

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 LAUREL HILL VALLEY CITIZENS,  
4 *Petitioner,*

5  
6 vs.

7  
8 CITY OF EUGENE,  
9 *Respondent,*

10  
11 and

12  
13 ENVIRON-METAL PROPERTIES, LLC  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2015-091

17  
18 ENVIRON-METAL PROPERTIES, LLC,  
19 *Petitioner,*

20  
21 vs.

22  
23 CITY OF EUGENE,  
24 *Respondent,*

25  
26 and

27  
28 LAUREL HILL VALLEY CITIZENS,  
29 *Intervenor-Respondent.*

30  
31 LUBA No. 2015-092

32  
33 FINAL OPINION  
34 AND ORDER

35  
36 Appeal from City of Eugene.  
37

1 Sean T. Malone, Eugene, filed the petition for review and response brief  
2 and argued on behalf of petitioner/intervenor-respondent Laurel Hill Valley  
3 Citizens.

4  
5 Bill Kloos, Eugene, filed the petition for review and response brief and  
6 argued on behalf of petitioner/intervenor-respondent Environ-Metal Properties,  
7 LLC.

8  
9 No appearance by the City of Eugene.

10  
11 BASSHAM, Board Chair; RYAN, Board Member, participated in the  
12 decision.

13  
14 HOLSTUN, Board Member, concurring.

15  
16 REMANDED 03/11/2016

17  
18 You are entitled to judicial review of this Order. Judicial review is  
19 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners in LUBA Nos. 2015-091 and 2015-092 appeal a planning commission decision approving a zoning map amendment to conform the zoning of the applicant’s property to the underlying residential and open space comprehensive plan designations.

**MOTION TO INTERVENE**

Environ-Metal Properties, LLC (Environ-Metal), the applicant below, moves to intervene in LUBA No. 2015-091. Laurel Hill Valley LHVC (LHVC) moves to intervene in LUBA No. 2015-092. There is no opposition to either motion, and they are allowed.

**MOTION TO FILE REPLY BRIEF**

LHVC, petitioner in LUBA No. 2015-091, moves to file a reply brief in that appeal to address waiver challenges. There is no opposition to the motion and the reply brief is allowed.

**MOTION TO SUPPLEMENT PETITION FOR REVIEW**

Environ-Metal, petitioner in LUBA No. 2015-092, moves to supplement its petition for review in that appeal with a partial transcript of a planning commission hearing. There is no opposition to the motion, and the supplement is allowed.

1 **INTRODUCTION**

2 **A. Background**

3 The subject property is a 121-acre parcel with a long east-west axis,  
4 located at the southern edge of the city, adjacent to the urban growth boundary.  
5 The comprehensive plan designation for the subject property is controlled by  
6 the Metro Plan diagram, adopted in 2004, which is a paper 11x17 inch map at a  
7 scale of one inch equals 7,000 feet. The Metro Plan diagram is not property-  
8 specific, and indicates plan designation by blobs of color.

9 In the present case, the southwestern boundary of the property adjoins  
10 the right-of-way for East 30<sup>th</sup> Avenue. In this area, which has steep slopes, the  
11 city-owned property that includes the East 30<sup>th</sup> Avenue right-of-way is  
12 approximately 240 to 300 feet wide. On the Metro Plan diagram, East 30<sup>th</sup>  
13 Avenue in the vicinity of the subject property is depicted as a black line that  
14 runs along a southeast to northwest axis, then curving gently to the west, where  
15 it intersects with Spring Boulevard, approaching from the south, and then  
16 continues west.

17 In 2012, Environ-Metal applied to the city for zoning map amendments  
18 and development approvals to develop the entire property for residential use,  
19 based on a refinement plan map that appeared to show the entire property  
20 designated Low Density Residential (LDR). The city denied the application,  
21 concluding that the controlling document, the 2004 Metro Plan Diagram,  
22 depicts a strip of land in the southern portion of the property with the Parks and

1 Open Space (POS) designation. In *Environ-Metal Properties, LLC v. City of*  
2 *Eugene*, 69 Or LUBA 33, *aff'd* 263 Or App 714, 330 P3d 74 (2014), LUBA  
3 affirmed the city’s conclusion that a southern portion of the subject 121-acre  
4 property is designated POS. LUBA rejected Environ-Metal’s argument that it  
5 was impossible to determine based on the scale and lack of detail on the Metro  
6 Plan Diagram exactly where on the subject property the boundary line between  
7 the LDR and POS designations lies. We commented:

8 “Because the Metro Plan diagram is now digitized, and the  
9 depicted plan boundaries [on the digitized map] are sharper than in  
10 previous versions, the problem may not be as difficult to solve as  
11 [Environ-Metal] fear[s]. It may be possible to scale up the digital  
12 version of the map, overlay it with property lines from a digital  
13 database, and determine the precise plan designation boundaries  
14 on the subject property with reasonable accuracy. If for some  
15 reason that is not possible, the city and [Environ-Metal] will have  
16 to do the best they can with the tools at their disposal.” 69 Or  
17 LUBA at 47.

18 **B. The Present Zoning Application**

19 In 2015, Environ-Metal filed the present application to rezone the  
20 northern portion of the subject property for residential use, and to zone  
21 approximately 20 acres of the southern portion of the property Parks and Open  
22 Space (POS), zones that implement the plan designations on the property.  
23 Eugene Code (EC) 9.8865(1) is a zone change criterion requiring that the  
24 applicant demonstrate that “[t]he proposed change is consistent with the  
25 applicable provisions of the Metro Plan.” Thus, the relevant legal question is

1 whether the proposed zoning of the subject property is consistent with the  
2 Metro Plan diagram.

3 In general, the evidence submitted below attempted to follow LUBA's  
4 suggested approach, by first creating a map (which we refer to as a survey  
5 map), at a scale of 1 inch equals 200 feet that depicts the subject property lines,  
6 the urban growth boundary, city limits and the 30<sup>th</sup> Avenue centerline. The 30<sup>th</sup>  
7 Avenue centerline is located based on data from the Lane County Surveyor's  
8 Office. The property boundary, city limits and urban growth boundary are  
9 based on surveys. We understand the parties to agree that the subject property  
10 lines, the urban growth boundary, city limits and the 30<sup>th</sup> Avenue center line  
11 are accurately depicted in relation to each other.

12 Next, the Metro Plan diagram is enlarged and scaled to 1 inch equals 200  
13 feet (the enlarged Metro Plan diagram). The parties initially used the digital  
14 version of the Metro Plan diagram. However, as explained below, the parties  
15 later shifted to using enlarged scans of the official paper 2004 Metro Plan  
16 diagram.<sup>1</sup>

---

<sup>1</sup> What we refer to as the "digital version" of the Metro Plan diagram is one or more maps generated by a digital database maintained by the Lane County Council of Governments (LCOG). All parties agree that maps generated from the LCOG database are not officially adopted maps, and that the paper 2004 Metro Plan diagram is the relevant Metro Plan diagram for purposes of EC 9.8865(1). However, at oral argument, LHVC and Environ-Metal agreed that there are no substantive differences relevant in this appeal between the features depicted on the enlarged maps in the record based on the digital version of the Metro Plan diagram and those based on the paper 2004 Metro Plan diagram.

