BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ERNEST McCULLOH and PAM McCULLOH,
Petitioners,

vs.

CITY OF JACKSONVILLE,
Respondent,

and

DAN HAWKINS and RHONDA HAWKINS,
Intervenors-Respondent.

LUBA No. 2003-061

FINAL OPINION
AND ORDER

Appeal from City of Jacksonville.

Debbie V. Minder, Medford, filed the petition for review and argued on behalf of petitioners.

No appearance by City of Jacksonville.

Alan D. B. Harper, Medford, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Hornecker, Cowling, Hassen and Heysell, LLP.

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

REMANDED 01/20/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal city approval of a four-lot residential subdivision.

FACTS

The subject property is a 6.37-acre parcel zoned Hillside Residential (HR), situated on a west-facing slope of the Daisy Creek drainage. The property is rectangular in shape, and extends from 3rd Street on the west, across a portion of Daisy Creek, and thence up an increasingly steep and wooded slope. A single family dwelling is located on the western third of the property near Daisy Creek. The HR zone allows two single-family dwelling units per acre, and allows subdivision only with conditional use approval. The conditional use standards at Jacksonville Municipal Code (JMC) 17.104 and standards governing hillside residential development at JMC 17.16 apply to such conditional use approvals.

On August 13, 2002, intervenors-respondent (intervenors) applied to the city for a conditional use permit to divide the property into four residential lots. Lot 1 is .75-acre in size, and includes the portion of Daisy Creek next to 3rd Street. Lot 2 is also .75-acre in size, and includes the existing dwelling. Lot 3 is .55 acre in size, and is located just above the existing dwelling. The eastern two-thirds of the property consists of Lot 4, which is 4.0 acres in size.

Intervenors propose construction of a new public street, Lily Road, to provide access from 3rd Street to lots 1, 2, 3 and 4. The proposed new street runs along the southern border of the subject property, and dead-ends at the western boundary of lot 4. The anticipated finished grade of Lily Road will be 14 percent. The building footprint for the proposed dwelling on lot 4 is located in the approximate middle of that lot, accessed by a serpentine driveway that winds up past a proposed office/guest cottage through two S-curves to a hammerhead turnaround adjacent to the dwelling. The proposed driveway crosses slopes greater than 30 percent, for which intervenor proposes engineered cuts and fills to reduce the slopes to a maximum 18 percent grade.

1 The planning commission held a public hearing on the application October 9, 2002, at which
2 petitioners, who own the property to the south of intervenors' parcel, appeared in opposition. The
3 hearing was continued several times at intervenors' request in order to submit additional evidence.
4 The continued hearing was ultimately scheduled for March 12, 2003. On February 19, 2003, city
5 staff agreed with intervenors that intervenor could submit additional evidence no later than March 3,
6 2003, for the March 12, 2003 hearing. On February 24, 2003, petitioners objected that the
7 proposed schedule did not provide sufficient time for petitioners' expert to prepare for the March
8 12, 2003 hearing. On March 3, 2003, intervenors submitted additional material consisting of a
9 revised tentative subdivision map, a 48-page geologic hazards and geotechnical study, engineered
10 plans for roadways and drainage, a tree survey, traffic count, tree removal and mitigation plan, draft
11 covenants, conditions and restrictions (CC&Rs), a real estate market analysis, a street section
12 diagram, an erosion control plan, and proposed findings of fact and conclusions of law, with
13 suggested conditions of approval. City staff issued a staff report March 6, 2003.

14 The planning commission denied petitioners' motion to continue the March 12, 2003
15 hearing, but left the evidentiary record open until March 21, 2003. On March 21, 2003,
16 intervenors submitted a third revised tentative subdivision map, revised engineering plans, a new tree
17 inventory and a landscape plan. Petitioners submitted additional evidence with respect to uniform
18 fire code requirements. The planning commission allowed the parties until March 28, 2003, to
19 respond to the new evidence submitted March 21, 2003. Petitioners submitted a response on
20 March 28, 2003. On April 4, 2003, intervenors submitted their final written rebuttal. The planning
21 commission deliberated on April 7, 2003, and voted April 9, 2003, to approve the application with
22 conditions. This appeal followed.

23 **FOURTH ASSIGNMENT OF ERROR**

24 Petitioners argue that the planning commission erred in denying petitioners' request to
25 continue the March 12, 2003 hearing.

According to petitioners, the city allowed intervenor to submit a significant volume of technical evidence, found at Record 166 to 319, just 10 days prior to the March 12, 2003 hearing. Petitioners contend that the revised subdivision plat and other new information amounted to a new or at least significantly modified application. Petitioners explain that they appeared at county staff offices on March 3, 2003, but due to intervenors' filing late in the day and the volume of new evidence, petitioners were not able to obtain copies of the submitted material until the following day, March 4, 2003. Petitioners assert that nine days was insufficient time to allow petitioners' experts to examine the new evidence and prepare oral and written testimony for the hearing. For example, petitioners argue, with sufficient time their engineer could have prepared three-dimensional computer-aided drawings depicting the impacts to the viewshed resulting from the proposed cuts, fills and retaining wall on the newly revised lot 4, and presented that evidence at the hearing.

