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. 2004-087

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 the City of Jacksonville.

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

HOLSTUN, Board Chair; DAVIES, Board Member, participated in the decision.
BASSHAM, Board Member, did not participate in the decision.

AFFIRMED 04/22/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision approving a conditional use permit and tentative subdivision plan for a four-lot subdivision.

FACTS

This is the third LUBA appeal involving this subdivision. In *McCulloh v. City of Jacksonville*, 46 Or LUBA 267, 269 (2004) (*McCulloh I*), we set out the facts describing the property:

> "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."

The main point of contention involves the construction of a new public street, Lily Road, to be constructed along the southern border of the property.[1] In *McCulloh I*, we sustained petitioners' assignment of error that the JMC precluded any development on slopes of greater than 30 percent. Petitioners argued that because one lot and part of Lily Road were to be constructed on areas with slopes of over 30 percent, the application must be denied. We also sustained petitioners' subassignment of error that there were inadequate findings regarding compliance with grade and safety standards for Lily Road. On remand, intervenors submitted a revised tentative subdivision plan that moves the offending home site to a less steep area and changes the design of Lily Road. Petitioners continued to object to the revised design of Lily Road. The planning commission approved the application over petitioners' objections. This appeal followed.

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[1] Petitioners own the property to the south of intervenors.

MOTION FOR REMAND

This case has involved an unusual amount of post-oral argument activity. Prior to oral argument, the city retained a number of oversized exhibits. Under OAR 661-010-0025(2), those oversized exhibits were to be retained by the city and delivered to LUBA at oral argument. The city did not appear at oral argument, and no oversized exhibits were delivered to LUBA. Subsequent to oral argument, intervenors contacted the city and asked that it forward the oversized exhibits and tapes of hearings to LUBA. The city then provided LUBA with some, but not all, of the oversized exhibits and tapes. Petitioners filed a Motion to Compel Transmittal of the Record. In an order dated April 4, 2005, we gave the city until April 15, 2005 to:

> "* * * transmit all oversized or difficult to duplicate exhibits (including audio-tapes) that have been retained by the city in this matter. If any of the exhibits that are listed on page 3 of petitioners' Motion to Compel Transmittal of the Record are not included in that transmittal, the city shall explain why those oversized exhibits are not included." ___ Or LUBA ___ (LUBA No. 2004-087, April 4, 2005, Order) slip op at 2.

On April 13, 2005, the city submitted additional tapes and oversized exhibits, but did not produce all of the exhibits listed on page 3 of petitioners' motion. The city's explanation for this failure was:

> "These are the only oversized documents in our possession. Any other original documents have been misplaced due apparently to changes in administrative staff over the long period of time that this case has been at issue." Letter of Sandra J. Miller, Administrative Planning Assistant.

Petitioners now move for remand because the entire record cannot be produced. Petitioners' bases for this motion appear to be that: (1) respondent does not have the evidence it relied upon to support its decision; (2) the record is not really settled until the missing exhibits are produced; and (3) the city's failure to produce the missing exhibits prejudiced petitioners' substantial rights.

A. Whether There Is Evidence to Support Decision

Petitioners argue that remand is required because the city no longer possesses the evidence upon which it relied to make the challenged decision. It appears that the city has lost a number of tapes of planning commission hearings and oversized exhibits from *McCulloh I*. According to petitioners, because the city has lost the plans, no one can know what has actually been approved. Petitioners also argue that engineering plans from the challenged decision are missing, specifically the absence of "pages C-1 through C-4 of Thornton Engineering plans (17" x 24') submitted to the City of Jacksonville on February 12, 2004, revised 1/30/04." In our April 4, 2005 order, however, we specifically stated that the city had provided those engineering plans. Petitioners have not explained, nor do we see, that we were mistaken. In addition to the engineering plans, the only other oversized exhibits that petitioners point to are the erosion control plan and landscape plan. Petitioners do not, however, explain how those plans are critical to the city's decision or the arguments before us in this appeal.

