

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

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NATURE OF THE DECISION

Petitioner appeals a city council decision approving a 22-lot subdivision.

REPLY BRIEF

Petitioner moves to file a reply brief to address “new matters” raised in the response brief, and also seeks permission to file an overlength eight-page reply brief.¹ Intervenor-respondent Canby Development, LLC (intervenor) opposes the motions to file a reply brief and to exceed the page limit, and alternatively moves to strike portions of the reply brief.

Intervenor first argues that the reply brief was untimely filed because it was not filed within the seven-day period specified in OAR 661-010-0039 (2017), but instead was filed one day late. However, intervenor has not

¹ At the time of this appeal, OAR 661-010-0039 (2017) provided, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies within seven days of the date the respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief, state agency brief, or amicus brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board.”

1 established that filing the reply brief one day late prejudiced any party's
2 substantial rights in this appeal.²

3 Intervenor next challenges the motion to file an eight-page reply brief,
4 arguing that the proposed reply brief is devoted to replies to relatively
5 straightforward waiver responses in the response brief, which in turn respond to
6 preservation statements made in the petition for review. In his motion, petitioner
7 states that the overlength reply brief is justified based on the “novelty of
8 Respondents’ arguments and the complexity of the issues addressed[.]” Motion
9 to File Reply Brief and Exceed Page Limit 2. However, petitioner does not cite
10 to any example of novel or complex issues raised in the response brief. We tend
11 to agree with intervenor that petitioner has not established that an overlength
12 reply brief is warranted in this case to address intervenor’s waiver arguments.
13 However, we need not resolve that argument because we agree with intervenor’s
14 alternative argument that Sections II.B and III of the reply brief do not address
15 “new matters” raised in the response brief. OAR 661-010-0039 (2017). If those
16 sections are stricken, the remainder of the reply brief is approximately five pages
17 in length.

18 Finally, intervenor objects to Section IV of the reply, which responds to a
19 waiver challenge in the response brief to the fifth assignment of error.

² OAR 661-010-0005 provides in relevant part that “[t]echnical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.”

1 Intervenor’s argument rebuts the substance of Section IV and, in addition,
2 advances a new waiver challenge. However, LUBA’s rules do not provide for a
3 substantive rebuttal to the content of a reply brief, or multiple opportunities to
4 assert waiver. *Id.* Accordingly, LUBA will ignore the arguments in intervenor’s
5 objection to Section IV of the reply brief.

6 The motion to strike is granted with respect to Sections II.B and III of the
7 reply brief, the motion to file an overlength brief is denied as moot, and the
8 remainder of the reply brief is allowed.

9 **FACTS**

10 The subject property is a 6.84-acre parcel zoned Low Density Residential
11 (R-1). The property is triangular in shape, and has a single access from N. Maple
12 Street. The Canby Municipal Code (CMC) limits residential density on land
13 served by a single access point, but CMC 16.46.010.F provides an exemption for
14 certain streets, including N. Maple Street, “provided that legally binding
15 alternative emergency vehicle access is available.”³

16 The subject property is bordered on its northeastern side by a city-owned
17 linear tract that includes what is known as the Molalla Forest Logging Road

³ CMC 16.46.010.F provides:

“N. Maple Street, north of NE 23rd Avenue, and S. Elm Street, south of SW 13th Avenue, shall be exempt from the residential unit restrictions for single access roads, provided that legally binding alternative emergency vehicle access is available. Road width requirements for these roads shall remain in effect.”

1 (Logging Road). The city acquired the Logging Road sometime around 2002,
2 using in part state and federal funds that were advanced on condition that the city
3 grant a conservation easement including the Logging Road to the Oregon
4 Department of Fish and Wildlife (ODFW). On May 28, 2002, the city and
5 ODFW executed a conservation easement in favor of ODFW (the 2002
6 Easement). The 2002 Easement prohibits any use of the property, including the
7 Logging Road, unless expressly permitted by the 2002 Easement or a separately
8 adopted joint management plan, or as approved in writing by ODFW, with a non-
9 exclusive list of examples of prohibited uses. One express prohibition, listed in
10 Section 4(h) of the 2002 Easement, states:

11 “Off-road Vehicles. Except for emergency vehicles and vehicles
12 needed to facilitate implementing an approved management plan,
13 motorized off-road vehicles such as snowmobiles, dune buggies, all-
14 terrain vehicles and motorcycles may not be operated on the
15 Property, except on roads open to the public.” Record 216-17.