In addition, petitioners note that the notice of the March 12, 2003 hearing stated that, while written comments may be submitted at the public hearing, copies would only be provided to the planning commission in advance of the hearing if received by March 6, 2003. Petitioners contend that two to three days is insufficient time to prepare written testimony, and argue that the city effectively denied petitioners the same opportunity granted to intervenors to place written testimony before the planning commission prior to the March 12, 2003 hearing. Similarly, petitioners note that the supplemental staff report was not available until March 6, 2003, the same day written comments were due and six days prior to the hearing, which made it impossible for petitioners to provide written responses to the staff report in advance of the hearing. Petitioners contend that city's actions in this case prejudiced their substantial rights to prepare and participate in the evidentiary proceedings.

JMC 16.12.14 provides in relevant part that the complete application for subdivision approval "and all evidence to be used by the applicant in seeking approval" must be made available for public inspection "no less than 14 days prior to the first public hearing date regarding the proposal." Petitioners argue that the March 12, 2003 hearing should be viewed as the "first public

1 hearing date regarding the proposal," given the substantive changes to the application submitted
2 March 3, 2003, and therefore the city violated JMC 16.12.14 in providing less than 14 days for the
3 public to inspect all the evidence used by the applicant. Even if the March 12, 2003 hearing is not
4 viewed as the first public hearing for purposes of JMC 16.12.14, petitioners contend that implicit in
5 JMC 16.12.14 is the requirement that the public have an adequate opportunity to inspect significant
6 new evidence or revised applications submitted for continued hearings prior to such hearings, and
7 that an adequate opportunity was not provided in the present case.

8 Intervenors concede that the staff report was not made available a full seven days prior to
9 the hearing, as required by ORS 197.763(4)(b), but dispute that the city committed any other
10 procedural error, or that any error prejudiced petitioners' substantial rights. According to
11 intervenors, the planning commission left the record open to all parties an additional nine days after
12 the hearing, until March 21, 2003, and further allowed petitioners until March 28, 2003, to submit
13 rebuttal arguments related to any new evidence that was submitted on or before March 21, 2003.
14 Intervenors argue that such post-hearing opportunities to submit evidence and argument prevented
15 any prejudice that might have occurred to petitioners' right to participate in the city's proceedings.

16 We disagree with petitioners that the March 12, 2003 hearing should be viewed as the "first
17 public hearing" for purposes of JMC 16.12.14. Nothing in the text of the code suggests that
18 evidentiary submissions subsequent to the initial evidentiary hearing convert a subsequent hearing
19 into the "first public hearing." Even if JMC 16.12.14 implicitly requires that the city provide the
20 public with an adequate opportunity to inspect substantial new evidence submitted prior to a
21 continued hearing, we agree with intervenors that any prejudice that petitioners might have suffered
22 from having insufficient time to prepare testimony in response to the evidence submitted March 3,
23 2003, was avoided by allowing petitioners to submit additional evidence and argument following the
24 March 12, 2003 hearing. The statutes governing quasi-judicial hearings at ORS 197.763(6)
25 provide for post-hearing written submissions as an appropriate and sufficient means of allowing
26 participants to respond to new evidence submitted at or following a quasi-judicial hearing.

1 Petitioners do not explain why the similar post-hearing process employed here was insufficient to
2 avoid any prejudice to petitioners' substantial rights that might otherwise have resulted from the late
3 staff report and late evidentiary submissions by intervenors.
4 The fourth assignment of error is denied.

5 **FIRST ASSIGNMENT OF ERROR**

6 JMC 17.16.090, which imposes "required conditions" for development in the HR District,
7 provides that "[t]here shall be no construction on slopes greater than 30 [percent]."
8 JMC 17.16.090(C). Petitioners argue that the term "construction" includes roads, driveways,
9 retaining walls and other structures, and therefore JMC 17.16.090(C) prohibits the proposed
10 driveway and retaining walls on lot 4, which will be built across slopes that exceed 30 percent.
11 The planning commission interpreted JMC 17.16.090(C) to prohibit only construction
12 within a *building envelope* on slopes that exceed 30 percent. The planning commission concluded
13 that the proposed driveway and retaining walls are not "construction" for purposes of
14 JMC 17.16.090 because they are not within the residential building envelope proposed for lot 4.[1]

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[1] The planning commission findings state, in relevant part:

> "The Commission concludes that, based on the * * * revised subdivision plan and the engineering plans submitted by Applicant, * * * all future homesites, as depicted by the indicated building envelopes, are located on less than a 30 [percent] slope. By action of the Planning Commission, moved and adopted, the Commission determined that the term 'construction' in this criterion does not, as a matter of law, apply to roadways, driveways or utilities. The Commission specifically interpreted this term to refer to the construction of buildings or structures. This conclusion is based on the following factors:
>
> "* The term 'construction' is not specifically defined in the JMC.
>
> "* The purpose of this Chapter and historic use has been to apply the limitation to buildings or structures.
>
> "* A more expansive interpretation apply to roadways, driveways or utilities would not be consistent with the City's understanding of the available future buildable land inventory.
>
> "* Roadway and driveway construction are specifically governed by other JMC provisions.