1           The final, and most difficult task, is to overlay the survey map (which  
2 does not show the LDR/POS boundary) on the enlarged Metro Plan diagram  
3 (which shows the LDR/POS boundary). We refer to such combined maps as  
4 “overlaid diagrams.” If the surveyed property boundaries matched up to any  
5 features on the enlarged Metro Plan diagram, it would be relatively  
6 straightforward to establish the location of the LDR/POS boundary on the  
7 subject property, and hence the zoning boundary. However, in general the  
8 surveyed property boundaries do not match up to any features on the enlarged  
9 Metro Plan diagram. There are, however, several nearby features that can be  
10 aligned with the other surveyed lines on the survey map. We refer to these  
11 features depicted on the enlarged Metro Plan diagram as “referents.”  
12 Depending on how they are counted, in the area of the subject property there  
13 are three to four referents that could be used to align the survey map onto the  
14 enlarged Metro Plan diagram. Because all of the surveyed lines on the survey  
15 map have an accurate relationship with each other, by matching up surveyed  
16 lines and features located near the subject property, one can be reasonably  
17 confident that the LDR/POS boundary is located as accurately as possible  
18 within the boundaries of the surveyed property lines. One of the overlaid  
19 diagrams is set out in an appendix to assist in understanding the relatively

---

The only apparent difference is greater fuzziness in the lines and boundaries depicted on the paper 2004 Metro Plan diagram, compared to the crisper lines and boundaries depicted on the digital version. In this opinion, all references to the “2004 Metro Plan diagram” are to the official, paper version.

1 complicated facts in this case. LUBA has modified the copy of the overlaid  
2 diagram with text boxes to identify various features and survey lines.

3 Both Environ-Metal and LHVC submitted overlaid diagrams that differ  
4 somewhat, and those differences are discussed in more detail below. In  
5 general, Environ-Metal relied on only a single referent, matching the surveyed  
6 centerline of East 30<sup>th</sup> Avenue with a portion of the black line representing East  
7 30<sup>th</sup> Avenue depicted on the enlarged Metro Plan diagram. As noted, Environ-  
8 Metal used a survey obtained from the county surveyor to locate the built  
9 centerline of East 30<sup>th</sup> Avenue on the survey map, and attempted to align that  
10 centerline, depicted as a thin green line on the survey map, with the thicker  
11 black line that depicts East 30<sup>th</sup> on the enlarged Metro Plan diagram that  
12 represents the paved portion of East 30<sup>th</sup> Avenue. The resulting overlaid  
13 diagram depicts the features shown on both maps. *See* Exhibit G, Record 1378  
14 and the color copy at Oversize Exhibit RE-Z. As explained below, on Exhibit  
15 G and all other Environ-Metal overlaid diagrams, the thin green line  
16 representing the East 30<sup>th</sup> Avenue centerline (from the survey map) matches the  
17 line showing the East 30<sup>th</sup> Avenue alignment from the enlarged Metro Plan  
18 diagram where it is closest to the subject property, but where East 30<sup>th</sup> Avenue  
19 curves west, those lines diverge.

20 LHVC submitted testimony and maps prepared by an engineer,  
21 Schlieder, critiquing the proposed diagram at Exhibit G. Record 1071-91.  
22 Schlieder noted that Exhibit G is apparently based not on the official paper

1 version of the 2004 Metro Plan diagram, but on the unofficial digital version.  
2 Schlieder presumably did not intend this to be a criticism in itself, because the  
3 initial maps submitted by Schlieder were also based on the digital Metro Plan  
4 diagram.

5 Substantively, Schlieder identified what we will call the “north arrow”  
6 problem. In brief, Environ-Metal’s surveyed map and enlarged Metro Plan  
7 diagram were both oriented with true north to the top of the diagram.  
8 However, Schlieder noted that the north arrow on the 2004 Metro Plan diagram  
9 is tilted two degrees to the right relative to the top of the printed page,  
10 apparently to reflect what is called “grid north,” a convention reflecting the  
11 difficulty of representing a portion of the round globe on a flat map. Schlieder  
12 submitted diagrams showing that when the property boundaries are tilted two  
13 degrees to match the north arrow on the 2004 Metro Plan diagram an additional  
14 eight acres is subject to the POS designation.

15 Second, Schlieder noted that on Exhibit G the centerline of East 30<sup>th</sup>  
16 Avenue from the survey map diverges north of the thick black line representing  
17 East 30<sup>th</sup> Avenue from the enlarged Metro Plan diagram at the point where East  
18 30<sup>th</sup> Avenue curves west near its intersection with Spring Boulevard. Schlieder  
19 calculated this divergence to represent approximately 124 feet on the ground at  
20 the appropriate scale. Further, Schlieder took the position that the city limits  
21 line from the survey map, as depicted on Exhibit G, is offset to the northwest  
22 from its correct position, which according to Schlieder is actually located along

1 the eastern boundary of Spring Boulevard, but Exhibit G depicts the city limits  
2 line to the west of Spring Boulevard. Schlieder attributed these anomalies in  
3 part to the north arrow problem, and in part to what LHVC calls the “sliding”  
4 problem. Schlieder argued that Environ-Metals’ single-referent, single-axis  
5 approach allows the subject property lines to “slide” in a northwest direction  
6 along the axis of East 30<sup>th</sup> Avenue, with the result that less land within the  
7 subject property is subject to the POS designation. Schlieder calculated that  
8 with the north arrow problem corrected, and the East 30<sup>th</sup> Avenue centerline  
9 and city limits lines placed to match the western curve of the East 30<sup>th</sup> Avenue  
10 alignment and the eastern boundary of Spring Boulevard, approximately 40  
11 acres of the subject property is subject to the POS designation, rather than the  
12 20 acres advocated by Environ-Metal.

13 On September 2, 2015, city planning staff submitted a supplemental staff  
14 memorandum that agreed with Schlieder that using additional physical  
15 referents would more accurately align the property with the Metro Plan  
16 diagram, and that a more accurate map would result if the property boundaries  
17 are rotated to match the two-degree tilt of the north arrow on the Metro Plan  
18 diagram. Record 195. Staff also argued that the hearings official should not  
19 rely upon diagrams based on the unofficial digital Metro Plan diagram. Record  
20 194.

21 On the same date, September 2, 2015, Environ-Metal submitted two  
22 additional, alternative overlaid diagrams (Exhibit L and Exhibit M) to address

1 the “north arrow” problem and the criticism that Exhibit G is based on an  
2 enlargement of the digital Metro Plan diagram. Record 201, 202 (see also  
3 oversize color copies RE-K and RE-L). Both additional overlaid diagrams that  
4 are Exhibits L and M are based on a scanned enlargement of the official paper  
5 2004 Metro Plan diagram.

