

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

4                           LAWRENCE E. TOKARSKI,  
5                           OF THE LAWRENCE E. TOKARSKI  
6                           REVOCABLE LIVING TRUST,  
7                                   *Petitioner,*  
8

9   vs.

10   CITY OF SALEM,  
11   *Respondent,*  
12

13   and  
14

15   CREEKSIDE HOMEOWNERS  
16   ASSOCIATION, INC.,  
17   *Intervenor-Respondent.*  
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19   LUBA No. 2016-025  
20

21   FINAL OPINION  
22   AND ORDER  
23

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25                   Appeal from City of Salem.  
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27                   Alan M. Sorem, Salem, filed the petition for review and argued on behalf  
28 of petitioner. With him on the brief was Saalfeld Griggs PC.  
29

30                   Natasha A. Zimmerman, City Attorney’s Office, Salem, filed a response  
31 brief and argued on behalf of respondent.  
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33                   T. Beau Ellis, Lake Oswego, filed a response brief and argued on behalf  
34 of intervenor-respondent. With him on the brief was Vial Fotheringham LLP.  
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36                   BASSHAM, Board Member; HOLSTUN, Board Chair, participated in  
37 the decision.  
38

1 RYAN, Board Member, did not participate in the decision.

2

3 REMANDED

08/01/2016

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

**NATURE OF THE DECISION**

Petitioner appeals a planning commission decision that approves petitioner’s application to modify a portion of a planned unit development (PUD) approval to allow a four-lot subdivision.

**MOTIONS FOR OFFICIAL NOTICE**

Petitioner moves for LUBA to take official notice of a recorded re-plat of a lot that is a part of the larger PUD phase that includes petitioner’s lot. Intervenor-respondent Creekside Homeowners Association, Inc. (intervenor) moves for LUBA to take official notice of the conditions of approval for the final plat of Phase 11 of the PUD, which created Lot 473. There is no opposition to either motion, and they are allowed.

**MOTION TO FILE OVERLENGTH REPLY BRIEF**

Petitioner moves to file an overlength 10-page reply brief. There is no opposition to the motion, and it is allowed.

**FACTS**

Lot 473 is a 2.83-acre lot within Phase 11 of the Golf Club Estates at Creekside PUD (Creekside PUD). An unfortunate amount of history and detail is necessary to understand the issues in this case.

**A. Creekside PUD03-1**

The Creekside PUD was initially approved in 1990, with eight phases developed prior to 2003. In 2003, the city approved PUD03-1, which governed

1 84 acres of the Creekside PUD, and approved four additional phases, Phases 9  
2 through 12. In 2006, the city approved the final subdivision plat for Phase 11,  
3 which created 16 lots, including Lot 473. All but two of the lots in Phase 11  
4 are smaller lots intended for development with single-family dwellings without  
5 further subdivision. Lot 473 is one of two larger lots in Phase 11, referred to in  
6 the record as “acreage” lots.<sup>1</sup> Like the other lots in Phase 11, Lot 473 is zoned  
7 Single Family Residential (RS).

8 PUD03-1 contemplated that its phases would be ultimately connected by  
9 an extension of Lone Oak Road, which includes a bridge crossing over Jory  
10 Creek (Lone Oak extension). PUD03-1 included Condition 4.d, which required  
11 construction of Lone Oak Road, but provided no particular schedule or timing  
12 for construction. Instead Condition 4.d provided that “construction may be  
13 staged to support phasing of the development.”<sup>2</sup> Access to Phase 11 lots is

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<sup>1</sup> No party explains what designating a lot an “acreage” lot signifies, but it apparently means a larger-size lot within a subdivision that is intended or available for further subdivision into smaller lots to be developed with single-family dwellings.

<sup>2</sup> PUD03-1 Condition 4.d states, in full:

“Construct a full 34-foot-wide improvement within a 60-foot-wide of right-of-way along the realignment of Lone Oak Road SE within the subject property. The construction may be staged to support phasing of the development. The design and phasing of streets shall provide safe, orderly, and efficient circulation of traffic in, through, and out of each phase of the development to the satisfaction of the City Traffic Engineer.” Record 833.

