

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

4 GORDON R. MARTIN, TRUSTEE  
5 OF THE TRI-COUNTY CENTER  
6 TRUST,  
7 *Petitioner,*  
8

9 vs.

10 CITY OF TIGARD,  
11 *Respondent,*  
12

13 and  
14

15 BASE CAMP 1, LLC,  
16 *Intervenor-Respondent.*  
17

04/13/18 AM 7:54 LUBA

18 LUBA No. 2017-116  
19

20 FINAL OPINION  
21 AND ORDER  
22

23  
24 Appeal from City of Tigard.  
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26 William K. Kabeiseman, Portland, filed the petition for review. With him  
27 on the brief was Bateman Seidel, P.C. Carrie Richter, Portland, argued on  
28 behalf of petitioner.  
29

30 Shelby Rihala, Tigard, filed a joint response brief and argued on behalf  
31 of the respondent.  
32

33 Dana L. Krawczuk, Portland, filed a joint response brief and argued on  
34 behalf of intervenor-respondent. With her on the brief was Stoel Rives LLP.  
35

36 HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board  
37 Member, participated in the decision.  
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AFFIRMED

04/13/2018

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

**NATURE OF THE DECISION**

The challenged decision approves intervenor-respondent’s (intervenor’s) proposed medical oncology facility and parking lot on a 3.76-acre parcel (subject property) located at the southwest corner of SW Dartmouth Street and SW 72<sup>nd</sup> Avenue in the City of Tigard in an area of the city known as the Tigard Triangle.

**REPLY BRIEF**

Petitioner moves for permission to file a reply brief to respond to new issues raised in the response brief. The motion is granted.