6 Overlaid diagrams Exhibit L and M omit the city limit lines and some of  
7 the urban growth boundary lines from Environ-Metal’s survey map, which  
8 were included on overlaid diagram Exhibit G, leaving only the property  
9 boundaries and the centerline of East 30<sup>th</sup> Avenue from the survey map.  
10 Exhibit L rotates the property boundaries and centerline two degrees to the  
11 right, to match the north arrow on the 2004 Metro Plan diagram. Because of  
12 the long east-west axis of the subject property, the rotation adds approximately  
13 eight acres to land subject to the POS designation. Exhibit M is not rotated,  
14 and we understand Exhibit M to be consistent with Exhibit G. Environ-Metal  
15 argued to the hearings official that the two-degree north arrow tilt on the Metro  
16 Plan diagram is a scrivener’s error, and that the hearings official should  
17 determine the location of the property relative to the features on the enlarged  
18 Metro Plan diagram, based on the unrotated “true north” Exhibit M over the  
19 rotated “grid north” Exhibit L.

20 On the same date, Schlieder submitted a set of five new overlaid  
21 diagrams, labeled LHVC Sheets 9/2/15-01 through -05. Record 188-92,  
22 Oversize Exhibit RE-I. The most relevant in the present appeal is Sheet 9/2/15-

1 04.<sup>2</sup> Schlieder testified that Sheet 9/2/15-04 is an overlaid diagram using an  
2 enlarged Metro Plan diagram based on the official paper 2004 Metro Plan  
3 diagram. Sheet 9/2/15-04 purports to correct the “north arrow” problem and  
4 the “sliding” problem identified in Schlieder’s earlier testimony. Schlieder  
5 argues that Sheet 9/2/15-04 overlays the surveyed lines shown on Environ-  
6 Metal’s survey map, including the East 30<sup>th</sup> Avenue centerline and the city  
7 limits, with the associated features on the enlarged Metro Plan diagram in a  
8 manner that matches all referents more closely than any of Environ-Metal’s  
9 diagrams.

10 **C. The Hearings Official’s Decision**

11 On September 24, 2015, the hearings official issued his decision that  
12 essentially chose to rely on Environ-Metal’s Exhibit L, the two-degree rotated  
13 diagram. The hearings official rejected Environ-Metal’s arguments that the  
14 two-degree tilt to the north arrow on the 2004 Metro Plan diagram is a  
15 scrivener’s error.

16 With respect to the Schlieder overlaid diagrams submitted on September  
17 2, 2015, LHVC Sheet 9/2/15-01 through -05, the hearings official stated that

---

<sup>2</sup> Sheets 9/2/15-01 and -02 are based on Environ-Metals’ scans of the digital Metro Plan diagram. Sheet 9/2/15-03 is a scan of the official paper 2004 Metro Plan diagram, at the scale of one inch equals 7,000 feet, overlaid by the property boundaries. However, at that scale, the subject property is almost indiscernible. Sheet 9/2/15-05 is based on the digital Metro plan map, and is overlaid with tax lot information.

1 Schlieder's arguments based on those diagrams were "compelling," and if the  
2 question was where is the LDR/POS boundary located based on any available  
3 information, he would likely agree. Record 148. However, the hearings  
4 official concluded that he could not rely on LHVC Sheets 9/2/15-01 through -  
5 05, because all were based on the digital Metro Plan diagram rather than the  
6 official 2004 Metro Plan diagram. *Id.* Further, the hearings official noted that  
7 Schlieder's arguments are based in part on city limit lines and tax lot  
8 information, which are not features depicted on the official 2004 Metro Plan  
9 diagram.

10 **D. Appeal to the Planning Commission**

11 LHVC appealed the hearings official's decision to the planning  
12 commission. Environ-Metal moved to strike portions of the appeal that  
13 included or referenced new evidence or raised new issues not raised before the  
14 hearings official. LHVC submitted a revised appeal statement that the planning  
15 commission accepted.

16 The planning commission conducted a hearing on the appeal and, on  
17 October 29, 2015, issued its decision affirming and adopting the hearings  
18 official's decision as its own. Because the planning commission adopted no  
19 findings of its own, for clarity we refer to the city's decision as the hearings  
20 official's decision.

1           **E.     Environ-Metal’s Appeal to LUBA**

2           In LUBA No. 2015-092, Environ-Metal argues in a single assignment of  
3 error that the hearings official erred in rotating the property boundary lines two  
4 degrees to align with the two-degree skew in the north arrow printed on the  
5 2004 Metro Plan diagram. According to Environ-Metal, the two-degree tilt to  
6 the north arrow is a scrivener’s error and was not intended to require that plan  
7 designation and zoning boundaries should be determined based on a two-  
8 degree tilt from true north. In essence, Environ-Metal argues that the hearings  
9 official erred in adopting the rotated Exhibit L rather than the non-rotated  
10 Exhibit M, as the basis for determining the LDR/POS boundary.

11           **F.     LHVC’s Appeal to LUBA**

12           In LUBA No. 2015-091, LHVC advances a single assignment of error  
13 with three sub-assignments of error. First, LHVC argues that the hearings  
14 official erred in rejecting Sheet 9/2/15-04, in the erroneous belief that that  
15 overlaid diagram was not based on an enlargement of the official 2004 Metro  
16 Plan diagram. Second, LHVC argues that the hearings official erred in  
17 rejecting two other maps as sources of information to determine consistency  
18 with the 2004 Metro Plan diagram. Third, LHVC argues that the hearings  
19 official erred in determining the LDR/POS boundary based on Environ-Metal’s  
20 single-referent approach, rather than on the multiple-referent approach  
21 advocated by LHVC. Environ-Metal presents waiver challenges to some of the  
22 issues presented in the second and third sub-assignments of error.

1 With that introduction, we turn to the parties' arguments.

2 **ASSIGNMENT OF ERROR (ENVIRON-METAL)**

3 As noted, the hearings official concluded that because the 2004 Metro  
4 Plan depicts a "grid north" arrow rotated two degrees to the right, the subject  
5 property overlay and other overlays should also be rotated to match. Record  
6 150. Environ-Metal assigns error to that conclusion, arguing that the use of a  
7 grid north arrow instead of a true north arrow was a scrivener's error, and that  
8 rotating the overlays to match the grid north arrow is therefore inconsistent  
9 with the 2004 Metro Plan diagram.

10 Environ-Metal supports its argument that the rotated north arrow on the  
11 2004 Metro Plan diagram was a scrivener's error by noting that no evidence  
12 exists in the record to demonstrate that the governing bodies who adopted the  
13 2004 Metro Plan diagram intended to adopt a grid north rather than true north  
14 orientation for the diagram. Environ-Metal notes that the north arrow on  
15 earlier versions of the Metro Plan diagram appear to have a true north  
16 orientation, *i.e.*, the north arrow points toward the top of the printed map.  
17 According to Environ-Metal, if the governing bodies that adopted the Metro  
18 Plan intended to change the orientation of the north arrow to grid north, there  
19 would have been some mention of that intent in the legislative history. That is  
20 because, Environ-Metal argues, adoption of grid north rather than true north

1 has weighty implications. According to Environ-Metal, if plan designation  
2 boundaries are based on grid north rather than true north, the result is a  
3 significant change in the location of plan boundaries in areas, such as the  
4 present one, where the plan is not parcel-specific and the property in question  
5 is subject to more than one plan designation. However, Environ-Metal argues,  
6 the available legislative history is silent about the north arrow, from which  
7 Environ-Metal concludes that there was no intentional decision to adopt a grid  
8 north arrow. If so, Environ-Metal argues, the grid north arrow is a scrivener's  
9 error that should be ignored. Environ-Metal argues that consistency with the  
10 2004 Metro Plan requires orienting the property boundary and other overlays  
11 with the understanding that the diagram itself is oriented to true north, *i.e.* north  
12 is straight up to the top of the page on which the diagram is printed, which is  
13 how Environ-Metal's preferred diagram, Exhibit M, is oriented.