1 provided by Sahalee Drive, which connects to points east. The western end of  
2 Sahalee Drive connects to a partially completed section of Lone Oak Road.  
3 The unconstructed portion of the Lone Oak Road right-of-way travels north,  
4 and once constructed, will provide connections to and among other phases of  
5 PUD03-1.

6 **B. First Amendment: PUD03-01A**

7 In 2006, the city approved a PUD amendment (PUD03-01A) that in  
8 relevant part required the applicant<sup>3</sup> to either construct Lone Oak Road, or  
9 enter into a performance agreement with the city for Phase 12 and a new phase,  
10 designated Phase 13. PUD03-01A is limited in scope and does not apply to  
11 Phase 11 or Lot 473. The city and the applicant subsequently entered into a  
12 performance agreement that requires the applicant to construct required  
13 improvements, including the Lone Oak extension, within 18 months. The  
14 agreement authorizes the city to withhold construction permits on lots within  
15 Phases 12 and 13 if required improvements are not constructed. In 2007, the  
16 city approved the final plat for Phase 12. Phase 12 has access to the already

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<sup>3</sup> We understand that petitioner Lawrence E. Tokarski is a controlling member of the various entities that applied for PUD03-01, as well as each of the phases authorized under PUD03-01, and the two subsequent amendments to the PUD. We do not understand petitioner to dispute that he is properly viewed as the “applicant,” or one of the applicants, for each of those applications, as well as the present application.

1 constructed portion of Lone Oak Road. No final plat for Phase 13 has been  
2 approved, and it remains unplatted.

3 **C. Second Amendment: PUD-SUB03-01A2**

4 In 2014, the city approved a second amendment (PUD-SUB03-01A2)  
5 which created new Phase 14 on 26 acres bordering the eastern side of the Lone  
6 Oak Road right-of-way. The city and the applicant entered into a memorandum  
7 of understanding (MOU) that details the schedule and scope of construction for  
8 the Lone Oak extension over the course of developing Phase 14. Like the first  
9 amendment, PUD-SUB03-01A2 also does not affect Phase 11 or Lot 473. To  
10 date, the Lone Oak extension has not been constructed. In 2015, the city  
11 adopted a capital improvement program that allocates funds for the bridge  
12 crossing needed to connect Lone Oak Road across Jory Creek.

13 **D. Lot 473**

14 In 2015, petitioner applied for a PUD modification and tentative  
15 subdivision plat approval, in order to divide Lot 473 into four lots, each to be  
16 developed with a single-family dwelling. The planning director approved the  
17 application, subject to conditions, including Condition 3, which required:

18 “Prior to final PUD plan/plat approval, construct Lone Oak Road  
19 SE from its existing southerly terminus at Muirfeld Street SE to its  
20 existing northerly terminus at August[a] Street SE as a minimum  
21 34-foot-wide improvement within a 60-foot-wide right-of-way.”  
22 Record 450.

23 Petitioner appealed the planning director’s decision to the planning  
24 commission, challenging Condition 3. Petitioner argued that development of

1 the four lots created by his application would generate only minimal traffic, and  
2 the traffic impacts would not be proportional to the million-plus dollars it will  
3 cost to construct the Lone Oak extension, not including the cost of the bridge,  
4 as required by Condition 3.<sup>4</sup> The city engineer recommended that Condition 3  
5 be modified to instead require a fee-in-lieu payment of \$9,212 for each of the  
6 four lots in the proposed subdivision. The planning commission initially voted  
7 to adopt the recommended modification, but subsequently reversed course and  
8 reinstated Condition 3 unchanged.

9 On February 25, 2016, the planning commission issued the city’s final  
10 decision, denying petitioner’s appeal, and approving the PUD modification and  
11 tentative subdivision plat with Condition 3 unchanged. This appeal followed.