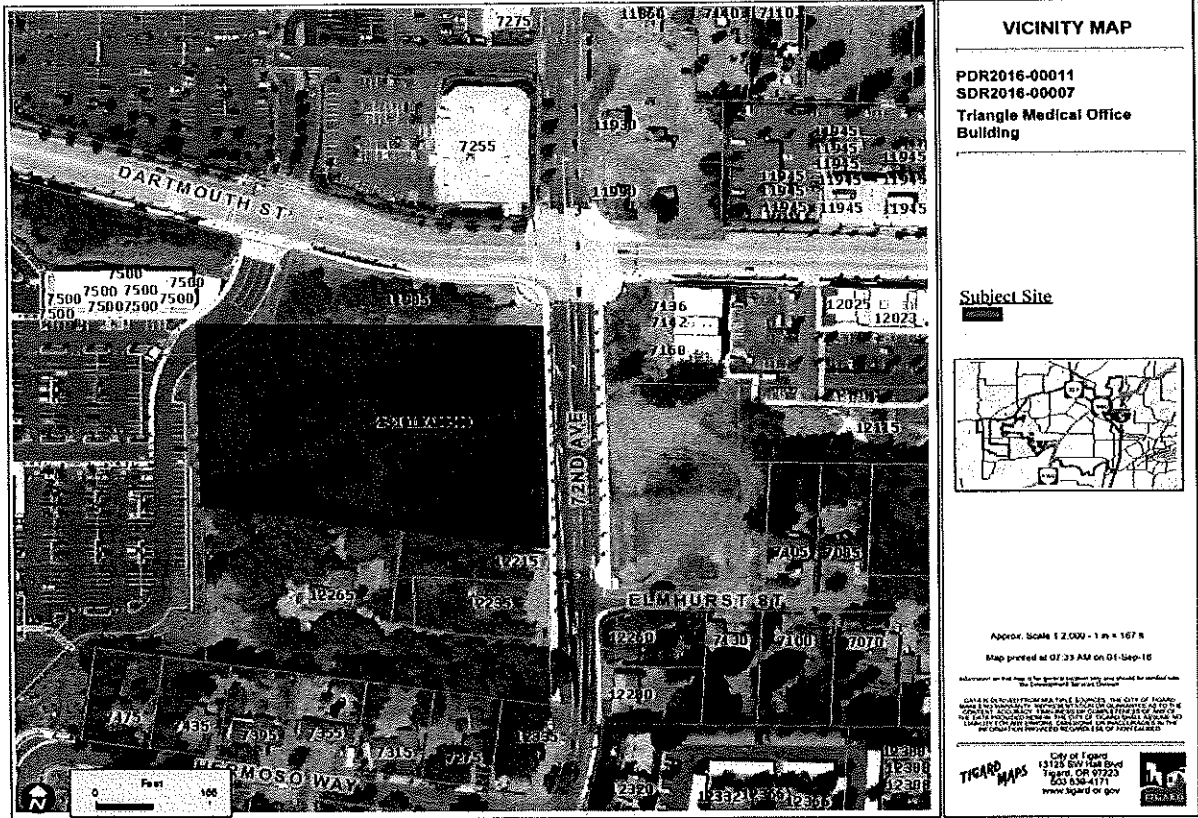
**FACTS**

The challenged decision is the city’s decision following our remand in *Martin v. City of Tigard*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2017-020, July 31, 2017) (*Martin I*). A map that appears at Record 51 is reproduced below.<sup>1</sup> The subject property is the dark shaded property in the middle of the map below.

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<sup>1</sup> The format of the record in this appeal is confusing. The record in this appeal was originally received by LUBA on December 22, 2017. That transmittal was made up of a single computer disk, with two copies (a total of three computer disks). As far as we can tell, that version of the record was limited to the record the city compiled following our remand in *Martin I* and did not include the Record from *Martin I*.

After petitioner filed record objections, the city transmitted a second record, made up of six computer disks, with two copies (a total of 18 computer disks). The first five of the six computer disks are video and audio recordings of city proceedings in this matter. The actual second record is included on the sixth



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The property has frontage on SW 72<sup>nd</sup> Avenue, but access to the oncology facility would be from SW Dartmouth Street, via an easement across the Walmart parking lot, which is located immediately west. The issue presented in *Martin I*, and the issue presented in this appeal, is whether the proposal violates two Tigard Community Development Code (CDC)

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computer disk, which is labeled “LUBA No. 2017-116 Base Camp LLC Remand Record.” The “Remand Record” in fact includes the “Record” in *Martin I* (Remand Record 887-2268), the “Supplemental Record” in *Martin I* (Remand Record 147-881), the “Second Supplemental Record” in *Martin I* (Remand Record 129-138) and the record compiled by the city following our remand in *Martin I* (Remand Record 1-126). In this opinion all citations to the “Record” are citations to pages of the 2268-page “Remand Record” described above (the Remand Record that is included on sixth computer disk).

1 requirements—one entitled “Street alignment and connections,” (CDC  
2 18.810.030.H.1, *see n 3*) and one entitled “Street Connectivity” (CDC  
3 18.620.020A, *see n 4*).<sup>2</sup>

4 The CDC 18.810.030.H.1 street alignment and connection standard  
5 applies generally and requires that street connections be spaced no more than  
6 530 feet apart.<sup>3</sup> The CDC 18.620.020.A.1 street connectivity standard applies  
7 in the Tigard Triangle Plan District, and requires that street connections be no  
8 more than 660 feet apart.<sup>4</sup> The street connection between SW 72<sup>nd</sup> Avenue and  
9 SW Dartmouth Street to the north and SW Hermoso Way to the south of the  
10 property are 990 feet apart on the west side of SW 72<sup>nd</sup> Avenue. There is no

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<sup>2</sup> The CDC was significantly reorganized on December 14, 2017. All citations to the CDC are to the version that was in effect in 2017, prior to the December 2017 amendments.

<sup>3</sup> CDC 18.810.030.H.1 provides:

“Full street connections with spacing of no more than 530 feet between connections is required except where prevented by barriers such as topography, railroads, freeways, pre-existing developments, lease provisions, easements, covenants or other restrictions existing prior to May 1, 1995 which preclude street connections. A full street connection may also be exempted due to a regulated water feature if regulations would not permit construction.”

<sup>4</sup> Unless a variance is approved, CDC 18.620.020.A.1 requires that:

“Local street spacing shall provide public street connections at intervals of no more than 660 feet.”