Petitioners cite *Andrews v. City of Prineville*, 28 Or LUBA 653, 661 (1995), for the proposition that failure of the local government to provide a sufficient record can serve as a basis for reversal or remand. In *Andrews*, an issue was whether the city council had properly limited the issues on appeal from the planning commission. We did not reach that issue because we concluded that even if the city council had the authority to limit issues to those raised at the planning commission we could not tell what they were because the tapes from the planning commission meeting were so inadequate. *Id*. In other words, when the record is so inadequate that LUBA does not have what it needs to adequately review the decision, that may constitute a basis for remand.

While petitioners are correct that *Andrews* stands for this general proposition, they have not explained how the missing exhibits are necessary for our review. The issues on appeal involve the safety of Lily Road. The record does include the engineering plans from the challenged decision. We do not see that the absence of engineering plans from an earlier design of Lily Road that is not

approved in the current decision are necessary for our review. Furthermore, the parties are not in disagreement about the approved design of Lily Road, merely the factual and legal consequences of that design. We do not believe the missing exhibits are required for our review of those issues.

B. Whether Record Can Be Settled

Petitioners argue that because our earlier order on record objections settled the record based upon the assumption that the city "will bring [the engineering plans] to oral argument, along with the other large exhibits." ___ Or LUBA ___ (LUBA No. 2004-087, Order on Record Objections, January 4, 2005) slip op at 1, the record cannot be settled. As we have discussed, the city did provide the engineering plans. Furthermore, when items in the record are lost or cannot be reproduced, there is nothing more we can do, and their continuing absence provides no basis to leave the record open. *Friends of Neabeack Hill v. City of Philomath*, 29 Or LUBA 557 (1995). Therefore, the record is settled as of the date of this final opinion and order.

C. Whether Petitioners' Substantial Rights Were Prejudiced

Petitioners essentially argue that the city's failure to provide the oversized exhibits constitutes a procedural error that prejudiced petitioners' substantial rights, and therefore the decision should be remanded. Procedural errors will not serve as a basis for reversal or remand unless a petitioner's substantial rights are prejudiced. ORS 197.835(9)(a)(B). Those substantial rights include an adequate opportunity to prepare and submit one's case and the right to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). We have generally understood those substantial rights to refer to rights at the local government level. We assume without deciding that those rights may include rights before LUBA as well.

Petitioners argue that they intended to rely upon the oversized exhibits to illustrate their positions at oral argument. Petitioners' frustration with the city's failure to reproduce all the oversized exhibits is understandable. The question, however, is whether the lack of oversized exhibits substantially prejudiced petitioners' ability to argue their case before the board. Although not as large as the oversized exhibits, a blueprint of the plans was displayed at oral argument that

showed the challenged road and the surrounding property. While inconvenient, the blueprint was adequate to allow the board to follow petitioners' arguments, and petitioners' counsel's presentation was understood. The missing exhibits did not prejudice petitioners' substantial rights.

Petitioners' motion for remand is denied.

FIRST ASSIGNMENT OF ERROR

The approval criteria for tentative subdivision plans are found at JMC 16.12.24 and provide in pertinent part:

> "The review body shall approve, approve with conditions or deny the request, based upon the following criteria:
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> "* * * * *
>
> "(9) That the project's proposed transportation plan affords the most economic, safe, efficient and least environmentally damaging circulation of people, goods, and information and layout of utilities and parking possible. * * *"

The city specifically limited the remand proceedings to those issues that were remanded by LUBA in *McCulloh I.* In addressing those issues, the city made 18 separate findings of facts in reaching its decision. Petitioners challenge all 18 of those findings. Although petitioners challenge all 18 findings, arguing that they are not based upon substantial evidence, they do not directly challenge the city's ultimate conclusion regarding JMC 16.12.24(9). Presumably, petitioners believe that by demonstrating that every single one of the city's findings is not supported by substantial evidence, the city's decision must be reversed or remanded. We do not specifically address all 18 challenges to the city's findings, but rather address the relevant issues in manageable groups.