14 LHVC responds, and we agree, that Environ-Metal has not demonstrated  
15 that the hearings official erred in requiring that the overlays match the grid  
16 north arrow. Environ-Metal's premise is that there is a mis-match between the  
17 orientation of the north arrow and the orientation of the printed diagram itself.  
18 However, Environ-Metal cites to no evidentiary or other support for that  
19 premise. Environ-Metal is probably correct that if the governing bodies who  
20 adopted the 2004 Metro Plan diagram intended to take the extraordinary and  
Page 16

1 confusing step of orienting the diagram itself to the top of the printed page as  
2 north but orienting the north arrow to grid north, there would likely be  
3 something in the legislative history to explain that odd choice. The basic  
4 function of the north arrow on a map is to indicate the orientation of the  
5 features depicted on the map relative to the north pole. The simpler  
6 explanation for legislative silence regarding the north arrow, as LHVC argues,  
7 is that both the diagram itself and the north arrow are oriented toward grid  
8 north. LHVC cites the Schlieder testimony to explain that the use of grid north  
9 on the 2004 Metro Plan map was purposeful. Schlieder explained:

10 “The Oregon State Plane Coordinate System’s central meridian is  
11 located in Central Oregon. \* \* \* [W]ith increasing distance  
12 eastward and westward from the meridian, lines actually pointing  
13 to True North are subject to increasing rotation toward the  
14 meridian at their northern end and no longer run straight up and  
15 down on the projection. \* \* \* In the Eugene area, which is located  
16 approximately 125 miles west of the meridian, the rotation  
17 imparted by the projection is right around 2 degrees (clockwise).”  
18 Record 881.

19 LHVC also argues that the grid north orientation of the 2004 Metro Plan  
20 diagram can be seen by looking at the north-south streets on the diagram. In  
21 older versions of the Metro Plan diagram that orient north toward the top of the  
22 printed page, the north-south streets appear to be parallel to the side borders.  
23 By contrast, on the 2004 Metro Plan diagram, the north-south streets appear to

1 be slightly tilted to the right on the 2004 Metro Plan diagram, relative to the  
2 side borders, to match the two-degree rotation of the north arrow.<sup>3</sup>

3 It is Environ-Metal's burden to demonstrate that the hearings official  
4 erred in requiring that the overlays align to match the north arrow on the 2004  
5 Metro Plan diagram. Environ-Metal has not done so. Environ-Metal relies  
6 upon the questionable premise that on the 2004 Metro Plan diagram the north  
7 arrow was accidentally rotated two degrees to grid north, while the body of the  
8 diagram was oriented to reflect the top of the printed page as true north.  
9 However, there is simply no evidence to support that premise. To the contrary,  
10 the testimony and evidence in the record, while not conclusive, suggests that  
11 both the north arrow and the features on the diagram are oriented to grid north.

12 Environ-Metal's assignment of error is denied.

---

<sup>3</sup> The record helpfully includes Exhibit N (oversize exhibit RE-M), which appears to support LHVC's position. Exhibit N provides side-by-side comparisons of adopted Metro Plan diagrams from 1980, 1987, and 2004. The adopted 1980 and 1987 Metro Plan diagrams have true north arrows pointing to the top of the maps, and the north-south streets appear to align accordingly, being parallel to the sides of the map. Record 203. In contrast, on the 2004 Metro Plan diagram the same north-south streets depicted on earlier diagrams appear, to our untutored eye, to be rotated slightly to the right, relative to the side borders, consistent with the two-degree tilt of the grid north arrow. *Id.*

1 **ASSIGNMENT OF ERROR (LHVC)**

2 **A. First Sub-Assignment of Error**

3 LHVC argues that the hearings official mistakenly assumed that the  
4 LHVC Sheet 9/2/15-04, submitted on September 2, 2015, was based on an  
5 enlargement of the digital Metro Plan diagram rather than an enlargement of  
6 the official paper 2004 Metro Plan diagram.<sup>4</sup> Due to this mistake, LHVC

---

<sup>4</sup> The hearings official's decision states, in relevant part:

“LHVC produced maps showing much more POS designated lands by using a version of the Metro Plan diagram obtained from LCOG that are depicted in Exhibits 1-5 [Sheets 9/2/15-01 through -05] to their letter of September 2, 2015. LHVC also uses tax lots for other properties, city limits, and additional streets to generate what it argues are more accurate maps than the applicant. LHVC' materials were prepared in part by a certified engineering geologist, and the arguments are compelling. In fact, if the question were where the boundary is most likely located using any available information, I would likely agree with [LHVC]. In determining the boundary, however, we are all bound by the 2004 Metro Plan diagram. As staff's September 2, 2015 memorandum explains, LHVC' used maps generated by LCOG from a digital version that is different from the 2004 Metro Plan. Even though the digitized version is likely more accurate than the 2004 Metro Plan, even LCOG acknowledges that only the 2004 Metro Plan is the official version of the diagram. Furthermore, city limits and tax lots are not depicted on the 2004 Metro Plan diagram. So even though LHVC' maps may be theoretically more accurate, they are not more accurate for determining the boundary by using the 2004 Metro Plan diagram.” Record 148.

1 argues, the hearings official failed to consider Sheet 9/2/15-04. LHVC argues  
2 that it raised this issue on appeal to the planning commission, but the planning  
3 commission did not adopt findings addressing the issue, instead simply  
4 adopting the hearings official's decision as its own, thus perpetuating the error.

5 Environ-Metal responds that the hearings official correctly concluded  
6 that none of the diagrams Schlieder submitted on September 2, 2015, including  
7 Sheet 9/2/15-04, are based on enlargements of the 2004 Metro Plan diagram.  
8 However, Environ-Metal offers no basis for that assertion. Schlieder stated in  
9 his testimony, to which he imprinted his seal as an engineer, that Sheets 9/2/15-  
10 03 and -04 are based on the 2004 Metro Plan diagram instead of the digital  
11 version. Record 185-86. As far as we can tell from comparing the various  
12 maps in the record, that statement is correct. Sheet 9/2/15-04 appears to have  
13 the same fuzzier lines and boundaries of the enlargement of the paper 2004  
14 Metro Plan diagram that Environ-Metal's Exhibits L and M show, rather than  
15 the crisper lines and boundaries of maps based on an enlargement of the digital  
16 Metro Plan diagram.