12 **INTRODUCTION**

13 In three assignments of error, petitioner challenges imposition of  
14 Condition 3. In the first assignment of error, petitioner argues that the city  
15 erred in approving the application as a modification to PUD03-1, which  
16 apparently provided the basis under the city’s code for imposing Condition 3.  
17 In the second assignment of error, petitioner argues that imposition of  
18 Condition 3 violates the needed housing statutes, at ORS 197.307. In the third  
19 assignment of error, petitioner argues that the burden of constructing the Lone  
20 Oak extension is not “roughly proportional” to the traffic impacts of a four-lot

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<sup>4</sup> Petitioner’s traffic engineer estimated that construction of the Lone Oak extension would cost approximately \$1,364,000 in 2006 dollars.

1 subdivision, and therefore Condition 3 violates the Takings Clause of the  
2 United States Constitution, under the reasoning in *Dolan v. City of Tigard*, 512  
3 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994) and *Koontz v. St. Johns Water*  
4 *Management District*, \_\_ US \_\_, 133 S Ct 2586, 186 L Ed 2d 697 (2013).

5 For the reasons below, we agree with petitioner that the city erred in  
6 requiring that the proposed four-lot subdivision be approved as a modification  
7 to PUD03-1. Accordingly, the city had no basis under its code to impose  
8 Condition 3. Consequently, we need not resolve petitioner’s second and third  
9 assignments of error.

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioner argues that the city erred in processing his application as a  
12 PUD modification, rather than an application for a simple four-lot replat or  
13 subdivision of Lot 473. According to petitioner, the only basis for the city’s  
14 imposition of Condition 3, requiring petitioner to construct the Lone Oak  
15 extension prior to receiving final plat approval for his four lots, is the  
16 erroneous supposition that the subdivision of Lot 473 must be accomplished by  
17 a modification to PUD03-1. Petitioner argues that the application proposed no  
18 modifications to PUD03-1, and the city’s decision approved no modifications,  
19 and therefore no application for a PUD modification was required. Petitioner  
20 contends that the only applicable criteria for the proposed four-lot subdivision  
21 are those for subdivision approval, at Salem Revised Code (SRC) 205.010,  
22 rather than the criteria for a PUD amendment, at SRC 210.035.



1           Petitioner raised this issue during the proceedings below. The planning  
2 commission adopted no findings in response, but did adopt, by incorporation, a  
3 staff response:

4           “The approval criteria for modification of a PUD tentative plan  
5 included with the application notice, and addressed in the  
6 decision, are the correct approval criteria.

7           “As a platted lot within PUD03-1, Lot 473 remains subject to the  
8 conditions of approval in effect throughout the PUD. Twelve of  
9 the lots approved within the PUD03-1 tentative plan were acreage  
10 lots located adjacent to Sahalee Drive and the future extension of  
11 Lone Oak Road. These acreage lots, including Lot 473, were  
12 included as Phase 4 of the preliminary phasing plan for PUD03-  
13 01. Other acreage lots approved under the PUD03-1 tentative plan  
14 were amended to allow further residential development in 2006  
15 (PUD03-01A) and 2014 (PUD-SUB03-01A2). PUD03-1 and its  
16 subsequent amendments were approved as phased developments.

17           “SRC 210.015(b) provides that ‘Notwithstanding any other  
18 provision of the UDC, the applicable approval criteria and  
19 development standards for a PUD tentative plan with a subdivision  
20 or partition shall be the approval criteria and development  
21 standards set forth in this chapter [SRC Chapter 210].’ Other  
22 portions of the PUD03-1 tentative PUD plan were amended to  
23 allow for further residential development in 2006 (PUD03-01A)  
24 and 2014 (PUD-SUB03-01A2). Because the proposed  
25 modification differs from the original tentative plan approval, the  
26 proposed modification must be processed, like other amendments  
27 before it, as a modification to the tentative plan.” Record 15.