A. Lily Road Design

One of the issues that was considered by the city on remand was whether "the design of Lily Road [meets] the street grade and safety standards." Record 32. In *McCulloh I*, the street grade for Lily Road was essentially 14 percent for the entire length of the proposed road, including its intersection with 3rd Street. We sustained a subassignment of error stating that the city's findings regarding turning movements at 3rd Street and the safety of Lily Road were inadequate. 46 Or

LUBA at 281. On remand, the redesigned Lily Road has a maximum grade of 14 percent and the grade has been reduced to 6 percent at the intersection of 3rd Street. In addition to reducing the grade at the intersection, the redesign includes a section of rough grooved concrete prior to the intersection to allow for greater traction and stopping and guardrails and cut slope areas for motorist protection. Based upon the redesign, the city found that the project satisfies JMC 16.12.24.

Petitioners begin with the assertion that the redesign violates the American Association of State Highway and Transportation Officials (AASHTO) standards for highway construction. According to petitioners, the AASHTO standards would limit the Lily Road street grade at the intersection with 3rd Street to, at most, 2 percent. Petitioners allege that the AASHTO standards are approval criteria even though they are not listed in the JMC and are not referred to in the decision.

> "AASHTO standards apply in the City of Jacksonville. Intervenors' engineer embraced AASHTO standards in his presentation to the planning commission * * *. Based on his testimony concerning AASHTO standards, the planning commission concluded that the AASHTO standard was appropriate and would be applied in the City of Jacksonville." Petition for Review 12 (footnotes omitted).

Petitioners' first basis for relying on the AASHTO standards is their contention that intervenors' engineer "embraced" them.[2] Our review of the engineer's testimony does not support petitioners' view. Initially, the engineer discusses AASHTO standards regarding the issue of whether guardrails or cut slopes provide adequate safety for cars leaving the roadway. The discussion has nothing to do with the appropriate grades at intersections. Furthermore, it appears to us that he is using the AASHTO standards as an example to illustrate the issue of how to adequately

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[2] Petitioners cite the following testimony of intervenors' engineer:

> "Let's cite AASHTO here for a minute, to maybe tell you something you [do or don't know]. AASHTO talks about these barriers, and it's very specific in here that a barrier should not create more damage to the vehicle or the occupants than would be if there is not a barrier there. And they do talk about * * * cut slopes on a roadway can act as a barrier for purposes of safety, as well as can curbs, guard rails and some other kinds of barriers that you can think of. Most of this road is going to be in cut, after we get up the hill a little ways. In our plans * * * we listed several barriers." Testimony from April 14, 2004 Planning Commission Meeting.

provide protection. Even if we were to agree that actions by the applicant could have the legal effect of making AASHTO standards city approval criteria, which we do not, we do not agree that the applicant's engineer's actions below can be viewed as doing so.

Petitioners then state that the planning commission concluded the AASHTO standards apply and point to the following language in the planning commission's decision to support their position:

> "The Commission concludes that the cut slope of the ground is a suitable protective structure, thereby eliminating the need for guardrail installation but should any appeals body determine that the cut slope will not satisfy this criterion, the applicant shall, as a condition of approval, install guardrails in all areas of excessive gradient as indicated on the proposed plans. Turning movements shall include all driveways * * *." Record 35.

Nothing that petitioners identify can reasonably be viewed as a decision to adopt the AASHTO standards or to apply those AASHTO standards to the challenged decision as applicable approval criteria. All of petitioners' arguments based upon an alleged failure to comply with the AASHTO standards are rejected.

The JMC standard that does apply to street grades is JMC 18.21.050(J), which provides in pertinent part:

> "Grades. 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:
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> "* * * * *
>
> "(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. When guardrails or other protective structures are required, the plans for same shall be prepared by an engineer experienced in highway construction."

