 446
14 (2005) (where the applicant submits a revised planned unit development plan the day before
15 the appeal hearing, the city is obligated to allow the parties an opportunity to review and
16 respond to the revision). Failure to provide such an opportunity can be procedural error and
17 a basis for remand, if the petitioner demonstrates that the procedural error prejudiced his
18 substantial rights. ORS 197.835(9)(a)(B).

19 We understand respondents to argue that petitioner had an adequate opportunity to
20 respond to the changed application during the seven-day open record period for all parties to
21 provide argument, and in fact did so in a May 7, 2012 letter to the city. Respondents are
22 correct that petitioner submitted argument that addresses the change in the application.
23 Record 100-102. As noted above, petitioner framed his response almost entirely as a request
24 for the city to re-notice the decision and provide another hearing or evidentiary proceeding to
25 allow petitioner to address the "new evidence." However, petitioner also argued in relevant
26 part that the withdrawal of the request to vacate Willamette Alley might conflict with bicycle

1 and pedestrian use of the replacement pathway, because the northern portion of Willamette
2 Alley, if unvacated, would remain open to vehicular traffic. Record 101. That is essentially
3 the same argument petitioner presents on appeal. Continued vehicular use of Willamette
4 Alley could conceivably conflict with the replacement pathway, and such conflicts could
5 conceivably have bearing on the question of whether the vacation of West 12th Avenue, in
6 isolation from the vacation of Willamette Alley, is in the public interest. Petitioner arguably
7 had an adequate opportunity to present responsive *argument* during the second seven-day
8 open record period, and exercised that opportunity. However, that seven-day period was
9 closed to *new evidence*, and the city rejected his request for the opportunity to present new
10 evidence. It is not clear to us what kind of evidence responding to the withdrawal could be
11 presented that would have a bearing on whether the vacation of West 12th Avenue is in the
12 public interest, but we cannot say that no such evidence exists. We conclude that the city
13 committed procedural error in accepting a revised application without providing a reasonable
14 opportunity for parties to submit responsive evidence, and that petitioner has adequately
15 demonstrated that the city’s procedural error prejudiced his substantial rights.

16 The third assignment of error is sustained.

17 **FIRST ASSIGNMENT OF ERROR**

18 As noted, EC 9.8725 requires a finding that the proposed right-of-way vacation is in
19 the public interest. The city concluded that vacating the West 12th Avenue right-of-way is in
20 the public interest, based largely on the fact that intervenor proposes, as required by the
21 MUPTE decision, to dedicate and construct a new bicycle and pedestrian pathway to replace
22 the existing alley.³ In addition, the city’s findings recite other anticipated benefits flowing

³ The city’s finding state, in relevant part:

“The following findings demonstrate that the vacation request is in the public interest. This determination is based on the facts that the vacation, by the terms of the ordinance, will only take effect if the applicant’s development project proceeds to permitting and that, through

1 from development facilitated by the road vacation, including construction jobs and higher
2 density residential uses consistent with the city's downtown plan.⁴ Based on these
3 considerations, the city concluded:

other City actions, the applicant's development project will include replacement of public infrastructure and enhancement of the bicycle and pedestrian connection through the site as more specifically described below. The transportation system will be further improved given that future development of this site will be subject to current Eugene Code standards for commercial zones, which require bicycle and pedestrian amenities such as bicycle parking and pedestrian connections. The Eugene Code will also require the developer to obtain Traffic Impact Analysis approval, which evaluates the development impacts on the transportation system and requires the developer to mitigate those impacts at its expense.

"The current West 12th Avenue right-of-way has an angled alignment and an uneven width. The rededicated right of way will be a uniform 20-foot width located between Olive and Willamette Streets. The new alley would be just south of the existing alley, in a more direct alignment with the existing public access way on the east side of Willamette Street. The applicant proposes to relocated public infrastructure within the new public way, including wastewater, stormwater, bicycle and pedestrian improvements.

"The existing public alley between Olive Street and Willamette Street is heavily used by bicycles and pedestrians. Redevelopment of the site will include dedication of a new 20 foot wide public alley for bicycles and pedestrians to continue to address this public interest. The new alley will include a 10-foot wide clear zone for bicyclists, free from obstructions and designed in a manner that minimizes potential conflicts. The future alley alignment benefits bicycles and pedestrians by providing a straight alley and without conflicts with automobiles, as vehicular movement will not be allowed in the rededicated alley location. * * * The new right-of-way dedication and related public improvements for the realigned public bicycle and pedestrian connection through the site, between Olive and Willamette Streets, is a condition of MUPTE approval, which is essential to the applicant's development of the site." Record 9-10.