16 Sometime after executing the 2002 Easement, the city constructed a 10-foot wide
17 paved pedestrian/bicycle path within the linear course of the Logging Road.

18 In 2018, intervenor applied to the city to subdivide the subject property
19 into 22 lots for single-family dwellings. To avoid the CMC limitations on
20 residential density based on a single access road, intervenor proposed providing
21 emergency vehicle access via the Logging Road, with a connection to the internal
22 subdivision streets via Tract C. The planning commission approved the proposed
23 subdivision. Opponents appealed the planning commission decision to the city
24 council. On January 10, 2018, an ODFW deputy director wrote the city council

1 taking the position that city approval of the proposed emergency access via the
2 Logging Road to intervenor's property, was not permitted under the terms of the
3 2002 Easement. Record 237-38. Based on the ODFW letter, petitioner argued to
4 the city that the proposed emergency access is not permitted under the terms of
5 the 2002 Easement. Record 232-34.

6 On January 17, 2018, the city council held a hearing on the appeal, at which
7 an ODFW representative appeared and testified. At the conclusion of the January
8 17, 2018 hearing the city council closed the record, deliberated, and voted to deny
9 the appeal, approving the subdivision application, with an additional condition of
10 approval intended to address the issue raised by ODFW and petitioner.

11 In its final decision, issued on February 7, 2018, the city council concluded
12 that the proposed emergency access is permitted under the terms of the 2002
13 Easement. In the alternative, the city council found that, if the proposed
14 emergency access is prohibited, the use can be allowed with the express written
15 consent of ODFW. To ensure resolution of this issue, the city council imposed
16 Condition of Approval 1 (Condition 1), which provides that "[t]he Applicant shall
17 comply with the terms of the Canby Landing Conservation Easement between
18 the City of Canby and ODFW dated May 28, 2002." Record 55. This appeal
19 followed.⁴

⁴ ODFW initially intervened in this appeal on the side of petitioner, but later withdrew, after ODFW and intervenor resolved their portion of this dispute. Motion to Withdraw Motion to Intervene by ODFW 1.

1 **FIRST, SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

2 The first through fourth assignments of error all concern Condition 1 and
3 compliance with the CMC 16.46.010.F requirement for “legally binding
4 alternative emergency vehicle access.”⁵ We address them together.

5 **A. The City Council Findings**

6 As noted, the city council’s primary finding is that the subject property has
7 “legally binding alternative emergency vehicle access,” based on the terms of the
8 2002 Easement and the management plan signed by the city and ODFW, both of
9 which authorize use of the easement for at least some types of emergency access.⁶

⁵ Intervenor argues that petitioner did not raise any objection to Condition 1 during the proceedings below, despite the fact that Condition 1 was proposed and discussed during those proceedings. Intervenor argues that petitioner has the burden of raising objections locally to Condition 1 but failed to do so, and thus failed to preserve any challenges to Condition 1 before LUBA. Petitioner responds that several versions of Condition 1 were discussed below, and petitioner was under no obligation to object to the wording of Condition 1 because petitioner could not know which version the city would adopt as part of its final written decision. We agree with petitioner. Intervenor cites no authority for the proposition that, to preserve challenges to the adequacy of a condition of approval for purposes of appeal to LUBA, a party must lodge objections to the condition if some version of the condition ultimately adopted was discussed during the proceedings below. Petitioner raised issues regarding compliance with CMC 16.46.010.F, which is sufficient to satisfy the preservation requirements of ORS 197.763(1). Petitioner was not obligated to anticipate the precise language of conditions of approval the city might or might not adopt in its final written decision to ensure compliance with CMC 16.46.010.F.

⁶ The city council findings state, in relevant part:

“The Applicant’s legal counsel, the Planning Director, and City Attorney, offered oral testimony at the January 17 hearing indicating that in their view the terms of the conservation easement allow emergency vehicles on the Logging Road which could serve the project. An ODFW representative, Mr. Richard Duncan, attended the hearing and offered neutral oral testimony. Mr. Duncan indicated that ODFW was willing to discuss the scope of emergency access and ODFW’s primary concern was the new connection between the Project and the existing Logging Road, not the use of the Logging Road for emergency access.