As discussed earlier, the street grade for Lily Road as now proposed will not exceed 14 percent. The city found that because of the topographical conditions, a grade of 14 percent was

necessary. The redesign eliminates the excessive grade at the intersection of 3rd Street, and guardrails or other protective structures are required along the areas of excessive grade. That is what JMC 18.21.050(J) requires and, therefore, Lily Road does not violate the street grade standards.[3]

Petitioners claim that reducing the road grade to only 6 percent at the intersection with 3rd Street is unsafe and thereby violates JMC 16.12.24. Petitioners repeat the arguments and testimony of their experts at the local level in detail regarding their opinions that the 6 percent grade is unsafe. There is certainly believable evidence the city could have relied upon to agree with petitioners that the intersection will be unsafe. That, however, is not the question before us. The question is whether a reasonable person could have made the decision the city did. As discussed above, the road design does not violate any objective standards. Although petitioners do not believe that the rough grooved concrete section at the intersection increases safety, intervenors and their experts testified that it would. A reasonable person could choose to believe intervenors. The city is entitled to choose between competing evidence, and we will not reweigh the evidence to reach a different decision. The city's decision that the Lily Road engineering design satisfies JMC 16.12.24 is supported by substantial evidence.[4]

B. Alternative Location

Petitioners challenge the city's findings rejecting petitioners' argument that Lily Road should be constructed on the north edge of intervenors' property instead of the south. Petitioners do not

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[3] Petitioners also challenge the use of cut slopes as opposed to guardrails in certain areas of excessive grade. Intervenors' experts testified that such safety measures are equivalent or superior to guardrails for motorist protection. A reasonable person could reach the decision made by the city that cut slopes were adequate for safety.

[4] As we have explained on many occasions, substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984). Where LUBA concludes that a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, the choice between conflicting evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). That a petitioner may disagree with the local government's conclusions provides no basis for reversal or remand. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993).

explain the significance of this argument. Presumably they mean to demonstrate that because the northern option is better, then the southern option approved by the city does not provide the "most economic, safe, efficient and least environmentally damaging circulation of people, goods, and information and layout of utilities and parking possible." JMC 16.12.24(9).

Petitioners spent a great deal of time below arguing that Lily Road should be constructed on the northern portion of intervenors' property. Petitioners had their own experts analyze their proposed northern option and they took the position that it was preferable. Petitioners also take issue with the numerous reasons the city cited in choosing not to proceed with the northern option. Among the reasons the city gave for rejecting the northern option were that the approved design avoids: (1) construction in the riparian zone around class II Daisy Creek in the northern part of the property, including bridges and/or culverts; (2) building on slopes of over 30 percent; and (3) extra construction to put in a new road as opposed to improving the existing driveway. While petitioners challenge these findings, they are based on substantial evidence provided by intervenors and their experts and adequately express the city's reasoning in reaching its decision. Finally, petitioners fail to demonstrate how the ultimate approval standard, whether the "proposed transportation plan affords the most economic, safe, efficient and least environmentally damaging circulation of people, goods, and information and layout of utilities and parking possible," is violated. The approval standard requires a balancing of many different factors in reaching a conclusion. Petitioners merely attack the facts underlying that balancing test. Petitioners have not shown that a reasonable person could not rely on the evidence the city did, and petitioners have not shown that the city's ultimate conclusion regarding the balancing test of JMC 16.12.24 is not supported by substantial evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners argue that the city impermissibly shifted the burden of proof from intervenors to petitioners. The dispute surrounds petitioners' argument that the northern option, discussed above, is superior to the southern option approved by the city. According to petitioners, the city shifted the

burden of proof by requiring petitioners to demonstrate that the southern option is unsafe rather than requiring intervenors to demonstrate that it is safe. Petitioners' argument is based upon a sharp exchange between petitioners' attorney and one of the planning commissioners during the remand hearing. The gist of petitioners' argument is that the planning commissioner's repeated insistence that petitioners' attorney show him where her experts said the southern option was unsafe and his questions regarding whether petitioners had submitted their northern option road design to the city engineer must be viewed as shifting the burden of proof.