⁴ The city's findings continue:

"The public interest in the area was examined in the City's recent compilation of the Eugene Downtown Plan (EDP). The City's aspirational vision as reflected in the EDP is to establish the downtown area as a strong regional, community, and cultural center. To achieve this vision, the City plays a proactive role in promoting the desired high-density and high-quality development investment downtown. Without the vacation of the 12th Avenue right-of-way, the applicant will be unable to move forward with its development proposal for the site. That development proposal is to locate a large, privately-funded, residential development for student housing in the downtown area, within a block of the downtown transit center. This development will provide the opportunity for dense, urban, downtown living, consistent with the City's vision of providing compact urban development with easy access to a variety of transportation options. The addition of a student housing development consisting of approximately 230 apartments with 725 bedrooms on the site will add both density and vitality to the downtown, consistent with City goals, and allow hundreds of new downtown residents to live, shop, eat and enjoy cultural amenities downtown.

1 “The ability to redevelop this property in a consolidated manner enhances the
2 economic viability of the site. The vacation will result in a safe and efficient
3 transportation system, an improved bicycle and pedestrian connection through
4 the site, and a redevelopment project that provides compact urban growth and
5 adds density and vitality to the downtown area. The proposal is consistent
6 with the City’s vision for this area as reflected in the Eugene Downtown Plan
7 and related policy documents. The project will result in substantial economic
8 opportunities for the construction trade and downtown businesses, and the
9 additional employment opportunities will benefit the entire community. The
10 City will continue to work with the downtown and nearby neighborhoods to
11 address livability concerns through appropriate programs. Based on the above
12 findings, substantial evidence and testimony received, the City finds that the
13 requested right-of-way vacation will be in the public interest.” Record 11.

14 Accordingly, the city adopted Ordinance No. 20491, which includes the following finding:

15 “[Intervenor] will be dedicating a new West 12th Avenue right-of-way having
16 a consistent width of 20 feet, located more directly with the existing public
17 access way east of Willamette Street just south of the West 12th Avenue right-
18 of-way being vacated. The applicant will improve this replacement right-of-
19 way to accommodate a bicycle and pedestrian connection through the site.”
20 Record 4.

21 Section 4 of Ordinance No. 20491 imposes the following requirement:

22 “Notwithstanding the effective date of Ordinances as provided in the Eugene
23 Charter of 2002, this Ordinance and the vacation described herein shall
24 become effective on the date the City issues a building permit for construction
25 of the structural shell of a multi-story residential building proposed by
26 [intervenor], located north of the West 12th Avenue right-of-way to be
27 vacated.” Record 5.

28 However, the ordinance does not include any express condition of approval, as such, that
29 requires intervenor to dedicate and construct the replacement pathway.

“In addition to jobs the development will provide in the construction industry, the additional residents within walking distance of businesses will strengthen downtown’s position as a service center and central business district. The use and location of the proposed development will promote the efficient use of existing public facilities and encourage alternative modes of transportation, as residents will have access to services downtown and to the University of Oregon, by walking, bicycling or transit. The downtown transit station is located within a block to the north, which provides transit service to the Eugene-Springfield area, including a Bus Rapid Transit system that connects to Springfield and the Riverbend Hospital. This convenience promotes and supports the use of alternative transportation.” Record 10.

1 In the first assignment of error, petitioner argues that the city erred in failing to
2 impose conditions of approval sufficient to ensure that intervenor provides the replacement
3 pathway. According to petitioner, the city cannot rely upon non-binding expressions of intent
4 from an applicant to ensure that approval standards are met. *See Neste Resins Corp. v. City*
5 *of Eugene*, 23 Or LUBA 55, 67 (1992) (the applicant’s statement of intent to limit housing to
6 elderly to avoid impacting schools is insufficient); *Penland v. Josephine County*, 29 Or
7 LUBA 213, 222 (1995) (applicant’s statement of intent to limit construction height and use a
8 solid insulated wall to avoid impacts of composting facility on neighbors is insufficient);
9 *Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008) (applicant’s statement of
10 intent to limit housing to elderly to reduce traffic impacts and avoid need for mitigation is
11 insufficient).

12 Intervenor responds initially that the issue of whether a condition of approval is
13 necessary to ensure construction of the replacement pathway was not raised during the
14 proceedings below, and is therefore waived. ORS 197.763(1); ORS 197.835(3).⁵ In the

⁵ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) and (4) provide, in relevant part:

“(3) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.