17 Environ-Metal next argues that LHVC has the burden of demonstrating  
18 that the hearings official did not, in fact, consider Sheet 9/2/15-04. Environ-  
19 Metal notes that at the beginning of his decision, under the heading  
20 "Documents Considered by the Hearings Official," the hearings official stated  
Page 20

1 that “I have considered all of the documents in the planning file for the  
2 proposed zone change, (Z 15-5) as well as the testimony and documents  
3 provided at the public hearing and the evidence submitted during the open  
4 record period.” Record 145. Environ-Metal argues that this declaration  
5 establishes that the hearings official considered all of Schlieder’s submissions,  
6 including Sheet 9/2/15-04.

7 The hearings official certainly considered Sheets 9/2/15-01 through -05  
8 in the sense that he must have viewed them. However, based on the findings  
9 quoted at n 4, it is clear that the hearings official believed he could not apply or  
10 rely on Schlieder’s September 2, 2015 maps, in order to determine the location  
11 of the LDR/POS boundary, in part because the hearings official understood that  
12 all five sheets were based on the digital Metro Plan diagram. We disagree with  
13 Environ-Metal that the hearings official’s declaration of documents considered  
14 is sufficient to establish that the hearings official in fact considered Sheet  
15 9/2/15-04 for its potential significance in resolving the question before the  
16 hearings official: whether the proposed alignment of the property boundaries,  
17 and hence the location of the LDR/POS boundary, is consistent with the 2004  
18 Metro Plan diagram, as required by EC 9.8865(1). The hearings official  
19 expressly *declined* to consider Schlieder’s September 2, 2015 maps, including  
20 Sheet 9/2/15-04, for that purpose, under the impression that all of the maps  
Page 21

1 were disqualified from consideration for that purpose, because they were based  
2 on the digital rather than paper Metro Plan diagram. As explained above, that  
3 impression is only partially correct: Sheets 9/2/15-03 and -04 are based on  
4 scans of the paper 2004 Metro Plan diagram.

5 In sum, we agree with LHVC that remand is necessary for the planning  
6 commission or hearings official to consider Sheet 9/2/15-04 free of the  
7 mistaken assumption that it is based on the digital Metro Plan diagram, and  
8 adopt any necessary findings based on that consideration. We do not mean to  
9 suggest that the city may not choose to consider or to rely on Sheet 9/2/15-04  
10 for other reasons that are explained in its findings on remand. However, the  
11 city erred in declining to consider Sheet 9/2/15-04 for the reason cited.

12 As explained below, consideration of Sheet 9/2/15-04 on remand will  
13 likely be shaped by our resolution of the third sub-assignment of error, which  
14 concerns whether the city must consider additional referents, and which ones,  
15 in determining whether the proposed zoning is consistent with the 2004 Metro  
16 Plan diagram.

17 The first sub-assignment of error is sustained.

18 **B. Second Sub-Assignment of Error**

19 LHVC argues that the hearings official erred in refusing to consider  
20 other maps, in determining whether the proposed zone change is consistent

1 with the 2004 Metro Plan diagram. Specifically, LHVC argues that the  
2 hearings official erred in rejecting consideration of (1) various overlaid  
3 diagrams based on enlargements of the unofficial digital version of the Metro  
4 Plan diagram, and (2) Sheet SA 7.0, which is a overlaid diagram that Environ-  
5 Metal introduced in the first proceeding that led to *Environ-Metal Properties,*  
6 *LLC*.<sup>5</sup>

7 Environ-Metal responds in part that no issues were raised during the  
8 local appeal of the hearings official’s decision to the planning commission  
9 regarding whether the hearings official erred in rejecting consideration of maps  
10 based on the digital Metro Plan diagram, or regarding Sheet SA 7.0, and thus  
11 the arguments raised in the second sub-assignment of error are waived.  
12 Although Environ-Metal does not cite the source of its waiver argument, we  
13 understand Environ-Metal to refer to the “exhaustion-waiver” principle  
14 articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) (to  
15 preserve an issue before LUBA where the local appeal regulations require  
16 specification of issues, the issue must have been specified in the local appeal).

17 As noted, the planning commission granted a motion to strike with  
18 respect to portions of the original October 6, 2015 appeal statement, and

---

<sup>5</sup> According to LHVC, Sheet SA 7.0 shows approximately 40 acres of the subject property subject to the POS designation, consistent with LHVC’ position, rather than the 20 acres advocated by Environ-Metal in the proceedings leading to this appeal.

1 accepted a redacted version of that original appeal statement. In addition, the  
2 planning commission allowed LHVC to submit a revised appeal statement  
3 dated October 12, 2015, which we understand reflects most of the redactions in  
4 the original. Record 63-71.

5 With respect to Sheet SA 7.0, in its reply brief, LHVC does not identify  
6 any place in either the original redacted or the revised appeal statement  
7 accepted by the planning commission that mentions Sheet SA 7.0.  
8 Accordingly, we agree with Environ-Metal that under *Miles* issues regarding  
9 Sheet SA 7.0 cannot be raised in this appeal.

10 With respect to whether the hearings official erred in rejecting  
11 consideration of overlaid diagrams based on enlargements of the digital Metro  
12 Plan diagram, LHVC argues that this issue was adequately raised in the revised  
13 appeal statement, which refers to several maps attached to the appeal statement  
14 that are based on the digital version of the Metro Plan diagram.

15 While the revised appeal statement discusses several overlaid diagrams  
16 attached to the revised appeal statement that are based on enlargements of the  
17 digital Metro Plan diagram, that discussion is in service of Appeal issue No. 1,  
18 which concerns one of the issues raised in the third sub-assignment of error.  
19 Appeal issue No. 1 concerns arguments that the hearings official should have  
20 considered the city limits line depicted on several maps in the record as one of  
21 the referents to determine whether the proposed zoning is consistent with the  
22 2004 Metro Plan diagram. Record 64. Appeal issue No. 1 does not raise, at

1 least expressly, the different issue raised in the second sub-assignment of error,  
2 that the hearings official erred in rejecting consideration of maps based on  
3 enlargements of the digital Metro plan diagram. The digital Metro plan  
4 diagram does not depict or include the city limits line, although several  
5 overlaid diagrams prepared by the applicant and opponents that are based on  
6 enlargements of the digital Metro plan diagram show the city limits.

7 Accordingly, we agree with Environ-Metal that the issue of whether the  
8 hearings official erred in rejecting consideration of maps based on  
9 enlargements of the digital Metro plan diagram was not raised in the local  
10 appeal statement, and is therefore not an issue that can be raised before LUBA,  
11 pursuant to *Miles*.