1 Petitioners dispute that interpretation, arguing that nothing in the text or context of
2 JMC 17.16.090(C) limits the plain meaning of "construction" to buildings or structures erected
3 within a proposed building envelope, or would exclude construction of the proposed road with its
4 two switchbacks and engineered retaining walls.[2] Petitioners note that other code provisions
5 contain specific limitations with respect to "building envelopes" and development on slopes
6 exceeding 30 percent, and argue that the city council clearly knows how to limit regulatory
7 application to "building envelopes" when that is its intent.[3] According to petitioners, the planning
8 commission interpretation impermissibly reads JMC 17.16.090(C) to state that "[t]here shall be no
9 construction *within building envelopes* on slopes greater than 30 [percent]," thus inserting
10 language not found in the code.

11 In addition, petitioners argue that one purpose of JMC 17.16.090(C) is to implement
12 comprehensive plan policies requiring regulations that limit potential erosion, displacement of
13 vegetation and visual scarring that may result from development on steep slopes within the HR
14 zone.[4] According to petitioners, the planning commission's interpretation of JMC 17.16.090(C) is

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> "* This provision should be interpreted to be consistent with [JMC] 18.20.080A(2) and 18.20.080(E)(1)(a) which limit the slope of building envelopes." Record 22.

[2] The county's code does not define the term "construction." JMC 1.04.030 states in relevant part that "[a]ll words and phrases shall be construed according to the common and approved usage of the language * * *." Petitioners note that the dictionary definition of "construction" includes "the act of putting parts together to form a complete integrated object." *Webster's Third New Int'l Dictionary* 489 (unabridged ed 1976). Petitioners argue that that broad definition would seem to include construction of the proposed driveway and retaining walls.

[3] Both the decision and petitioners cite to JMC 18.20.080(A)(2) and 18.20.080(E)(1) as context. The former provides that "[a]ll newly created lots either by subdivision or partition shall contain a building envelope with a slope of 30 [percent] or less." The latter provides standards for "building locations" in the HR zone and provides in relevant part that "[t]he building envelope shall contain a buildable area with a slope of 30 [percent] or less."

[4] Petitioners cite to the following language from the description of Hillside and Border Residential Zoning in the Jacksonville Comprehensive Plan (JCP):

> "In addition to the density and spatial separation issues, the urban/wildlife interface area also presents problems for fire prevention and control while retaining wildlife habitat. The preceding Comprehensive Plan stated that implementing ordinances should have provided for special development standards in forest areas to minimize erosion problems, fire hazard, the

1 inconsistent with its purpose, because that interpretation allows significant cuts and fills for road
2 construction if that construction is outside a proposed building envelope. Petitioners argues that the
3 proposed road construction raises at least as much, if not more, concern regarding erosion, loss of
4 vegetation and visual scarring than would construction of a single-family dwelling within a building
5 envelope.

6 Intervenors respond that the planning commission interpretation of JMC 17.16.090(C) is
7 entitled to deference under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and
8 *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). According to intervenors, the
9 planning commission is empowered to interpret and apply the city's land use regulations, and is the
10 final decision maker for matters related to subdivision approval. Because the planning commission
11 stands in the shoes of the governing body in this matter, we understand intervenors to argue, its
12 code interpretation is entitled to the same deference that would be given to the governing body's
13 code interpretation.

14 We disagree. The deference described in *Clark* and *Church* applies only to a governing
15 body's interpretation of its local plan or code provisions. *Gage v. City of Portland*, 319 Or 308,
16 317, 877 P2d 1187 (1994) (*Clark* deference applies to governing body's code interpretation, not
17 a hearings officer's interpretation). Like an interpretation of a hearings officer, a planning
18 commission code interpretation is not entitled to deference under *Clark*. *Derry v. Douglas*
19 *County*, 132 Or App 386, 390, 888 P2d 588 (1995). The appropriate standard of review of the
20 planning commission's interpretation of local land use regulations is whether the interpretation is
21 reasonable and correct. *McCoy v. Linn County*, 90 Or App 271, 275-76, 752 P2d 323 (1988).

22 We agree with petitioners that the planning commission's interpretation of
23 JMC 17.16.090(C) is incorrect. Nothing in the text of JMC 17.16.090(C) suggests that

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unnecessary displacement of natural vegetation and visual scarring of the landscape that results from excessive cuts and fills for buildings and road construction. (Page 116). Therefore, new Hillside Residential and Border Residential zoning districts need to be created to address the above issues." JCP Open Space Element 10.