“(4) A petitioner may raise new issues to the board if:

“* * * * *

“(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government’s final action.”

1 reply brief, petitioner cites two places in the record where, petitioner alleges, the issue of
2 whether a condition of approval is necessary was raised below. In the alternative, petitioner
3 argues that, given the difference between the notice of hearing, which describes the proposal
4 to vacate two rights-of-way, and the city's final action, which vacates only one right-of-way,
5 petitioner is entitled to raise new issues pursuant to ORS 197.835(4)(b).

6 We agree with petitioner that the issue of whether a condition of approval is
7 necessary to ensure construction of the replacement pathway is not waived. At Record 1153
8 a participant argued to the city that the vacation ordinance should be conditioned to require
9 that the vacated alleys be rededicated as shown in intervenor's application. That is sufficient
10 to raise the issue presented in this assignment of error. Moreover, we note that because
11 conditions of approval are typically not attached until the final decision, the participants
12 below sometimes do not have a reasonable opportunity to object to the inadequacy or
13 absence of conditions necessary to ensure compliance with approval criteria. Rigid
14 application of the waiver doctrine in such circumstances should not preclude challenges to
15 inadequate or absent conditions.

16 On the merits, the city responds that the ordinance and findings are sufficient to
17 condition the effectiveness of the road vacation on dedication and construction of the
18 replacement bicycle and pedestrian pathway, and that no express condition of approval was
19 necessary. We agree with the city.

20 Unlike *Neste Resins Corp*, *Penland*, and *Culligan*, in the present case the city did not
21 simply rely upon the applicant's unsupported assurances that an improvement the city is
22 relying on to ensure compliance with approval standards (i.e., the replacement pathway) will
23 actually be constructed. Instead, the city relied upon several measures to ensure that the
24 replacement pathway will be developed. The first is the fact that the MUPTE approval
25 requires intervenor to construct the propose development, and dedicate and construct the
26 replacement pathway. In the city's vacation decision, the city adopted an unchallenged

1 finding that the MUPTE approval is “essential to the applicant’s development of the site.”
2 Record 10. Given that finding, we believe the city could reasonably rely upon the fact that
3 the MUPTE decision requires intervenor to construct the replacement pathway, as some
4 support for the city’s conclusion that the road vacation is in the public interest, because it will
5 facilitate development that is dependent on a tax exemption decision that expressly
6 conditions that development on providing a replacement pathway.

7 Second, Section 4 of Ordinance No. 20491 makes the vacation ineffective until
8 intervenor obtains building approval for “multi-story residential building” proposed by
9 intervenor. It is true that Section 4 does not expressly require construction of the
10 replacement pathway, or expressly condition the effectiveness of the vacation on construction
11 approval of the identical 230-unit apartment building proposed by intervenor. As petitioner
12 points out, it is theoretically possible that Section 4 could be satisfied by an application for a
13 two-story single-family dwelling with no replacement pathway rather than the larger
14 development proposed by intervenor. However, in context with the findings adopted by the
15 city it is clear that the city intended Section 4 to allow the vacation to become effective only
16 if intervenor proposes development of the kind proposed and evaluated in the city’s findings,
17 including the replacement pathway. In our view, while Section 4 may not be sufficient by
18 itself to ensure that the replacement pathway is constructed, it provides some additional
19 assurance to that effect.

20 Finally and most importantly, as previously noted, Ordinance No. 20491 itself
21 includes a specific finding that intervenor “will” dedicate and improve the replacement
22 pathway. Read in context with its other findings and with Section 4 of the ordinance, it is
23 reasonably clear that the city views the replacement pathway to be a mandatory element, and
24 that the city would not approve a building permit for development under Section 4 if the
25 development proposed does not include a replacement pathway consistent with that
26 contemplated in the city’s findings and required by the MUPTE decision. In other words, the

1 finding in Ordinance No. 20491 that intervenor will provide the replacement pathway when
2 developing the site is functionally a condition of approval to that effect.