Petitioners are certainly correct that the applicant has the burden of satisfying the applicable approval criteria. *Rochlin v. Multnomah County*, 35 Or LUBA 333, 341 (1998), *aff'd* 159 Or App 681, 981 P2d 399 (1999). Petitioners are also correct that it is error to shift the burden to opponents to show that the approval criteria are not met. *Stahl v. Tillamook County*, 43 Or LUBA 518, 528 (2003). A local government, however, does not improperly shift the burden of proof in finding that a petitioner did not present evidence showing that an approval criterion was not met, so long as the findings addressing the criterion also explain why the evidence that was submitted demonstrates that the approval criterion is satisfied. *Hannah v. City of Eugene*, 35 Or LUBA 1, 11-12 (1998). Petitioners point only to the following findings in the decision to bolster their claim:

> "The commission has reviewed material on other proposed locations for the dedicated roadway but specifically concludes that, while offering alternative locations, there is no evidence that the applicant's proposed location is unsafe or even less safe than the proposed alternatives.
>
> "* * * * *
>
> "There is no undisputed evidence that directly claims that the design of Lily Road is unsafe." Record 36, 38.

The city's decision is not based on findings that petitioners did not establish that the design of Lily Road was unsafe. As discussed in the first assignment of error, the city made numerous findings explaining why it believed the approved design was safe and why petitioners' alternative design was not preferable. The quoted findings merely illustrate that the city believed that the

approved design was safe and that their consideration of petitioners' alternative did not change that belief. Findings that indicate the local government believed the applicants submitted sufficient evidence to support a conclusion that the relevant approval standards are met, and that petitioners did not present evidence adequate to undermine that conclusion, reflect a correct allocation of the burden of proof. *Bouman v. Jackson County*, 23 Or LUBA 628, 633 (1992).

In addition to the findings supporting that the city properly understood the burden of proof, the evidence of burden shifting relied upon by petitioners occurred during a conversation during the remand hearing. The decision itself is what we review to see whether the burden of proof has been shifted. *Terra v. City of Newport*, 24 Or LUBA 438, 441 (1993). Positions expressed during hearings are at most preliminary and subject to change in the final decision. *Id*. at 442; *Toth v. Curry County*, 22 Or LUBA 488, 492-93 (1991). Even considering the planning commissioner's statements, however, we do not see that he had an incorrect understanding of the party with the burden of proof. It is reasonably clear that he merely wanted petitioners' attorney to show him where she believed there was evidence that intervenors' design was unsafe. He clearly believed that there was evidence supporting intervenors' position that the Lily Road design was safe, and that if petitioners wanted him to weigh any conflicting evidence then they needed to show him where it was. While the dialogue provided by petitioners may illustrate some exasperation on the part of the planning commissioner, it does not demonstrate that he improperly shifted the burden of proof.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the decision violates the city's transportation system plan (TSP). According to petitioners, the city's TSP specifically requires Lily Road to be constructed on the north end of intervenors' property. Intervenors respond that because petitioners could have but did not raise that issue in *McCulloh I*, they may not raise that issue in the present appeal.[5]

[5] Intervenors also respond on the merits.

We recently discussed the extent of the *Beck* waiver principle in limiting issues that were conclusively resolved in prior appeals:

> "The *Beck* 'law of the case' or 'waiver' principle concerns reviewability on appeal. *Beck v. City of Tillamook*, 105 Or App 276, 278, 805 P2d 144 (1991) *aff'd in part, rev'd in part*, 313 Or 148, 831 P2d 678 (1992). Under the *Beck* waiver principle, issues that have been conclusively resolved at a prior point in a single continuous land use proceeding are not reviewable for a second time by LUBA or an appellate court at a later point in that proceeding. As the Supreme Court explained in *Beck*:
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> > "'ORS 197.763(7) provides:
> >
> > > "'When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence or testimony, any person may raise new issues which relate to the new evidence, testimony or criteria for decision-making which apply to the matter at issue.'
> >
> > "'In other words, when the record is reopened, parties may raise new, unresolved issues that relate to new evidence. The logical corollary is that parties may not raise old, resolved issues again. When the record is reopened at LUBA's direction on remand, the 'new issues' by definition include the remanded issues, but not the issues that LUBA affirmed or reversed on their merits, which are old, resolved issues.' 313 Or at 153 (footnote omitted).
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> "In *Schatz v. City of Jacksonville*, 113 Or App 675, 680, 835 P2d 923 (1992), the Court of Appeals clarified that the 'new' issues that may be raised during the later stages of a single proceeding and the 'old resolved' issues that may not be raised during the later stages of a single proceeding do not complete the universe of potential issues on appeal:
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> > "'However, another logical corollary is that issues may be considered on remand that were not or could not have been dispositively resolved on their merits in the appeal that resulted in the remand.'" *Rutigliano v. Jackson County*, 47 Or LUBA 476-77 (2004).

Although *Rutigliano* involved issues that had been resolved in prior appeals, the "old resolved issues that may not be raised" in subsequent appeals also include issues that could have been raised in prior appeals but were not. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500 (2004).

In addition, when a local government specifically limits the scope of the remand proceedings, issues that were not raised in the first appeal cannot be raised in a subsequent appeal. *O'Rourke v. Union County*, 31 Or LUBA 174, 176 (1996). In the present appeal, the city specifically limited the issues:

> "The initial approval in this matter was appealed to LUBA * * *. LUBA remanded three issues raised by the petitioners in that action. * * * The proceedings on remand were specifically limited to addressing the remanded assignments of error.
>
> "The three issues raised in petitioners' assignments of error are briefly restated as follows:
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> "(1) construction cannot take place on slopes greater than 30%;
>
> "(2) the CC&Rs were not approved prior to the planning commission decision; and
>
> "(3) the design of Lily Road must meet the street grade and safety standard." Record 32 (footnotes omitted).

Regarding petitioners' contention that the southern alignment violates the TSP, the city stated:

> "The Commission concludes that this issue has not been raised with any specificity by the opponents, such that the Commission can respond to their objection * * *." Record 39.

While we agree with petitioners that they adequately raised the issue at the *remand hearing*, the city also found that:

> "Petitioners in [*McCulloh I*] did not raise, nor did LUBA remand the commission's prior decision on the basis that his project did not require a Future Transportation Plan." Record 38.[6]

Petitioners discuss *Beck* in attempting to show that this issue was not waived. They point to the language from *Beck* that when a local government reopens the record to admit new evidence on

[6] The reference to a future transportation plan is from JMC 16.12.24(9) that a future transportation plan is required if the project does not comply with the TSP.

remand, it does so pursuant to ORS 197.763(7).[7] Although, petitioners argue that their arguments were preserved under ORS 197.763(7), the TSP issue they seek to raise is not a product of the new evidence the city accepted on remand.

Petitioners did not raise the issue of compliance with the TSP in *McCulloh I*, but they argue that it is a new or unresolved issue because "the issue is and has been Lily Road." Petition for Review 43. While the issue is and has been Lily Road, the issue has been the *safety* of Lily Road. Whether or nor the location of the approved Lily Road is inconsistent with the TSP is a different issue from the safety or lack thereof of Lily Road. Lily Road is in the same location and is the same length as it was in *McCulloh I.* The only new and unresolved issues are the safety issues related to the redesign. None of the changes proposed to Lily Road have any effect upon the issue of whether its location is consistent with the TSP. The TSP consistency issue could have been raised in the prior appeal but was not. That issue is not a new or unresolved issue. Therefore, the *Beck* waiver principle applies, and petitioners may not raise the TSP issue in this appeal.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city did not adopt adequate findings that it is "necessary" to approve a grade of 14 percent for the redesigned Lily Road.[8] JMC 18.21.050(J) generally requires street grades to be no more than 12 percent, but allows for grades of up to 14 percent when

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[7] ORS 197.763(7) provides:

> "When a local * * * planning commission * * * reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue."