"construction" is limited to construction that occurs within a building envelope. The plain meaning of that term would seem to include construction of the proposed driveway and retaining walls. As petitioners point out, the city council knows how to apply regulations governing steep slopes to "building envelopes" and apparently chose not to do so in adopting JMC 17.16.090(C). That apparent legislative choice is eliminated by the planning commission interpretation, which effectively reduces JMC 17.16.090(C) to the same regulatory scope as other code provisions that govern construction on steep slopes, such as JMC 18.20.080(E)(1). *See* n 3. Moreover, intervenors do not dispute that the purposes of JMC 17.16.090(C) include limiting erosion, the loss of vegetation and visual scarring on steep slopes in the HR zone. Intervenors do not explain why those regulatory concerns are not equally present when applied to the proposed driveway with its switchbacks and engineered retaining walls. Intervenors express concern, as does the planning commission decision, that viewing JMC 17.16.090(C) to regulate construction outside building envelopes may impact the city's buildable lands inventory and render some parcels effectively unbuildable.[5] Even if those concerns are well-taken, which intervenors make no effort to demonstrate, that would not allow the planning commission to interpret JMC 17.16.090(C) to state what it plainly does not.[6]

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the planning commission failed to adopt adequate findings of compliance with tentative subdivision approval criteria, and that the adopted findings are not supported by substantial evidence.

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[5] Those concerns do not appear to be applicable here, either with respect to the parcel as a whole or to lot 4. As petitioners point out, the staff report recommended that the single-family dwelling building envelope on lot 4 be relocated near the terminus of Lily Road and combined with the office/guest cottage site, thus eliminating the steep driveway, which suggests that lot 4 can be developed in compliance with JMC 17.16.090(C). Record 164.

[6] Even if applying JMC 17.16.090(C) as it is written could make development of some parcels difficult or impossible, the variance procedures at JMC Chapter 17.100 would seem to be potentially applicable to allow development.

A. Historic And Architectural Review Commission (HARC) Approval of CC&Rs (JMC 16.12.24(3))

JMC 16.12.24(3) requires for tentative subdivision approval a finding that "all proposed deed restrictions have been approved by the HARC for historic compatibility." The planning commission found in response to JMC 16.12.24(3) that "[t]he applicant has submitted proposed CC&Rs, the adoption and recordation of which, in substantially the same form, will be required for final plat approval and HARC review, and will be a condition of this approval." Record 26. The planning commission required several changes to the draft CC&Rs submitted to the planning commission. Record 50-51. Contrary to the above-quoted finding, the conditions of approval attached to the planning commission decision do not appear to require HARC review and approval of the draft CC&Rs.[7] *Id.* Nor do the conditions require adoption and recordation of the draft CC&Rs, in any form, as a condition of final plat approval.

Petitioners contend that at the time of the planning commission decision, HARC had not yet approved the draft CC&Rs. Therefore, petitioners argue, it was impossible for the planning commission to conclude, as it arguably did, that the CC&Rs "have been approved" by HARC. Petitioners explain that HARC review is a separate procedure governed by separate criteria at JMC Title 18, and argue that the city's code apparently contemplates that HARC complete its review of proposed CC&Rs prior to planning commission tentative subdivision approval.

Intervenors respond that the planning commission properly found compliance with JMC 16.12.24(3), subject to the condition that intervenors obtain HARC approval of the CC&Rs, as modified by the planning commission.

Petitioners are correct that JMC 16.12.24(3) appears to contemplate that a planning commission tentative subdivision decision occur *after* HARC has reviewed and approved the draft CC&Rs for that subdivision for compatibility with standards in JMC Title 18. The planning

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[7] Condition 19 does require that "subsequent residential development" be subject to HARC review under JMC Title 18. Record 51. However, condition 19 does not reference or require HARC review of the proposed CC&Rs.

1 commission decision does not recognize the sequence of events that JMC 16.12.24(3) appears to
2 require, or explain why JMC 16.12.24(3) does not in fact require that sequence of events. It may
3 that JMC 16.12.24(3) can be interpreted to allow planning commission tentative plat approval to
4 precede HARC approval of the CC&Rs. If so, intervenors may be correct the planning
5 commission could find compliance or feasibility of compliance with JMC 16.12.24(3), with
6 imposition of appropriate conditions. *See Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-
7 48 (1992) (where there is conflicting evidence regarding compliance with approval criteria, a local
8 government must either (1) find compliance or feasibility of compliance with approval criteria and
9 impose conditions necessary to assure compliance, (2) deny the application, or (3) defer a finding of
10 compliance with criteria to a second stage that affords opportunity for notice and hearing).
11 However, the planning commission decision does not explain why the sequence that
12 JMC 16.12.24(3) appears to require can be dispensed with. To the extent the decision attempts to
13 condition tentative plat approval on subsequent HARC approval of the CC&Rs, as explained
14 above the decision does not in fact appear to impose any such condition.[8]