28           Petitioner contends that the foregoing finding misconstrues the applicable law,  
29 and fails to establish that a PUD modification is required in order to subdivide  
30 Lot 473 into four lots. We agree with petitioner.

1           Initially, we note that the city does not dispute petitioner’s premise that it  
2 is the purported modification to PUD03-1 that provides the basis for the city to  
3 impose Condition 3. As discussed below, modifications to a final PUD are  
4 governed by SRC 210.035(b), and subject to criteria that require that the  
5 “proposed modification is not substantially inconsistent with the conditions of  
6 the original approval.”<sup>5</sup> The city apparently imposed Condition 3 to ensure that  
7 the proposal would be consistent with Condition 4.d of PUD03-1. We do not  
8 understand the city to argue that the city could have imposed Condition 3

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<sup>5</sup> SRC 210.035(b) provides, in relevant part:

“(1) Applicability. The approval of a PUD final plan, with or without a land division, may be modified after its effective date if the proposed modification meets the criteria set forth in this section. Modifications that do not meet the criteria in this section require submittal of a new application for PUD final plan.

“\* \* \* \* \*

“(4) Criteria. An application for modification a PUD final plan approval shall be granted if the following criteria are met.

“(A) The proposed modification is not substantially inconsistent with the conditions of the original approval; and

“(B) The proposed modification will not result in significant changes to the physical appearance of the development, the use of the site, and the impacts on surrounding properties.”

1 absent a modification under SRC 210.035(b)(4), based solely upon a proposal  
2 to subdivide or replat Lot 473 into four lots.

3         However, what is missing from the city’s findings is an explanation for  
4 why the proposed subdivision of Lot 473 is accurately viewed as a “proposed  
5 modification” of PUD03-1. By their terms, the SRC 210.035 standards for  
6 approving a PUD modification apply only to proposals that modify a PUD. If  
7 an application does not, in fact, propose to modify a PUD, then the SRC  
8 210.035 modification standards would seem to be inapplicable.

9         The above-quoted finding cites SRC 210.015, entitled “Planned Unit  
10 Development with Land Division,” as support for the city’s apparent view that  
11 an application to subdivide an already created and recorded lot within a  
12 previously approved PUD requires a modification to the PUD. However, SRC  
13 210.015 is evidently directed at circumstances where an applicant applies for  
14 both a tentative PUD approval and a tentative subdivision approval. Nothing  
15 in SRC 210.015, or any other code section cited to us, suggests that a PUD  
16 modification is necessary in order to replat or subdivide a lot created and  
17 recorded as part of an already approved and final PUD.

18         The above-quoted finding also states that “[b]ecause the proposed  
19 modification differs from the original tentative plan approval, the proposed  
20 modification must be processed \* \* \* as a modification to the tentative plan.”  
21 *Id.* However, as we understand matters, Lot 473 was created as one of two  
22 “acreage lots” within Phase 11, with the apparent expectation that the acreage

1 lots would later be subdivided to allow for single-family development on the  
2 later subdivided lots. It is not clear, and the finding does not explain, why  
3 subdivision of a created and recorded acreage lot as contemplated by PUD03-1  
4 must be viewed as a “modification” of PUD03-1.

5 Finally, the above-quoted finding cites to two earlier PUD amendments,  
6 PUD03-01A and PUD-SUB03-1A2, and argues that because those proposals  
7 involved subdivisions that were processed as PUD modifications, petitioner’s  
8 proposal must also be processed as a PUD modification. We understand  
9 PUD03-01A to be the 2006 amendment to PUD03-1 that created a new phase,  
10 Phase 13. We understand PUD-SUB03-1A2 to be the 2014 amendment to  
11 PUD03-01 that created a new Phase 14. However, the city does not explain  
12 why the fact that the city has processed as PUD modifications applications to  
13 create new PUD phases means that an application limited to a proposal to  
14 subdivide an already *platted and recorded* lot must be processed as a PUD  
15 modification.