[8] Intervenors argue that this issue was not raised in the prior appeal or in the remand hearing. Although it is a close question, we believe petitioners' arguments concerning JMC 18.21.050(J) were sufficient to preserve the issue in the prior appeal and at the remand hearing.

"necessary" if certain conditions are met.[9] The city adopted findings concluding that a grade of 14 percent is necessary and that the required conditions are met:

> "Based on the contour maps submitted in the original proceedings, and the subsequent evidence provided in written material and in testimony during the remand proceedings (specifically engineered diagrams relating to the proposed grade of Lily Road submitted by Thornton Engineering) the applicant/developer has presented all information required by the Planning Commission in order to determine the necessity of allowing the excessive gradient along Lily Road in written form. The Commission concludes that the topological conditions for this project, together with the safety concerns and location feasibility as discussed in other portions of these Findings and Conclusions and in the original Findings and Conclusions, necessitate an excessive gradient of 14%, as proposed by the applicant. The Commission further concludes that it is inherent in the physical limitations of the project and unavoidable that an excessive gradient will be required for the construction of Lily Road." Record 35.

Petitioners do not acknowledge or challenge the city's findings and conclusions quoted above. The city clearly found that due to the inherent physical limitations of the property, a grade of 14 percent would be required. The city also found that the conditions required to allow a grade of

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[9] JMC 18.21.050(J) provides:

> "Grades. 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) A contour map of the subdivision or development is presented showing the proposed subdivision in relationship with the existing contours. The contour interval shall not be greater than five (5) feet within the subdivision or development area.
>
> "(2) That the length 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. When guardrails or other protective structures are required, the plans for same shall be prepared by an engineer experienced in highway construction.
>
> "(4) The developer shall present all information required by the planning commission to determine the necessity for the excessive gradient in a written document."

14 percent were satisfied. Instead of challenging the city's findings regarding this provision, petitioners claim the 14 percent grade is not necessary by repeating their arguments that the road is not safe and that a better alternative exists on the northern portion of the property. As discussed earlier, petitioners' arguments regarding safety and their preference for the northern option were denied for a number of reasons. The city's findings regarding the 14 percent grade and the requirements of JMC 18.21.050(3) are adequate.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the city failed to include conditions of approval regarding future extension of streets. JMC 18.21.050(F) provides:

> "Where necessary to give access to or permit satisfactory future subdivision of adjoining land, streets shall be extended to the boundary of the subdivision or development. Reserve strips and street plugs shall be required to preserve the objectives of street extension. * * *"

Petitioners appear to argue that the redesigned Lily Road will not be extended to the boundary of the development. We are not sure that we understand petitioners' argument, because the design for Lily Road calls for a dedication of intervenors' property from the intersection of 3rd Street along the southern boundary. Record 224. The dedication allows for future connection to Lily Road from the south. This certainly seems to satisfy JMC 18.21.050(F). If petitioners' argument is that Lily Road must be immediately *paved* to the boundary with petitioners' property, we see nothing in the rule that requires that the street be paved to the boundary of the development. It is the right-of-way that must be extended to the boundary so that a street may later be extended to serve the adjoining land if necessary.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners argue that the project violates JMC 17.104.050(C)(6), which requires "the proposed use to have minimal adverse impact upon adjoining properties and improvements."

Intervenors respond that this issue was not an issue in the limited remand proceedings and that petitioners did not raise the issue with any specificity at the remand hearing. Petitioners have not responded to intervenors' assertion that the issue was not raised below and the issue is therefore waived.

The sixth assignment of error is denied.

The city's decision is affirmed.