“The Council finds that substantial evidence in the record indicates that the Logging Road can be used for emergency access that can serve the project. In so finding, the Council relies on the testimony of the Planning Director and City Attorney, as well as Section 4.h. of the 2002 Conservation Easement, which provides [quoting Section 4.h].

“The Council received testimony indicating that the Canby Landing Management Plan specifically contemplates the Logging Road being used for emergency access. * * * The Council also finds that to any extent that the 2002 Conservation Easement could be read to prohibit the proposed access, Section 15 of the easement allows it to be modified with the express written consent of ODFW and the City, and Mr. Duncan’s testimony indicated that the ODFW would work with the Applicant to see if a solution under the terms of the conservation easement could be reached. The Council expressly adopts the January 16, 2018 memorandum from the Planning Director as part of these findings.

“To conclude, the Council finds that the 2002 Conservation Easement and Management Plan allow use of the Logging Road for emergency access and that substantial evidence in the whole record demonstrates that the Applicant can obtain legal access to the Logging Road. To ensure that this is done, the Council shall apply the following condition of approval: [quoting Condition 1].” Record 47-48.

1 In the alternative, the city council found that, even if the proposed emergency
2 access is not within the scope of the 2002 Easement, ODFW indicated
3 willingness to negotiate the scope of the 2002 Easement with the city and
4 intervenor. Record 47. To ensure resolution of this issue, the city council imposed
5 Condition 1, which binds intervenor to comply with the terms of the 2002
6 Easement. Record 55.

7 **B. Petitioner’s Arguments**

8 In the third and fourth assignments of error, petitioner argues that the city
9 council misconstrued CMC 16.46.010.F and the terms of the 2002 Easement to
10 find that the proposed emergency access is permitted by the 2002 Easement, and
11 therefore is sufficient to establish the “legally binding emergency vehicle access”
12 required by CMC 16.46.010.F. According to petitioner, the 2002 Easement is
13 properly interpreted to allow emergency access only to serve the conservation
14 area, not residential development on adjoining lands. Petitioner contends that the
15 only way the Logging Road can satisfy CMC 16.46.010.F is if ODFW consents
16 in writing to include emergency access for intervenor’s property. In the first and
17 second assignments of error, petitioner argues that Condition 1 is insufficient to
18 ensure that intervenor obtains the required ODFW consent to allow the 2002
19 Easement to be used for the proposed emergency access.⁷

⁷ As noted, the parties advise us that, in fact, ODFW has signed a settlement agreement with intervenor and the city that authorizes the conservation area to be used for emergency access to the subject property.

1 The fundamental issue raised in the first and second assignments of error
2 is whether emergency access to the subject property is within the scope of the
3 2002 Easement. No party disputes that the 2002 Easement is ambiguous on this
4 point.⁸ Resolving that issue requires interpretation of the 2002 Easement, and is
5 a matter of real estate law involving, among other things, a determination of the
6 intent of the parties to the 2002 Easement. Generally, a final and authoritative
7 determination regarding the intent and scope of deeds, easements and similar real
8 estate documents can be obtained only in circuit court, based on application of
9 real estate law. *See Central Oregon Landwatch v. Deschutes County*, 75 Or
10 LUBA 328, 334-35 (2017) (interpreting deeds under real estate law is a function
11 within the particular competence of the circuit court, and is a function that local
12 governments and LUBA, in the exercise of land use approval and review, should
13 avoid if possible). Land use review bodies such as the city council are not
14 particularly competent bodies to render interpretations of ambiguous terms in
15 easements or deeds. For that reason, where an issue arises regarding compliance
16 with an approval criterion that can be resolved only by interpretation of the
17 ambiguous terms of an easement, the most problematic option for the local

⁸ If the 2002 Easement unambiguously authorized the proposed emergency access, then the city could simply cite to the 2002 Easement as substantial evidence demonstrating compliance with CMC 16.46.010.F, and no particular findings, interpretations or conditions would be necessary.