15 This subassignment of error is sustained.

16 **B. Street Grade and Safety Standards (JMC 18.21.050 and 16.12.24(9))**

17 JMC 18.21.050 limits street grades to 12 percent, but allows a grade of up to 14 percent
18 under certain conditions.[9] Relatedly, JMC 16.12.24(9) requires a finding that the project's

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[8] All this may be academic, however, as we understand that subsequent to the close of the record before the planning commission regarding the proposed subdivision intervenors in fact obtained HARC approval of the draft CC&Rs. That HARC approval was separately appealed to LUBA and is currently pending. *McCulloh v. City of Jacksonville*, LUBA No. 2003-083. If on remand in this case the planning commission can conclude that the CC&Rs "have been approved" by HARC then there would obviously be no need to interpret JMC 16.12.24(3) or to impose conditions to ensure compliance with that standard.

[9] JMC 18.21.050(J) provides:

> "* * * No street or highway shall have a grade of more than twelve percent (12%) unless, because of topographical conditions, the planning commission determines that a grade in excess of twelve percent is necessary. Permission may be granted to construct grades up to fourteen percent (14%) if the following conditions are met:

1 proposed transportation plan "affords the most economic, safe, efficient and least environmentally
2 damaging circulation of people * * *." Intervenors requested, and the planning commission
3 approved, a 14 percent grade for Lily Road. The planning commission concluded that a 14 percent
4 grade was "necessary" for purposes of JMC 18.21.50 and was also consistent with
5 JMC 16.12.24(9).[10]
6 Petitioners contend that the entire length of Lily Road as proposed is 14 percent in grade,
7 including where it intersects with 3rd Street. Record 98. Petitioners challenge the planning

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"1. A contour map of the subdivision or development is presented showing the proposed subdivision in relationship to existing contours. * * *

"2. That the location of the excessive grade be a minimum distance as determined by the planning commission.

"3. That the location of the excessive gradient be outside the area of traffic turning movements, or that guardrails or other protective structures be constructed along the area of excessive grades. * * *

"4. The developer shall present all information required by the planning commission to determine the necessity for the excessive gradient in a written document."

[10] The planning commission findings state, in relevant part:

> "The Commission concludes that it does grant and approve an excessive grade for the proposed public street, Lily Road, up to 14 [percent] [pursuant to JMC 18.21.050], as depicted in the revised engineering plans submitted by the applicant. * * * It was determined that the length of the excessive grade as shown is the minimum length necessary to build this public way, taking into account the efforts to minimize visual and natural resource impacts, limit the amount of cut and fill required, the topographical limitations of the parcel and the desired length of this public way as proposed by the City's future transportation plan (which calls for a public way that extend[s] far enough into this parcel to then extend south to serve future Hillside Residential development). It is further concluded that no turning movements are currently proposed on Lily Road so no guardrails or other barriers are made a condition of this approval and grant. * * *" Record 48.
>
> "* * * The Commission concludes that, based on the public testimony and entire series of revisions to the subdivision plan and engineering proposals, the length of Lily Road has been designed to be the least environmentally damaging and is requested to be the minimum length of 14 [percent] grade necessary and possible. The Commission further concludes that locating Lily Road on the north side of this parcel would cause greater environmental damage and that it would significantly impact Daisy Creek and the riparian boundary of that Class II stream. The Commission concludes that by avoiding having to construct a public road on or through that riparian corridor, the applicant has designed the project in such a way as to provide an efficient transportation system to each lot and, yet, minimize environmental damage. * * *" Record 30.

commission's finding that "no turning movements are currently proposed on Lily Road" and the consequent failure to require guardrails or other barriers, as required by JMC 18.21.050(3). While that finding may be accurate with respect to the uphill terminus of Lily Road, which is proposed as a dead-end until proposed future connections to the south are made, petitioners contend that the planning commission failed to take into account the fact that vehicles will conduct turning movements through the intersection of Lily Road and 3rd Street. According to petitioners, the excessive grade at the intersection creates unsafe situations where in icy conditions cars may slide down Lily Road into oncoming traffic on 3rd Street. For this reason, petitioners argue, the city's findings of compliance with JMC 18.21.050(3) and 16.12.24(9) are inadequate and not supported by substantial evidence.

Intervenors do not dispute that the grade at the Lily Road/3rd Street intersection is 14 percent, or specifically respond to petitioners' challenge to the city's findings with respect to turning movements under JMC 18.21.050(3) and the related issue of safety under JMC 16.12.24(9). We agree with petitioners that the finding that no turning movements are proposed on Lily Road does not appear to take into account turning movements at the Lily Road/3rd Street intersection or, for that matter, turning movements to and from the proposed driveways along Lily Road. For that reason we agree with petitioners that the planning commission's findings with respect to turning movements and the safety of Lily Road are inadequate. Because those findings are inadequate, we need not address petitioners' evidentiary challenge to those findings.