1 north-south street between SW Dartmouth Street and SW Hermoso Way to the  
2 west of SW 72<sup>nd</sup> Avenue, in the vicinity of the subject property.

3 SW Elmhurst Street, an east-west street, intersects with the east side of  
4 SW 72<sup>nd</sup> Avenue approximately 560 feet south of SW Dartmouth Street. The  
5 central issue in this appeal is whether CDC 18.810.030.H.1 and 18.620.020.A.1  
6 require that SW Elmhurst Street be extended west at some point to achieve the  
7 maximum street separations specified in CDC 18.810.030.H.1, and  
8 18.620.020.A.1.

9 In our decision in *Martin I*, we explained that CDC 18.810.030.H.1 and  
10 18.620.020.A.1 are ambiguous and that it was unclear to us what those  
11 standards require in the circumstances presented here, where no north-south  
12 street exists to the west of SW 72<sup>nd</sup> Avenue that would allow for a connecting  
13 extension of SW Elmhurst Street west, or some other westward street extension  
14 from SW 72<sup>nd</sup> Avenue between SW Dartmouth and SW Hermoso Way.<sup>5</sup>

15 “The most obvious ambiguity is that while the relevant standards  
16 call for street connections, it is impossible for intervenor in this  
17 case to dedicate a street right of way and construct a street to  
18 connect SW 72<sup>nd</sup> Avenue on the east with a north-south street on

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<sup>5</sup> We noted in *Martin I* that although the Walmart development located to the west of the subject property appeared to make it impossible to extend a street west from SW 72<sup>nd</sup> Avenue to connect with a north-south street to the west, the Tigard Triangle Strategic Plan showed a possible future southern extension of SW 74<sup>th</sup> Avenue south, along the west side of the subject property and along the eastern part of the Walmart parking lot. We noted the city’s decision in *Martin I* did not expressly address the legal status of the Tigard Triangle Strategic Plan. *Martin I*, slip op at 4 n 3.

1 the west, because the applicant's property borders a Walmart store  
2 parking lot on the west, not a city street. As we explain below, the  
3 city never expressly addressed this ambiguity but implicitly  
4 interpreted the relevant standards to require that the applicant  
5 establish that its development will not preclude a future street  
6 connection between SW 72nd Avenue and another existing or  
7 planned street to the west, in the area between SW Dartmouth and  
8 SW Hermoso Way, even though such a north-south street does not  
9 currently exist." *Martin I*, slip op at 8 n 4.

10 In *Martin I*, we ultimately concluded that assuming those CDC standards  
11 apply and require the applicant to demonstrate that its proposal will not  
12 preclude a future street extension west from SW 72<sup>nd</sup> Avenue, the city's  
13 findings regarding those CDC standards were inadequate.

14 On remand the city found that in the circumstances presented in this  
15 case, CDC 18.810.030.H.1 and CDC 18.620.020.A.1 do not require a westward  
16 street extension from SW 72<sup>nd</sup> Avenue between SW Dartmouth Street and SW  
17 Hermoso Way.

## 18 **FIRST ASSIGNMENT OF ERROR**

### 19 **A. Introduction**

20 Before turning to the merits, two aspects of this decision largely dictate  
21 the outcome. First, the challenged decision was rendered by the city council  
22 and the decision largely turns on interpretations of ambiguous city land use  
23 laws. The city council's interpretations of its own land use laws are subject to  
24 review by LUBA under the highly deferential standard of review discussed in  
25 *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), under which

1 we must affirm a governing body's interpretations of local land use legislation  
2 unless the interpretations are implausible.

3 Second, one of the major problems with the city's first decision in  
4 *Martin I* was the almost complete lack of any express effort on the city's part to  
5 explain its understanding of what CDC 18.810.030.H.1 and 18.620.020.A.1  
6 require in the circumstances presented in this matter. We made it clear in  
7 *Martin I*, that the city was free on remand to adopt such express interpretations:

8 "We limit our review in this appeal to petitioner's challenge of the  
9 city's findings and for the reasons explained below remand the  
10 city's decision. In doing so, however, we do not mean to limit the  
11 city to the express and implied interpretations it adopted in the  
12 challenged findings. Stated differently, nothing in this opinion is  
13 intended to preclude the city from revisiting its express and  
14 implied interpretations of CDC 18.810.030.H.1 and CDC  
15 18.620.020 to attempt to more clearly articulate what the city  
16 believes those standards require of the proposal, in [the]  
17 circumstances presented in this application." *Martin I*, slip op at  
18 8.