1 government is to rely, without more, on its own interpretation of the ambiguous
2 terms of an easement to determine compliance with the approval criterion.

3 A less problematic option would be to impose conditions, at least as an
4 alternative, intended to ensure that the legal uncertainty is resolved prior to final
5 development approvals. Such a condition could take various forms. For example,
6 it could require the applicant to obtain a revised easement from the parties to the
7 2002 Easement clarifying that the scope of the 2002 Easement includes the
8 proposed access, or it could require the applicant to obtain a final circuit court
9 ruling interpreting the 2002 Easement in the applicant's favor.

10 Possibly the least problematic option is for the local government to
11 interpret the terms of its approval criterion, if it can, to the effect that compliance
12 can be determined regardless of how the ambiguous terms of the 2002 Easement
13 are interpreted or whether the dispute over the terms of the 2002 Easement is
14 resolved. In the present case, exercise of this option may be difficult, as CMC
15 16.46.010.F requires a finding that "legally binding" emergency access is
16 available, and it is not clear to us that there is any sustainable interpretation of
17 CMC 16.46.010.F that would allow the city to find that the proposed emergency
18 access complies with CMC 16.46.010.F while completely avoiding the issue of
19 whether the scope of the 2002 Easement includes emergency access for the
20 subject property. In any case, the city did not in fact attempt to interpret CMC
21 16.46.010.F in a manner that would allow compliance to be determined without
22 regard for how the ambiguous terms of the 2002 Easement are interpreted.

1 Turning to petitioner's arguments, petitioner first disputes the merits of the
2 city's interpretation of the 2002 Easement, that Section 4(h) authorizes the
3 proposed emergency access. According to petitioner, the stronger interpretation
4 of the 2002 Easement is that Section 4(h) authorizes emergency access only to
5 protect land within the conservation area, not to protect development on adjoining
6 lands outside the conservation area. Consequently, petitioner argues, the city's
7 only option to demonstrate compliance with CMC 16.46.010.F is to expressly
8 require the applicant to obtain ODFW's consent to authorize the emergency
9 access. However, petitioner argues, Condition 1 is insufficient to accomplish this
10 task. Petitioner contends that Condition 1 only requires intervenor to comply
11 with the existing 2002 Easement, and does not explicitly require intervenor to
12 obtain ODFW's consent to use the conservation area for emergency access to the
13 subject property.

14 As explained, neither the city nor LUBA is in a position to render a final
15 or authoritative interpretation of the 2002 Easement. Because the city in the
16 alternative imposed Condition 1 to address the possibility that it misinterpreted
17 the 2002 Easement and ODFW consent is required, if Condition 1 is adequate to
18 ensure compliance with CMC 16.46.010.F then there is no need for LUBA to
19 address petitioner's arguments regarding the correct interpretation of the 2002
20 Easement. Accordingly, we assume without deciding that the 2002 Easement was
21 not intended to allow the conservation area to be used for emergency access to

1 surrounding properties, and we focus our analysis on petitioner's challenges to
2 Condition 1.

3 The city manager suggested Condition 1 as a means to require the applicant
4 to meet with ODFW to resolve the emergency access issue raised by ODFW.
5 Petition for Review 14 (quoting portions of recording of January 17, 2018 city
6 council hearing). In its findings explaining Condition 1, the city council
7 expressly assumed that the 2002 Easement prohibits the proposed access, and
8 noted both that Section 15 of the 2002 Easement allows the 2002 Easement to be
9 modified with the express consent of ODFW and the city, and that ODFW has
10 expressed willingness to negotiate with the applicant to see if a solution can be
11 reached. Record 47 n 7. Read in this context, it is clear that the city intended
12 Condition 1 to require intervenor to negotiate with ODFW to resolve the
13 emergency access issue.