12 The second sub-assignment of error is denied.

### 13 **C. Third Sub-Assignment of Error**

14 Under the third sub-assignment of error, LHVC argues that the planning  
15 commission erred in affirming the hearings official's acceptance of the  
16 applicant's "single-referent" approach, and in failing to adopt findings  
17 regarding the issue of "sliding" and the failure to use multiple referents such as  
18 Spring Boulevard, the city limits line, and what LHVC refers to as the "green  
19 finger."<sup>6</sup>

---

<sup>6</sup> The green finger is a thin rectangle of land designated POS depicted on the enlarged Metro Plan diagram, which is located north of the intersection of East 30<sup>th</sup> Avenue and Spring Boulevard, and which is oriented in a north-south

Page 25

1           The issues raised under the third sub-assignment of error intersect with  
2 our resolution of the first sub-assignment of error. As explained, the hearings  
3 official failed to recognize that overlaid diagram Sheet 9/2/15-04 is based on an  
4 enlargement of the paper Metro Plan diagram, and therefore did not consider  
5 Sheet 9/2/15-04 for its proffered purpose. We concluded that remand is  
6 necessary for the city to consider Sheet 9/2/15-04. Sheet 9/2/15-04 represents  
7 what can fairly be characterized as a multiple-referent approach, compared to  
8 the diagrams submitted by Environ-Metal, which attempt to match only a single  
9 referent, a portion of East 30<sup>th</sup> Avenue. Therefore resolution of the arguments  
10 under the third sub-assignment of error have significance for the proceedings  
11 on remand.

12                           **1. Multiple Referents versus Single Referent**

13           We understand LHVC to contend that the single-referent, single-axis  
14 approach accepted by the hearings official is an inferior and less reliable  
15 approach, compared to the multiple-referent, multiple-axis approach advocated  
16 by Schlieder, because the single-referent approach allows “sliding” of the  
17 property boundaries along the single-axis, while a multiple-referent, multiple-

---

direction. We understand that the green finger, on the ground, is a public trail or pathway that runs north and south. The significance of the green finger is tied to the significance of the city limits line, because according to LHVC a portion of the city limits line runs down the eastern boundary of the green finger. The green finger is displayed on the diagram that is attached to this opinion.

1 axis approach provides a more accurate and reliable fix that is more likely to  
2 result in an overlaid diagram that is consistent with the 2004 Metro Plan  
3 diagram. LHVC argued in its appeal to the planning commission that “[u]sing  
4 a single referent when multiple referents are available is not reasonable.”  
5 Record 64. However, LHVC argues the planning commission did not adopt  
6 findings addressing this issue.<sup>7</sup>

7 Environ-Metal responds that LHVC has not identified any legal  
8 requirement that multiple referents be used, or that require a minimum or  
9 reasonable number of referents. According to Environ-Metal, the hearings  
10 official relied upon the referent that is closest to the subject property, the black  
11 line depicting the stretch of East 30<sup>th</sup> Avenue that runs parallel to the subject  
12 property’s southwestern border at a distance of approximately 200 to 250 feet,  
13 which the hearings official found to be the most proximate, and hence most  
14 reliable referent. Environ-Metal argues that all of the referents that LHVC  
15 argues should be used are further away from the subject property, and therefore

---

<sup>7</sup> Appeal Issue No. 2 stated, in relevant part:

“The Hearings Official erred by allowing the applicant to use 30<sup>th</sup> Avenue as the sole referent to locate their property on the 2004 Metro Plan diagram as seen on their map \* \* \*. [W]ithout the use of another referent the applicant could align their property anywhere along the approximately 1500 foot NW segment of 30<sup>th</sup> Avenue adjacent to the applicant’s property. \* \* \* Using a single referent when multiple referents are available is not reasonable.”  
Record 64.

1 presumably less reliable. Environ-Metal contends that trying to match other  
2 referents would simply water down the accuracy of the analysis.

3 While Environ-Metal is correct that there is no legal requirement to use  
4 multiple referents to answer the question posed by EC 9.8865(1), we generally  
5 agree with LHVC that, unless there is some reason to question the accuracy of  
6 referents, a multi-referent approach is likely to produce a more accurate and  
7 reliable result, compared to the single-referent approach advocated by Environ-  
8 Metal and accepted by the hearings official.

9 The question posed under EC 9.8865(1) is whether the proposed zoning  
10 is consistent with the 2004 Metro Plan diagram. Due to the exceedingly small  
11 scale and other limitations of the 2004 Metro Plan diagram, determining  
12 whether proposed zoning is consistent with the diagram means, as a practical  
13 matter, attempting to match or line up surveyed features or lines with features  
14 or lines depicted on the 2004 enlarged Metro Plan diagram. As explained  
15 above, because the property boundaries depicted on Environ-Metal's survey  
16 map do not directly overlay any features or lines depicted on the enlarged  
17 Metro Plan diagram,<sup>8</sup> the city and all parties recognized the necessity to match

---

<sup>8</sup> Actually, that is not quite true. The southern boundary of the subject property corresponds to the urban growth boundary line, a line which was first surveyed in 2005. The UGB line in this area runs along a ridgeline, and that line bears a strong correlation in shape to a series of black dashes on the 2004 Metro Plan diagram that represents the approximate location of the UGB along that same ridgeline, although in 2004 the exact location of the UGB had not

1 lines or features depicted on the survey map that are located some distance  
2 from the property with lines or features shown on the enlarged Metro Plan  
3 diagram that are also located some distance from the property. Because  
4 surveyed lines, such as the property boundaries, the UGB line, the East 30<sup>th</sup>  
5 Avenue centerline, and the city limits line, have a determinable spatial  
6 relationship with each other, if those surveyed lines are overlaid and matched  
7 with available referents depicted on the enlarged Metro Plan diagram, one can  
8 then determine how much of the subject property is subject to the POS  
9 designation.

10 Environ-Metal argues that matching up with a portion of only one  
11 referent, the portion of the black line on the enlarged Metro Plan diagram  
12 representing East 30<sup>th</sup> Avenue that is closest to the subject property, is a  
13 sufficient basis to determine with reasonable accuracy how much of the subject  
14 property is subject to the POS designation. If that portion of East 30<sup>th</sup> Avenue  
15 were the only available referent, we would likely agree. However, as LHVC  
16 argues, the portion of East 30<sup>th</sup> Avenue closest to the subject property is mostly  
17 a straight line running along a northwest-southeast axis. If the surveyed  
18 centerline is matched only to this straight portion of East 30<sup>th</sup> Avenue, and not

---

been surveyed or established. However, on appeal no party attaches any  
significance to whether and how well the surveyed property/UGB lines on the  
maps offered by Environ-Metal and LHVC match up with the black rectangular  
blobs that represent the UGB line on the 2004 Metro Plan diagram, and we  
consider that question no further.

1 fixed in place by a second reference point or reference axis, then it can “slide”  
2 unhindered to the northwest or southeast for at least a short distance, which  
3 reduces the accuracy and reliability of the ultimate determination of  
4 consistency with the 2004 Metro Plan diagram and the location of the  
5 LDR/POS boundary. If any other referent point or line is available in the area,  
6 then matching up to both that referent and the portion of East 30<sup>th</sup> Avenue  
7 closest to the subject property, if possible, should improve the accuracy and  
8 reliability of the consistency determination.

9       Accordingly, we agree with LHVC, at least in the abstract, that a multi-  
10 referent, multi-axis approach is likely to produce a more accurate and reliable  
11 result than a single-referent, single-axis approach. In our view, if multiple  
12 referents are available, a reasonable decision maker would at least consider the  
13 “fit” provided by multiple referents, and would not limit consideration to the fit  
14 provided by a single-referent, single-axis approach.