This subassignment of error is sustained, in part.

C. Dead End Street (JMC 17.40.030(A))

JMC 17.40.030(A) provides that "[a]ll new public roads must have at least two access points; no dead-end streets or cul-de-sacs unless no other option is available or [can be] made available." The planning commission found that until Lily Road is extended to the south, as contemplated in the city future transportation plan, a dead-end configuration is "the only option for the construction of this public road[.]" Record 21.

1 Petitioners contend that the planning commission erred in approving Lily Road as a dead-
2 end road, contrary to JMC 17.40.030(A). According to petitioners, the planning commission
3 should have considered denial, rather than approving a dead-end road. However, as intervenors
4 point out, JMC 17.40.030(A) specifically allows a dead-end road if "no other option" is available.
5 Petitioners identify no other road configuration that would not result in a dead-end. We disagree
6 with petitioners that the planning commission was required to deny the application under these
7 circumstances.

8 This subassignment of error is denied.

9 **D. Water Pressure (JMC 16.12.24(8)(3))**

10 JMC 16.12.24(8) requires that the project demonstrate the "adequate availability" of
11 "municipal water facilities," among other public services. Petitioners cite to testimony by the city
12 public works director that "additional engineering" will be necessary to ensure adequate water
13 pressure to all building sites and hydrants. Petitioners argue that without the requested "additional
14 engineering" the city cannot adopt a finding of compliance with JMC 16.12.24(8)(3), and that the
15 city essentially deferred a finding of compliance with JMC 16.12.24(8)(3) to a second stage of
16 review that does not afford notice or opportunity for public participation. *Rhyne*, 23 Or LUBA at
17 447-48.

18 The city's findings recite evidence that adequate water capacity exists and conclude that
19 "adequate water pressure for domestic use and fire service can and will be available to each
20 subdivision lot." Record 17. Rather than defer a finding of compliance, it appears that the city
21 found compliance with JMC 16.12.24(8)(3). Under such circumstances, the question becomes
22 whether that finding is adequate and supported by substantial evidence. *Salo v. City of Oregon
23 City*, 36 Or LUBA 415, 425 (1999). Petitioners rely on a statement by the city public works
24 director that "additional engineering" is necessary to ensure adequate pressure. The full statement of
25 the director is that "there is adequate water and sewer to supply services, however, additional
26 engineering will be needed to ensure adequate pressure to all building sites and/or hydrants."

1 Record 149. That testimony does not indicate, as petitioners suggest, that "additional engineering"
2 evidence must be presented to the planning commission in order to conclude that there will be
3 adequate water pressure for purposes of JMC 16.12.24(8)(3). Rather, it simply notes that ensuring
4 adequate water pressure will require additional engineering. Nothing cited to us in the record
5 suggests that providing the engineering necessary to ensure adequate water pressure will present any
6 difficulty, and certainly the public works director's testimony does not make that suggestion. The
7 planning commission's conclusion that "adequate water pressure * * * can and will be available to
8 each subdivision lot" is adequate and supported by substantial evidence.

9 This subassignment of error is denied.

10 **E. Fire Services (JMC 16.12.24(8)(5))**

11 Among other things, JMC 16.12.24(8) requires "adequate availability" of "fire services."
12 The city's decision concludes that "[t]he development will be acceptable for fire protection provided
13 that the driveways are constructed pursuant to Uniform Fire Code specifications * * *." Record
14 18. The Uniform Fire Code (UFC) requires that "fire apparatus access roads" have an
15 "unobstructed width of not less than 20 feet" and an "unobstructed vertical clearance of not less
16 than 13 feet 6 inches[.]" UFC 902.2.2.1. However, applicable city standards at
17 JMC 17.40.030(D) provide that "[d]riveways shall be built and maintained to provide a minimum
18 15-foot width with a 12-foot all-weather surface capable of supporting a fire apparatus weight of
19 24,000 pounds per rear axle and a vertical clearance of 13 [feet] 6 [inches]." The decision
20 approves driveways, including the long driveway on lot 4, with a 15-foot width and a 12-foot all-
21 weather surface, pursuant to JMC 17.40.030(D). In the alternative, the city adopted the position of
22 the city fire chief that even if UFC standards apply, those standards do not require a 20-foot built
23 width, as petitioners asserted, but rather that access is "unobstructed" for the required width.
24 Record 104. The city found that there is a 20-foot unobstructed access way for each driveway.

25 Petitioners contend that the city erred in relying on the 15-foot width standard at
26 JMC 17.40.30(D) rather than the 20-foot width UFC standard. Petitioners recognize that

1 ORS 368.039(1) authorizes the city to supersede UFC requirements, but argues that the city has
2 not in fact done so in adopting JMC 17.40.030(D).[11] Petitioners point out that the city has adopted
3 the UFC by reference into the JMC, and argue that the UFC 20-foot width road standard has thus
4 not been superseded. Record 75. We disagree. It is not clear to us why the city adopted the UFC
5 by reference, but the city's code must be read as a whole. JMC 17.40.030(D) provides specific
6 design standards intended to allow for adequate fire apparatus access that vary in one dimension
7 from analogous UFC standards. We conclude, as did the city, that JMC 17.40.030(D) supersedes
8 the UFC width standards.