16 In addition, petitioner notes that in 2015 the city approved a replat of the  
17 other acreage lot in Phase 11, Lot 482, to create six smaller lots, without  
18 requiring that the replat be processed as a PUD modification. To the extent the  
19 city’s past practice informs the correct process to be followed and standards to  
20 be applied in the present case, petitioner appears to be correct that the city has  
21 approved subdivision of platted acreage lots as replats, rather than treating the  
22 application as one to modify PUD03-1.

1           In its brief, the city also argues that because petitioner applied for a PUD  
2 modification with subdivision, the city appropriately processed and analyzed  
3 the application as a PUD modification. However, an applicant may file an  
4 application for development, while also objecting to the need to file the  
5 application, without thereby waiving the objection. *See Recovery House VI v.*  
6 *City of Eugene*, 150 Or App 382, 386, 946 P2d 342 (1997) (LUBA may review  
7 the issue of whether a conditional use permit was required at all, even though  
8 the applicant filed for the conditional use permit and the city granted the  
9 permit). Here, petitioner objected below that no application to modify the PUD  
10 was required because the application proposed no modifications, and that only  
11 an application for a replat or subdivision was needed. The city responded in  
12 the above-quoted finding, to the effect that an application for PUD  
13 modification was required. On appeal, petitioner challenges that finding. In  
14 essence, the city’s response is a variant of the “invited error” principle rejected  
15 in *Recovery House VI*, that petitioner’s challenge on appeal should be rejected  
16 because petitioner effectively invited the city to err by filing an application for  
17 a PUD modification. However, if that is the city’s argument, it provides no  
18 assistance. The city chose to continue processing and analyzing the application  
19 as a PUD modification, even after petitioner argued (correctly) in its local  
20 appeal to the planning commission that no modification was proposed or  
21 required.

1 In many circumstances, requiring an applicant to obtain an unnecessary  
2 development approval may be only harmless error. But in the present case, the  
3 purported need to obtain approval to modify PUD03-1 was apparently the only  
4 basis for the city to impose Condition 3, requiring construction of the Lone  
5 Oak extension prior to final subdivision plat approval. The city does not argue  
6 that it had a lawful basis to impose Condition 3 on a stand-alone application for  
7 a replat or subdivision of Lot 473 to create four lots, in the absence of a PUD  
8 modification.

9 In sum, we agree with petitioner that the city erred in requiring petitioner  
10 to seek and obtain approval to modify PUD03-1, in order to subdivide Lot 473  
11 into four lots.

12 The first assignment of error is sustained.

13 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

14 As noted, the second assignment of error argues that imposition of  
15 Condition 3 violates the ORS 197.307(4) prohibition on imposing conditions  
16 on needed housing that are not clear and objective, or that have the effect of  
17 discouraging needed housing through unreasonable cost or delay.<sup>6</sup> The third

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<sup>6</sup> ORS 197.307(4) provides:

“Except as provided in [ORS 197.307(6)], a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect,

1 assignment of error argues that requiring construction of the Lone Oak  
2 extension as required by Condition 3 is an unconstitutional exaction that is  
3 disproportionate to the traffic impact of the proposed four lots.

4       However, we need not resolve the second and third assignments of error.  
5 As discussed above, the city erred in requiring petitioner to obtain approval to  
6 modify PUD03-1, and the purported PUD modification was the only asserted  
7 basis for imposing Condition 3. Remand is necessary under the first  
8 assignment of error to remove Condition 3, the only condition or aspect of the  
9 city’s decision that petitioner challenges on appeal.<sup>7</sup> Accordingly, no purpose  
10 would be served by addressing the second and third assignments of error.

11       We do not reach the second or third assignments of error.

12       The city’s decision is remanded.

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either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

<sup>7</sup> We do not mean to foreclose the possibility that on remand the city may choose to impose other conditions, for example a condition requiring a fee-in-lieu contribution towards construction of the Lone Oak extension, to ensure compliance with any applicable tentative subdivision plat criteria.