

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

4
5 JULIE HULME, ROB HANDY, and H.M. SUSTAITA,
6 *Petitioners,*

7
8 vs.

03/06/19 PM 1:17 LUBA

9
10 CITY OF EUGENE,
11 *Respondent,*

12
13 and

14
15 HOME BUILDERS ASSOCIATION OF LANE COUNTY
16 and LOMBARD APARTMENTS, LLC,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2018-118

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Eugene.

25
26 Sean T. Malone, Eugene, filed the petition for review and a response brief,
27 and argued on behalf of petitioners.

28
29 Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response
30 brief and argued on behalf of respondent.

31
32 Bill Kloos, Eugene, filed a cross-petition for review on behalf of
33 intervenor-respondent Home Builders Association of Lane County. With him on
34 the brief was the Law Office of Bill Kloos, PC.

35
36 Micheal M. Reeder, Eugene, filed a cross-petition for review and a
37 response brief, and argued on behalf of intervenor-respondent Lombard
38 Apartments, LLC. With him on the brief was the Law Office of Mike Reeder.

1 ZAMUDIO, Board Member; RYAN, Board Chair; participated in the
2 decision.

3
4 RUDD, Board Member, did not participate in the decision.

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6 AFFIRMED

03/06/2019

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

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MOTION TO INTERVENE

Home Builders Association of Lane County (HBA) and Lombard Apartments, LLC (Lombard) move to intervene on the side of respondent. No party opposes the motions, and they are allowed.

BRIEFING

Petitioners filed a petition for review. Lombard filed a cross-petition for review. HBA filed a cross-petition for review joining in and adopting Lombard’s cross-petition for review in all respects, including the requested relief. Lombard also filed a response brief responding to the petition for review. Petitioners filed a response brief responding to the cross-petition for review. The City of Eugene (the city) filed one response brief responding to both the petition for review and the cross-petitions for review.

Petitioners move for permission to file a reply brief to respond to arguments and responses raised in the response briefs. No party filed any objection to the reply brief, and it is allowed.

NATURE OF THE DECISION

Petitioners and cross-petitioners challenge a city planning commission decision approving with conditions site review, adjustment review, and a Willamette River Greenway permit (Greenway Permit) for a 94-unit apartment complex.

1 **FACTS**

2 The subject property is comprised of approximately 3.59 acres, located
3 between River Road and the Willamette River (the river), and is zoned Medium-
4 Density Residential (R-2). The western boundary of the property abuts River
5 Road. Lombard Street is a short, dead-end street that currently terminates at the
6 southern boundary of the property and provides access to a residential area
7 immediately south of the subject property via River Road to Fir Lane. Fir Lane
8 intersects Lombard Street south of the subject property. The eastern boundary of
9 the property abuts city property that meets the river and contains a public paved
10 pedestrian and bike path along the river (the riverfront path). Record 220. The
11 entire property is within the Willamette River Greenway (the Greenway).

12 Lombard applied to the city for site review approval, adjustment review,
13 and a Greenway Permit to construct four, two- and three-story apartment
14 buildings containing 94 multi-family dwelling units, a leasing office,
15 maintenance building, and other site improvements, including parking areas. The
16 buildings will be up to 35 feet tall. The development is sited in the western portion
17 of the property, away from the river. A fenced, open space area is planned on the
18 easternmost portion of the property between the development and the riverfront
19 path.

20 Access to the apartment complex will be developed from River Road to
21 the west and from Lombard Street to the south. The development will extend
22 Lombard Street onto the property from the current terminus of Lombard Street to

1 the northern property line and be dedicated to the city for public use. The parking
2 area will include two parking drives that allow vehicle traffic through the
3 development connecting to River Road and Lombard Street.

4 The city hearings official held a hearing on the application and approved
5 the development in a written decision. Opponents appealed the hearings official's
6 decision to the planning commission. The planning commission held a hearing
7 and approved the development in a written decision that adopted and modified
8 parts of the hearings official's decision. Petitioners appeal the planning
9 commission's decision.

10 **FIRST ASSIGNMENT OF ERROR**

11 In the R-2 zone, the maximum net density is 28 dwelling units per acre.
12 Eugene City Code (EC) Table 9.2750. EC 9.2751(1)(b) defines "net density" to
13 mean "the number of dwelling units per acre of land in actual residential use and
14 reserved for the exclusive use of the residents in the development, such as
15 common open space or recreation facilities." EC 9.2751(1)(c)(1) further provides
16 that "[t]he acreage of land considered part of the residential use shall exclude
17 public and private streets and alleys, public parks, and other public facilities." In
18 calculating acreage for net density, the city counted the entire 3.59-acre property,
19 and excluded only a 0.21-acre area to be dedicated for the extension of Lombard
20 Street. Record 25. The city's calculation allows 94 dwelling units. *See*
21 EC9.2751(1)(c)(2) ("In calculating the minimum net density required for a

1 specific lot or development site, the planning director shall round down to the
2 previous whole number.”).