9 This subassignment of error is denied.

10 **F. Housing Need (JMC 16.12.24(14)**

11 JMC 16.12.24(14) requires a finding that "based on current market information there exists
12 a current need for the type of housing proposed by the project and that the project will not be
13 deleterious to any of Jacksonville's housing infill or rehabilitation policies that may exist at the time of
14 the application." The city found a current need for the proposed single-family dwellings in the HR
15 zone, based on a market analysis of current listings by a real estate agent. Record 32.

16 Petitioners fault the city for failing to require or conduct a detailed analysis of housing supply
17 and demand, including potential for redevelopment of developed lots and an updated population
18 projection. Petitioners also argue that the city's findings fail entirely to address whether the
19 proposed housing is deleterious to any housing infill or rehabilitation policies.

20 Intervenors respond, and we agree, that JMC 16.12.24(14) does not require the detailed
21 housing supply and demand analysis petitioners believe it does. JMC 16.12.24(14) simply requires
22 a finding of current need based upon "current market information," which was supplied in this case.

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[11] ORS 368.039(1) provides, in relevant part:

> "When the governing body of a county or city adopts specifications and standards, including standards for width for roads and streets under the jurisdiction of the governing body, such specifications and standards shall supersede and prevail over any specifications and standards for roads and streets that are set forth in [the UFC]. * * *"

1 While petitioners are correct that the city's findings do not address whether the proposed housing is
2 deleterious to applicable housing infill or rehabilitation policies, petitioners do not argue that any such
3 policies exist. Absent some indication that such policies exist and apply to the proposed
4 development, the city's failure to adopt an express finding addressing such policies is not a basis for
5 reversal or remand.

6 This subassignment of error is denied.

7 **G. Wildlife Habitat (JMC 16.12.24(7)**

8 JMC 16.12.24(7) requires a finding that "the project identifies, preserves, and protects
9 natural wildlife habitats and wetlands." The city found compliance with JMC 16.12.24(7), based on
10 (1) the proposed dwelling density, which is less than the two dwellings per half-acre allowed in the
11 HR zone, (2) the large hillside area left undisturbed on lot 4, and (3) the absence of encroachment
12 into the riparian areas of Daisy Creek. Record 29.

13 Petitioners argue that intervenors failed to "identify" the wildlife existing on the property, and
14 without such evidence the record cannot support compliance with JMC 16.12.24(7). Petitioners
15 also dispute the city's reliance on the proposed density and the maximum density allowed in the HR
16 zone. According to petitioners, given other code restrictions that potentially limit development of the
17 property, intervenors are actually maximizing the residential density allowed under the code,
18 notwithstanding the theoretical maximum density allowed in the HR zone.

19 Intervenors respond, and we agree, that JMC 16.12.47(7) requires identification of wildlife
20 *habitat*, not the specific wildlife species that currently reside on or use the property. Intervenor
21 argues that the wildlife habitat (principally the wooded hillside) is adequately identified by the tree
22 inventory and other evidence in the record. Intervenor further notes that the proposal retains 65
23 percent of the parcel in its natural wooded state. We agree with intervenors that petitioners have
24 failed to demonstrate evidentiary insufficiency with respect to the identification and preservation of
25 wildlife habitat, for purposes of JMC 16.12.24(7). We also agree that the city did not err in relying

in part on the difference between the proposed and zoned density for purposes of finding that intervenors had adequately "protected" wildlife habitat under JMC 16.12.24(7).

This subassignment of error is denied.

H. Handicap Access (JMC 16.12.24(11))

JMC 16.12.24(11) requires a finding that "the project, through sensitive housing and site design, minimizes the cost of housing and barriers to the handicapped." The city found that the proposed development complies with this standard, based on the location of three building envelopes on less steep portions of the parcel, the almost level driveways to lots 1, 2 and 3, and the fact that lots 1, 2 and 3 will be roughly the minimum size allowed for new lots, and thus more affordable than larger lots. Record 31.

Petitioners fault the city for failing to explain how the proposal minimizes "barriers" to the handicapped, and argues that there is no evidence in the record with respect to "barriers." Petitioners do not identify what barriers the city failed to address, or suggest that another site design could better minimize the barriers to the handicapped inherent in residential development on steep slopes. Absent a more developed argument, petitioners have failed to demonstrate reversible error with respect to the city's finding of compliance with JMC 16.12.24(11).

This subassignment of error is denied.

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the city's findings with respect to three conditional use criteria.