19 **B. The City Council's Interpretations on Remand**

20 The city council on remand adopted findings that explain that the Tigard  
21 Triangle Strategic Plan and Tigard Triangle Urban Renewal Plan, both of  
22 which discuss a possible extension of SW 74<sup>th</sup> Avenue south through the  
23 Walmart Parking lot, are not adopted as part of the city's comprehensive plan  
24 or land use regulations, and therefore are not approval standards in this quasi-  
25 judicial land use permit application. We do not understand petitioner to  
26 challenge those findings.



1 After establishing that there is no existing or planned north-south street  
2 located west of the subject property, with which a street extension from SW  
3 72<sup>nd</sup> Avenue west through the subject property could connect, the city council  
4 determined that CDC 18.810.030.H.1 does not require a street extension west  
5 from 72<sup>nd</sup> Avenue between SW Dartmouth Street and SW Hermoso Way:

6 “CDC 18.810.030.H.1 requires ‘full street connections’ ‘between  
7 connections,’ which the city interprets to mean that there must be  
8 two existing streets that can be connected. CDC18.810.030.H.1  
9 only requires a full street connection if one street can actually be  
10 connected with another street. CDC 18.810.030.H.1 does not  
11 require a full east-west street connection if there is not a street,  
12 public right-of-way or public access easement that can  
13 accommodate the street connection. In this case, it is impossible  
14 for the Project Applicant to dedicate a street right of way and  
15 construct a street to connect SW 72<sup>nd</sup> Avenue on the east with a  
16 north-south street on the west because the Property borders a  
17 Walmart store parking lot on the west, which is not a street and  
18 does not include public right-of-way or a public access easement.  
19 For the same reason, tax lots 400, 401 and 402 would not be  
20 required to dedicate a full street right of way and construct a street  
21 extension west of SW 72<sup>nd</sup> Avenue at the time those properties  
22 develop.[<sup>6</sup>] Therefore, the Project need not show how a future  
23 east-west connection, such as SW Elmhurst, may align, and  
24 whether such alignment is required to cross a portion of the  
25 Property because it is not possible to provide such a connection at  
26 this time.

27 “Because CDC 18.810.030.H.1 relates to connectivity ‘between  
28 connections’ and the City interprets that to mean existing street  
29 connections, the criterion does not require consideration of future  
30 street connections. Additionally, the City notes that neither a

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<sup>6</sup> Tax lot 400 is owned by petitioner. Tax lots 401 and 402 are other properties owned by intervenor, which are not part of the disputed application.

1 north-south street west of SW 72nd Street nor an east-west  
2 extension of SW Elmhurst is planned in the TSP [Transportation  
3 System Plan]. TSP Map 5-12. Therefore, even if it were  
4 appropriate to consider future or planned street connections, CDC  
5 18.810.030.H.1 does not require a full east-west street connection  
6 extending west from SW 72<sup>nd</sup> Avenue because there are no streets  
7 planned across or abutting the Property.” Record 7-8.

8 The city council adopted substantially identical findings to conclude that  
9 the CDC 18.620.020.A.1 street connectivity standard also does not require a  
10 westward street extension from SW 72<sup>nd</sup> Avenue between SW Dartmouth  
11 Street and SW Hermoso Way. Record 10-11.