14 Given the context of Condition 1, we disagree with petitioner that
15 Condition 1 is inadequate to ensure compliance with CMC 16.46.010.F. While
16 Condition 1 does not *explicitly* require intervenor to negotiate with ODFW to
17 resolve the emergency access issue, that was clearly the city's intent. Condition
18 1 is framed as an alternative, under the assumption that the 2002 Easement does
19 not authorize emergency access for the subject property. Under that assumption,
20 the only way to ensure compliance with CMC 16.46.010.F is to obtain ODFW's
21 written consent to use the 2002 Easement for emergency access for the subject
22 property. As framed, Condition 1 is reasonably understood as a directive to

1 intervenor to obtain ODFW's consent. Petitioner has not demonstrated that the
2 city erred in its alternative approach to establishing compliance with CMC
3 1.46.010.F. Accordingly, the arguments under the first through fourth
4 assignments of error do not provide a basis for reversal or remand, and those
5 assignments of error are denied.

6 **FIFTH ASSIGNMENT OF ERROR**

7 Under the fifth assignment of error, petitioner argues that approval of the
8 Logging Road as emergency access for the subject property is inconsistent with
9 CMC 16.46.050, which is one of the standards governing access. CMC 16.46.050
10 specifically governs "nonconforming access" and provides:

11 "Legal access connections in place as of April 19, 2000, that do not
12 conform with the standards herein are considered nonconforming
13 features and shall be brought into compliance with applicable
14 standards under the following conditions:

- 15 "A. When new access connection permits are requested; or
- 16 "B. Change in use or enlargements or improvements that will
17 significantly increase trip generation."

18 The Logging Road has a 10-foot-wide paved pedestrian pathway that was
19 constructed sometime after the 2002 Easement was signed. Petitioner contends
20 that pursuant to CMC 16.46.050 the city is required, when approving a new
21 access connection between the subject property and the Logging Road, to
22 conform the Logging Road to the currently applicable street width standards, and
23 hence require that the Logging Road be improved from the current 10 feet of

1 paved width to the minimum required street width. However, petitioner argues
2 that the city adopted no findings addressing compliance with CMC 16.46.050.

3 Intervenor offers a number of responses, including that no issue of
4 compliance with CMC 16.46.050 was raised below and therefore the issue raised
5 under this assignment of error is waived, under ORS 197.763(1).⁹ Petitioner
6 offers a number of replies to the waiver argument. However, we need not fully
7 resolve the parties' disputes regarding waiver, because petitioner has failed to
8 establish that CMC 16.46.050 is an applicable approval criterion.

9 Contrary to petitioner's argument, the city council decision did adopt a
10 finding regarding CMC 16.46.050. The city council decision addressed CMC
11 16.46.050 as follows:

12 "FINDING: The accesses subject to City spacing standards are new
13 and, therefore, this section does not apply." Record 16.

14 Petitioner does not acknowledge, or challenge, this finding. We understand the
15 city to find that CMC 16.46.050 is inapplicable because it is not concerned with
16 new access connections but only with "[l]egal access connections in place as of

⁹ ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 April 19, 2000[.]” *Id.* The approved new access connection between the subject
2 property and the Logging Road was obviously not “in place as of April 19, 2000,”
3 and petitioner does not explain how CMC 16.46.050 could possibly apply to that
4 new access. *Id.*

5 Petitioner’s only explanation for the applicability of CMC 16.46.050 is that
6 the Logging Road “was utilized for decade[s] prior to its conversion into a
7 walking/bicycle trail.” Petition for Review 46. However, the only alleged
8 “nonconformity” petitioner cites is the 10-foot wide paved pedestrian trail, which
9 was constructed sometime after April 19, 2000. As petitioner acknowledges,
10 sometime after April 19, 2000, the Logging Road right-of-way was converted to
11 a pedestrian/bicycle path, and petitioner cites no reason to believe the 10-foot
12 paved width does not conform to whatever standards apply to a
13 pedestrian/bicycle path. Petitioner appears to suggest that the Logging Road as
14 it existed prior to its conversion to a pedestrian/bicycle path did not conform to
15 whatever standards would apply if the city were now approving the Logging
16 Road as a new city street. That may be, but the city approved the emergency
17 access use of the post-2000 and presumably conforming pedestrian/bicycle path,
18 not the old Logging Road as it existed on April 19, 2000, prior to its conversion
19 to a pedestrian/bicycle path. The city found, in an unchallenged finding, that
20 CMC 16.46.050 is inapplicable, and petitioner has not established the city erred
21 in any regard involving CMC 16.46.050.

22 The fifth assignment of error is denied.

1 The city's decision is affirmed.