15       As discussed below, the parties dispute whether other referents are  
16 available or reliable. There appear to be two main disputes: whether the  
17 hearings official should have considered (1) the fit provided by matching the  
18 survey map and enlarged Metro Plan diagram depictions of the portion of East  
19 30<sup>th</sup> Avenue that curves to the west near its intersection with Spring Boulevard,  
20 and (2) matching the city limits line from the survey map with the east

1 boundary of Spring Boulevard and the “green finger” shown on enlarged Metro  
2 Plan diagram.<sup>9</sup> We turn to those arguments.

3 **2. The Western Curve of East 30<sup>th</sup> Avenue**

4 As explained above, Environ-Metal’s overlaid diagram Exhibit G  
5 matched the East 30<sup>th</sup> Avenue centerline from the survey map with the black  
6 line on the enlarged Metro Plan diagram depicting East 30<sup>th</sup> Avenue where the  
7 latter is closest to the subject property, but the two lines depicting East 30<sup>th</sup>  
8 Avenue from the survey map and enlarged Metro diagram diverge in the  
9 western curve of East 30<sup>th</sup> Avenue. The same divergence is seen on overlaid  
10 diagram Exhibit L, the map ultimately adopted by the hearing official.  
11 Schlieder argued to the hearings official that this divergence is evidence that  
12 the overlaid survey lines had been slid too far to the northwest, thus creating  
13 the divergence.

14 The hearings official rejected that argument:

15 “LHVC also takes issue with how the applicant aligned East 30<sup>th</sup>  
16 Avenue with the subject property. According to LHVC, aligning  
17 the location of East 30<sup>th</sup> Avenue on the map of the property with  
18 East 30<sup>th</sup> Avenue on the 2004 Metro Plan diagram results in the  
19 two depictions of East 30<sup>th</sup> Avenue diverging from each other,  
20 particularly the farther you get from the property. LHVC  
21 attempted to align East 30<sup>th</sup> Avenue differently to show more POS  
22 plan designation for the property. The 2004 Metro Plan diagram is

---

<sup>9</sup> To the extent LHVC argues about other potential referents, those arguments are not sufficiently developed for review.

1 a generalized map. When it is scaled up to match metes and  
2 bounds descriptions of individual parcels there will almost always  
3 be discrepancies. No matter where you align East 30<sup>th</sup> Avenue, the  
4 farther you get from the alignment the more the maps will diverge.  
5 It seems reasonable to me to align East 30<sup>th</sup> Avenue along the  
6 property line as the applicant did. That method seems more likely  
7 to be more accurate in the vicinity of the property than aligning  
8 East 30<sup>th</sup> Avenue farther away from the property. Therefore, I  
9 agree with the applicant that it properly used East 30<sup>th</sup> Avenue as a  
10 referent.” Record 9-10 (footnote omitted).

11 The foregoing finding seems to presume that it is an either/or choice: either  
12 match the centerline with the East 30<sup>th</sup> Avenue alignment close to the property  
13 or match the centerline with the alignment further from the property, where it  
14 curves west. The hearings official did not appear to consider the possibility  
15 that the surveyed centerline can be aligned with East 30<sup>th</sup> Avenue *both* where it  
16 is closest to the subject property, and where it curves west near its intersection  
17 with Spring Boulevard. As explained above, given the inherent uncertainty of  
18 a single-referent, single-axis approach, an alignment that matches multiple  
19 linear referents, particularly those on a different axis that intersect the first axis  
20 at angles, is likely to provide a more accurate and reliable fix. Because the  
21 western curve of East 30<sup>th</sup> Avenue is at an angle to the relatively straight  
22 portion of East 30<sup>th</sup> Avenue closest to the subject property, matching the  
23 centerline to the western curve provides an additional referent that acts as a  
24 second axis to the main axis provided by the portion of East 30<sup>th</sup> Avenue  
25 closest to the property.

1 As noted, LHVC overlaid diagram Sheet 9/2/15-04 appears to depict an  
2 alignment that matches East 30<sup>th</sup> Avenue along its entire length, both where it  
3 is closest to the subject property and where it curves to the west. However, the  
4 hearings official did not consider Sheet 9/2/15-04, in the mistaken impression  
5 that it was not based on the 2004 Metro Plan diagram.

6 Environ-Metal argues that choosing the “fit” of the East 30<sup>th</sup> Avenue  
7 centerline with the black line representing East 30<sup>th</sup> Avenue on the 2004 Metro  
8 Plan diagram has a fact-finding quality to it to which LUBA should defer, if  
9 that judgment is supported by substantial evidence. However, in our view,  
10 choosing the alignment that is consistent with the Metro Plan diagram is a  
11 mixed question of law and fact. Choosing which referents to rely upon is  
12 fundamentally an interpretation of the 2004 Metro Plan diagram, and thus a  
13 matter of construing the law. We agree with Environ-Metal that, once the  
14 relevant referents have been determined, the hearings official’s choice between  
15 competing diagrams showing different alignments of surveyed lines with the  
16 same set of referents would be an evidentiary call, which LUBA must affirm if  
17 based on substantial evidence, *i.e.* evidence that a reasonable person would rely  
18 on in reaching a decision. *Younger v. Portland*, 305 Or 346, 358-60, 752 P2d  
19 262 (1988). However, the hearings official never had the opportunity to make  
20 such a choice with respect to East 30<sup>th</sup> Avenue, in part because he had  
21 eliminated from consideration all maps he believed were not based on the 2004  
22 Metro Plan diagram, including Sheet 9/2/15/-04. He believed, erroneously, that

1 only the two final overlaid diagrams Environ-Metal submitted, Exhibits L and  
2 M, were based on enlargements of the paper Metro Plan diagram.

3 For the reasons stated in the first sub-assignment of error, remand is  
4 necessary for the hearings official to consider Sheet 9/2/15-04 free of the  
5 erroneous impression that it is based on an enlargement of the digital Metro  
6 Plan diagram. Unless there is some other reason not to consider Sheet 9/2/15-  
7 04, for the reasons stated above the hearings official on remand should make an  
8 evidentiary choice between Exhibit L and Sheet 9/2/15-04 with respect to the  
9 matchup between the surveyed centerline and the black line representing East  
10 30<sup>th</sup> Avenue. We do not mean to suggest that the hearings official cannot  
11 ultimately conclude, as an evidentiary matter, that the matchup between the  
12 centerline and the black line that is depicted on Exhibit L is more consistent  
13 with the 2004 Metro Plan diagram than matchup depicted on Sheet 9/2/15-04,  
14 based on findings that explain the basis for that conclusion. However, the  
15 hearings officer must resolve that question in the first instance.

### 16 **3. City Limits Line/Green Finger/Spring Boulevard**

17 One reason why the hearings official declined to consider Schlieder's  
18 overlaid diagrams submitted on September 2, 2015, is that the overlaid  
19 diagrams depicted the city limits line from Environ-Metal's survey map, and  
20 attempted to match the city limits line with the eastern boundary of Spring  
21 Boulevard and the eastern edge of the green finger. The hearings official

1 concluded that the city limits line could not be considered, because it was “not  
2 depicted on the Metro Plan diagram.” Record 9.