12 Petitioner argues that the “full street connections” required by the CDC  
13 18.810.030.H.1 street alignment and connections standard and the “public  
14 street connections” required by the CDC 18.620.020.A.1 street connectivity  
15 standard could be a street extension west from SW 72<sup>nd</sup> Avenue, which  
16 terminates in a cul de sac, and that a street connection need not connect with a  
17 north-south street to the west. Petition for Review 12-13, 17-18. Even if  
18 petitioner’s interpretation of CDC 18.810.030.H.1 and 18.620.020.A.1 is  
19 plausible, that is not the question under *Siporen*. The question is whether the  
20 city council’s contrary interpretation of those standards—to require that street  
21 extension connect with other streets on both ends of the extension—is  
22 plausible. The city council’s interpretation is certainly plausible and given the  
23 apparent purpose of those standards to provide for street connectivity, in our  
24 view, is a much stronger interpretation than petitioner’s interpretation, which  
25 could result in dead end street connections.

1 Finally, it is not clear to us whether petitioner argues the city council's  
2 interpretation of CDC 18.810.030.H.1 and 18.620.020.A.1 is inconsistent with  
3 the Court of Appeals' holding in *Holland v. Cannon Beach*, 154 Or App 450,  
4 962 P2d 701, *rev den* 328 Or 115 (1998).<sup>7</sup> In *Holland*, the City of Cannon  
5 Beach, consistent with past practice and consistent with the advice of its  
6 attorney that a slope and density standard had been impliedly repealed by prior  
7 comprehensive plan amendments, did not apply the slope and density standard  
8 to an application for subdivision approval, but denied the subdivision  
9 application on other grounds. After an appeal to LUBA, the Court of Appeals  
10 and Supreme Court resulted in a remand to the city, the city abandoned its  
11 original grounds for denial. Instead the city decided that the slope and density  
12 standard applied and denied the subdivision application based on the slope and  
13 density standard. In *Holland* the Court of Appeals concluded that in the  
14 relatively unique circumstances presented in that appeal, that change of  
15 interpretation regarding the applicability of the slope and density standard  
16 violated ORS 227.178(3), which limits applicable approval standards to the

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<sup>7</sup> Petitioner clearly does argue that a different, alternative finding adopted by the city—that CDC 18.810.030.H.1 and 18.620.020.A.1 conflict with the result that CDC 18.620.020.A.1 applies and CDC 18.810.030.H.1 does not apply—is inconsistent with *Holland*. We need not and do not address petitioner's challenge to those alternative findings. It is not clear whether petitioner asserts that interpreting those standards to apply to the proposal, but not to require a street extension in the circumstances presented here, is inconsistent with *Holland*.

1 standards that were in effect when the application was first submitted or  
2 deemed complete.

3 Unlike the city in *Holland*, the city in this case did not decide in the  
4 above-quoted findings that CDC 18.810.030.H.1 and 18.620.020.A.1 do not  
5 *apply*. Rather, the above-quoted findings simply adopt a different interpretation  
6 regarding *how* CDC 18.810.030.H.1 and 18.620.020.A.1 apply. Petitioner does  
7 not argue the city failed to give it an adequate opportunity to address this  
8 changed interpretation on remand. *See Gutoski v. Lane County*, 155 Or App  
9 369, 373-74, 963 P2d 145 (1998) (in some circumstances local government  
10 may be required to reopen evidentiary record and allow submittal of new  
11 evidence or argument where new interpretation is announced for the first time  
12 in the decision).

13 As we have already explained, the primary problem with the city's  
14 decision in *Martin I* was its lack of express interpretations. In our decision in  
15 *Martin I*, we essentially invited the city to address the ambiguities present in  
16 CDC 18.810.030.H.1 and 18.620.020.A.1 expressly. The city council's  
17 decision to do so in the decision that is the subject of this appeal is not  
18 inconsistent with the Court of Appeals' holding in *Holland*.

19 The first assignment of error is denied.<sup>8</sup>

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<sup>8</sup> The parties argue at some length over alternative findings the city adopted concerning CDC 18.810.030.H.1 and 18.620.020.A.1. Because we sustain the city's council's interpretation that CDC 18.810.030.H.1 and 18.620.020.A.1 do not require a westward extension from SW 72<sup>nd</sup> Avenue between SW

1 The city's decision is affirmed.

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Dartmouth Street and SW Hermoso Way in the circumstances presented in this appeal, and the city's decision must therefore be affirmed without regard to the merits of those alternative findings, we need not and do not address those additional arguments.