3 In sum, given the MUPTE decision's requirement to construct the proposed
4 development with the replacement pathway, the unchallenged finding that the MUPTE
5 decision is essential to development of the site, the terms and apparent intent of Section 4,
6 and the functional condition of approval in Ordinance No. 20491 that intervenor will
7 construct the replacement pathway, we conclude that the city has adopted adequate measures
8 to avoid the possibility that the site will be developed without a replacement pathway, and no
9 express condition of approval to that effect is necessary.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioner contends that the city misconstrued the EC 9.8725 "public interest"
13 standard by focusing on the benefits that flow from the proposed *development*, including the
14 replacement pathway. We understand petitioner to argue that in applying EC 9.8725 the city
15 should have focused exclusively on the benefits of *vacating* the West 12th Avenue right-of-
16 way. According to petitioner, the proper question is not whether development facilitated by
17 the vacation is in the public interest, but whether the vacation itself is in the public interest.
18 Given that the vacation would eliminate a heavily used bicycle and pedestrian pathway,
19 petitioner argues, the city cannot conclude under a proper application of EC 9.8725 that the
20 vacation itself is in the public interest.

21 Based on its findings, the city council clearly disagrees with petitioner that the EC
22 9.8725 "public interest" standard precludes evaluation of the benefits of development
23 facilitated by the vacation. The city's findings focus largely on the benefits of the proposed
24 development, and do not attempt to evaluate the public interest that would be served by the
25 road vacation itself, as isolated from how that vacation would facilitate proposed
26 development. Those findings embody an implicit interpretation of EC 9.8725 that is

1 adequate for review. We are required to affirm that interpretation of EC 9.8725 unless it is
2 inconsistent with the express language of EC 9.8725, its purpose or underlying policy. ORS
3 197.829(1); *Alliance for Responsible Land Use v. Deschutes Cty*, 149 Or App 259, 267-68,
4 942 P2d 836 (1997) (LUBA must apply the deferential standard of review at ORS 197.829(1)
5 to a governing body’s implicit interpretations of local provisions that are adequate for
6 review). For the reasons explained below, petitioner has not demonstrated that the city’s
7 interpretation is reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or
8 247, 259, 243 P3d 776 (2010) (an interpretation is consistent with the express language of the
9 code if it is “plausible”).

10 In *Bowers v. City of Eugene*, which petitioner cites, we rejected the petitioner’s
11 argument that the EC 9.8725 public interest standard obligates the city to find that
12 development that is facilitated by the vacation is in the public interest. We held that the city
13 could conclude that the vacation was in the public interest regardless of whether a new arena
14 is necessary, based solely on the negligible impacts of the vacation itself on the city’s
15 transportation network, and the increased development flexibility the vacation would permit
16 to any development. But there is nothing in *Bowers* that suggests the city would err if it did
17 consider whether the development made possible by the road vacation would further the
18 public interest. And in this case there is certainly nothing in *Bowers* that would preclude the
19 city from determining that vacating the existing right of way, which would make possible the
20 development of a more functional pathway, serves the public interest.

21 In the present case, petitioner argues that because West 12th Avenue is a heavily used
22 pathway, whether its vacation is in the public interest must depend solely on the benefits, if
23 any, of the vacation itself, not the benefits of subsequent development, including whether the
24 replacement pathway is superior to the existing pathway. However, the text of EC 9.8725
25 does not suggest any limits on what considerations inform whether the vacation is in the

1 public interest. The city's interpretation to that effect is consistent with the express language
2 of EC 9.8725, and must be affirmed. ORS 197.829(1)(a).

3 The second assignment of error is denied.

4 The city's decision is remanded.

5

APPENDIX

Figure 1

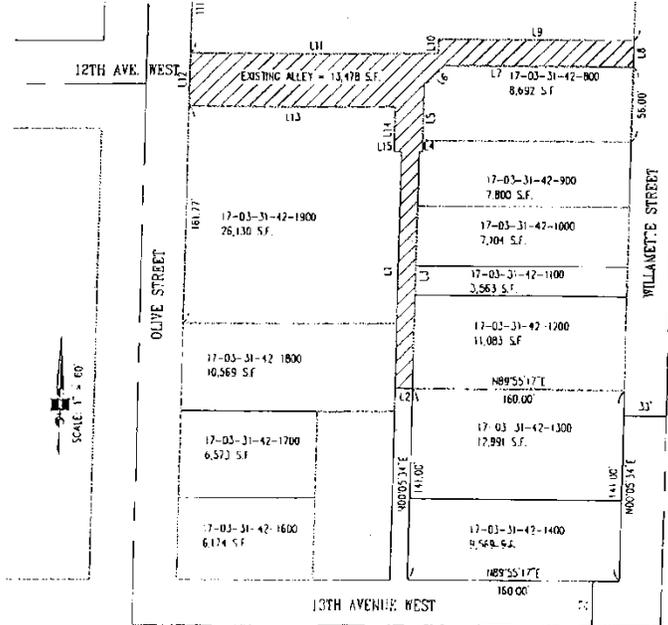


Figure 2