3 LHVC argues that the hearings official erred in refusing to consider the  
4 city limits line, because while not depicted on the enlarged Metro Plan  
5 diagram, the city limits line in this area is a surveyed line that can be accurately  
6 located along the boundaries of two features that *are* depicted on the enlarged  
7 Metro Plan diagram: Spring Boulevard and the so-called “green finger.”  
8 According to undisputed testimony in the record, the city limits line is located  
9 along the eastern boundary of Spring Boulevard, and borders the eastern and  
10 northern boundary of a portion of the green finger, the base of which forms an  
11 “L” shape. However, LHVC argues that Environ-Metal’s overlaid diagram  
12 Exhibit G, offsets the city limits line from its survey map to the northwest, so  
13 that the line is located west of Spring Boulevard and west of the green finger  
14 from the enlarged Metro Plan diagram. By contrast, LHVC argues, Schlieder’s  
15 maps, including overlaid diagram Sheet 9/2/15-04, locate the property  
16 boundaries consistently with all referents, including the matchups between the  
17 city limits line, Spring Boulevard, and the green finger, including the “L” shape  
18 formed by its base. According to LHVC, the hearings official erred in failing  
19 to consider matching the city limits line to Spring Boulevard and the green  
20 finger as additional referents.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

**a. Waiver**

Initially, Environ-Metal argues that no issues regarding the city limits line depicted on several maps in the record were raised in the unredacted portions of the original appeal statement filed October 6, 2015, and therefore any issues regarding the city limits were waived in this appeal, under *Miles*. Environ-Metal notes that, although the revised appeal statement raises issues regarding the city limits line, the revised appeal statement was submitted after the deadline for filing the local appeal. According to Environ-Metal, LHVC may not rely upon the issues raised in the untimely filed revised appeal statement to avoid waiver under *Miles*, but can only rely upon issues raised in the unredacted portions of the timely filed original appeal statement. Because all mention of the city limits issue was redacted from the original, timely filed, appeal statement, Environ-Metal argues, no issues regarding city limits can be raised in the present appeal.

We assume without deciding that Environ-Metal is correct that issues raised in a revised appeal statement filed after the deadline for filing the local appeal cannot survive to reach LUBA under *Miles*, although Environ-Metal cites no authority for that proposition. However, even under that assumption, we disagree with Environ-Metal that issues regarding use of the city limits line were waived in this case.

The process by which the planning commission accepted the redactions proposed by Environ-Metal in the original appeal statement (which redacts all

1 mention of the city limits), while also accepting the revised appeal statement  
2 (which includes the city limits issue redacted from the original appeal  
3 statement), is too complicated to relate in detail. But based on the partial  
4 transcript of the planning commission proceeding provided by Environ-Metal,  
5 it is reasonably clear that the planning commission concluded that the issues  
6 raised in the original appeal statement regarding the city limits line were  
7 properly before them. The planning commission chose to implement that  
8 conclusion by accepting both the redacted and revised appeal statements. The  
9 revised appeal statement effectively restored the redactions that concern the  
10 city limits issue. Because that issue was raised in the original timely filed  
11 appeal statement, Environ-Metal's arguments provide no basis to find that the  
12 issue is waived under *Miles*.

13                                   **b. Matching the surveyed city limits line to Spring**  
14                                   **Boulevard and the Green Finger is an appropriate**  
15                                   **referent**

16           On the merits, we agree with LHVC that the hearings official erred in  
17 declining to consider evidence regarding the matchup between the surveyed  
18 city limits line and Spring Boulevard and the green finger. While the city  
19 limits line is not depicted on the enlarged Metro Plan diagram, neither is the  
20 centerline of East 30<sup>th</sup> Avenue on which Environ-Metal exclusively relies.  
21 Both the city limits and center line are surveyed, and there is no dispute that the  
22 depiction of their location and relationship on the survey map is accurate. Both  
23 the centerline and the city limit line bear close physical relationships to features

1 depicted on the 2004 Metro Plan diagram: the survey map centerline to the  
2 enlarged Metro Plan diagram black line depicting East 30<sup>th</sup> Avenue, and the  
3 survey map city limits line to the boundaries of Spring Boulevard and the green  
4 finger. If there is some reason to regard the centerline matchup as a reliable  
5 referent, while regarding the city limits line matchup as an unreliable referent,  
6 neither the hearings official nor Environ-Metal identify it. Like the western  
7 curve of East 30<sup>th</sup> Avenue, the city limits line is positioned at various angles to  
8 the portion of East 30<sup>th</sup> Avenue that Environ-Metal relies upon as its sole  
9 referent, and thus the city limits line matchup acts as an additional referent to  
10 check the accuracy of Environ-Metal's preferred location of the match between  
11 the survey map and the enlarged Metro Plan diagram.

12 In sum, we agree with LHVC that on remand the hearings official should  
13 give appropriate evidentiary consideration to referents provided by the matchup  
14 between the city limits line, and the depicted boundaries of Spring Boulevard  
15 and the green finger, in determining whether the proposed zoning is consistent  
16 with the 2004 Metro Plan diagram.

17 LHVC's third sub-assignment of error is sustained.

18 LHVC's assignment of error is sustained, in part.

19 The city's decision is remanded.

20 Holstun, Board Member, concurring.

21 It is difficult to understand why, 12 years after the 2004 Metro Plan  
22 diagram was adopted, the plan designations for properties that are subject to

1 that Metro Plan diagram, and therefore the zoning, must ultimately be  
2 determined by enlarging that Metro Plan diagram by a factor of 35 and then  
3 trying to align that enlarged Metro Plan diagram on a map that is drawn at a  
4 usable scale. Any imperfections or inaccuracies in the relative positions of  
5 features shown on that Metro Plan diagram will be greatly magnified in that  
6 enlargement process and the effort to match the enlarged Metro Plan diagram  
7 with an accurate, usable-scale map is an inherently imprecise and subjective  
8 exercise no matter how one tries to dress the process up with indicia of  
9 precision. But until the Metro Plan jurisdictions prepare and adopt the Metro  
10 Plan diagram at a usable scale, an exercise like the one in this case is  
11 unfortunately unavoidable.

12 Notwithstanding the inherent imprecision of the required process to determine  
13 the location of the Metro Plan designations on the property, I agree with the  
14 majority that the hearings official's choice to rely on a overlaid diagram that  
15 matches only one referent (the nearby East 30<sup>th</sup> Avenue centerline) when an  
16 overlaid diagram that matches that referent *and* three additional referents (the  
17 East 30<sup>th</sup> curve, the East 30<sup>th</sup>/Spring Boulevard intersection, and the green  
18 finger) is inadequately explained in the decision on appeal. In particular, the  
19 hearings official does not appear to have appreciated that an overlaid diagram  
20 based on an enlargement of the official Metro Plan diagram that matches four  
21 referents was available. The hearings official's rejection of some other  
22 overlaid diagrams can be read to suggest that the hearings official may have  
23 believed those other three referents are too far from the subject property to be  
24 reliable. However, they are not that much further from the property than the  
25 single referent the hearings official ultimately relied on. Relying on a single  
26 referent approach, when a seemingly more accurate approach that matches that  
27 referent and three other nearby referents is available, needs a better  
28 explanation, if there is one.