A. Code Violations (JMC 17.104.050(C)(1))

JMC 17.104.050(C)(1) requires a finding that "[t]here are no outstanding code violations * * * on the subject property." The city concluded that intervenors had adequately resolved two potential code violations existing on the property, involving unauthorized removal of a tree and unauthorized grading of an existing driveway in the approximate right of way of the proposed Lily

Road. Intervenors agreed to provide mitigation for the removed tree and, if Lily Road was not approved, return the graded portion of the existing driveway to its prior condition. Record 34.

Petitioners dispute the city's finding that intervenors had adequately resolved these potential code violations. Petitioners contend that "mitigation" is not sufficient under the city's code enforcement provisions, which specify fines for unauthorized tree removal. Further, petitioners contend that a contingent agreement to restore the graded area to its prior condition in the event Lily Road is not approved does not correct the *existing* code violation, or allow a finding that "there *are* no outstanding code violations," as JMC 17.104.050(C)(1) requires.

JMC 17.104.050(C)(1) is apparently a means to require conditional use permit applicants to correct or mitigate code violations, in order to obtain a conditional use permit. We disagree with petitioners that JMC 17.104.050(C)(1) requires the city to formally adjudicate potential code violations and impose the penalties that might be imposed in such proceedings, or that it requires applicants to restore conditions to the *status quo ante*, notwithstanding that the existing condition is consistent with the development application, if approved.

This subassignment of error is denied.

B. Need for Conditional Use (JMC 17.104.050(C)(3))

JMC 17.104.050(C)(3) requires a finding that, if a conditional use is a permitted use in any other zone in the city, the "need would best be met by allowing the conditional use" on the subject property. The city found that the subdivision of a HR-zoned parcel is a "use" that is permitted only in the subject zone, and is thus not a use that is a "permitted use in any other zone." Record 35.

Petitioners apparently view the proposed conditional use to be single-family dwellings rather than a subdivision, and repeat their arguments that the analysis of market need challenged in the second assignment of error under JMC 16.12.24(14) is inadequate to show that the need for single family dwelling is best met on the subject property, for purposes of JMC 17.104.050(C)(3). Petitioners fail to challenge the city's actual finding that the proposed conditional use is not a

1 permitted use in any other zone in the city. Petitioners' misdirected challenge provides no basis for
2 reversal or remand.

3 **C. Complementary Design (JMC 17.104.050(C)(7))**

4 JMC 17.104.050(C)(7) requires a finding that, in areas designated as requiring preservation
5 of historic attributes, "proposed structures will be of a design complementary to the surrounding
6 area. The city addressed this criterion by simply concluding that "residential development will be
7 subject to the design review process found in Chapter 18 of the JMC and be subject to HARC
8 review." Record 38.

9 Petitioners note that intervenors failed to provide architectural drawings of the proposed
10 dwellings in submitting the subdivision application, as required by JMC 16.12.04(D).[12] Petitioners
11 argue that, without such drawings, the planning commission could not, and did not, find that the
12 proposed structures will be of a design complementary to the surrounding areas, as required by
13 JMC 17.104.050(C)(7). Instead, petitioners contend, the planning commission appears to defer
14 any finding of compliance with JMC 17.104.050(C)(7) to future HARC review. Petitioners argue
15 that such a finding is the responsibility of the planning commission.

16 Intervenors respond that deferral of findings regarding architectural details to HARC is
17 appropriate and permissible under *Rhyne*. Intervenors note that the design review process at
18 HARC affords notice and opportunity for a hearing, as required for deferral to a second-stage
19 under *Rhyne*, and that in addition the city imposed a condition requiring that any HARC review of
20 proposed residential development provide the same notice and opportunity for hearing required by
21 state law, notwithstanding any conflicting notice provisions in JMC Title 18. Record 51.

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[12] JMC 16.12.04 prescribes the information that must be submitted for tentative subdivision plat approval, and requires, in relevant part:

> "D. **Architectural Details**. The applicant shall submit the details of any structures proposed to be built in conjunction with the proposed subdivision. The applicant shall acquire a Certificate of Appropriateness from [HARC] for such structures prior to Final Plat approval in accordance with the City's Historic Protection Regulations."

1 Given the absence of architectural drawings in the record, and evidence regarding the
2 architectural character of the neighborhood, the planning commission clearly chose to defer a finding
3 of compliance with that criterion to a second stage of review that affords notice and opportunity for
4 public participation, as *Rhyne* authorizes, rather than to deny the application. Petitioners do not
5 dispute that proceedings before HARC, as conditioned by this decision, will provide the same
6 notice and opportunity for public participation as would a second stage proceeding before the
7 planning commission. Nor do petitioners advance any reason to believe that HARC is incapable of
8 addressing the requirements of JMC 17.104.050(C)(7). We agree with intervenors that the
9 planning commission's deferral with respect to JMC 17.104.050(C)(7) does not provide a basis for
10 reversal or remand.
11 This subassignment of error is denied.
12 The third assignment of error is denied.
13 The city's decision is remanded.