3 In the first assignment of error, petitioners argue that the planning
4 commission misconstrued applicable law in calculating the subject property’s
5 maximum net density. ORS 197.835(9)(a)(D). Petitioners argue that the planning
6 commission improperly included in the acreage calculation areas of the property
7 that should be excluded from the calculation. We review the planning
8 commission’s construction to determine whether it is correct. *McCoy v. Linn*
9 *County*, 90 Or App 271, 275, 752 P2d 323 (1988).

10 **A. Parking area**

11 EC 9.0500 contains general EC definitions and provides, in part:

12 **“Driveway.** The area located outside of the public right-of-way that
13 abuts the access connection and allows for vehicles to move to or
14 from a development site. * * *

15 “* * * * *

16 **“Parking Area.** Any area which can be used by motor vehicles,
17 recreational vehicles, trailers, and boats for parking, including
18 driveways and access aisles providing access to the parking stalls.

19 “* * * * *

20 **“Street.** An improved or unimproved public or private way, other
21 than an alley, that is created to provide ingress or egress for
22 vehicular traffic to one or more lots or parcels, excluding a private
23 way that is created to provide ingress or egress to land in conjunction
24 with the use of land for forestry, mining, or agricultural purposes. A
25 ‘street’ includes the land between right-of-way lines within the
26 ingress/egress easement areas serving multiple residential lots but

1 excluding ‘flagpole’ portions of flag lots.” (Boldface in original.)
2 EC 9.5500(11) contains multiple-family development standards and provides, in
3 part:

4 “(b) Driveways. Driveways and parking drives are private
5 roadways for projects or portions of projects not served by
6 streets. Driveways and parking drives shall be designed in
7 accordance with the following standards:

8 “1. Driveways. Driveways provide vehicular access to
9 parking and dwelling units but do not provide primary
10 pedestrian access to units. Driveways are intended to
11 be used primarily for vehicular circulation and
12 dwelling access and should be visually distinct from
13 streets. * * *

14 “2. Parking Drives. Parking drives are driveways lined
15 with head-in parking spaces, diagonal parking spaces,
16 garages, or any combination thereof along a significant
17 portion of their length. Parking drives for multiple-
18 family developments with more than 20 units shall be
19 designed so as to permit no through-motor vehicle
20 movements. * * *

21 “* * * * *

22 “(e) Criteria for Adjustment. Adjustments to the standards in this
23 subsection may be made, based on the criteria of EC
24 9.8030(8)(e).” (Underscoring in original.)

25 The site plan includes two parking drives that permit internal traffic
26 circulation from access points at Lombard Lane and River Road. EC
27 9.5500(11)(b)(2) generally prohibits through motor vehicle movement in parking
28 areas of multi-family developments with more than 20 units. Lombard requested
29 and was allowed an adjustment for the planned parking drives that allow through

1 motor vehicle movement. EC 9.5500(11)(e); EC 9.8030(8)(e). Petitioners do not
2 challenge that adjustment.

3 Petitioners argue that the internal parking circulation area constitutes a
4 “street” that should be excluded from the acreage used for the density calculation
5 under EC 9.2751(1)(c)(1), which provides that “[t]he acreage of land considered
6 part of the residential use shall exclude public and private streets.” The planning
7 commission determined that the adjustment did not transform the parking drive
8 into a street and concluded that the area of land used for the parking drive area
9 could be included in the net density calculation. Record 26.

10 The parking drives are within the apartment complex and lined with head-
11 in parking spaces along a significant portion of their length. Record 221. The
12 parking drives are not “created to provide ingress or egress for vehicular traffic
13 to one or more lots or parcels” within the meaning “street” as defined at EC
14 9.0500. The parking drives are designed primarily to provide vehicular
15 circulation to parking spaces in the apartment complex for parking for resident
16 and visitor access to the apartments. We agree with the city that the adjustment
17 to the parking area that allows internal traffic circulation from access points on
18 both River Road and Lombard Lane does not transform the parking drives into
19 streets. Thus, the city did not err by include the parking drive area in the net
20 density calculation.

1 **B. Leasing office and maintenance building**

2 As noted, EC 9.2751(1)(b) defines “net density” to mean “the number of
3 dwelling units per acre of land in actual residential use and reserved for the
4 exclusive use of the residents in the development, such as common open space
5 or recreation facilities.” EC 9.2751(1)(c)(1) further provides that “[t]he acreage
6 of land considered part of the residential use shall exclude public and private
7 streets and alleys, public parks, and other public facilities.”

8 Petitioners argue that EC 9.2751(1)(b) provides two “criteria”: (1) actual
9 residential use, and (2) exclusive use by residents of the development. Petitioners
10 argue that a leasing office and maintenance building are not planned for actual
11 residential use or reserved for exclusive use of the residents of the apartment
12 complex and, thus, those areas should be excluded from the net density
13 calculation.¹ Petitioners point out that neither the leasing office or the
14 maintenance building are dwellings. Petitioners argue, and Lombard does not
15 dispute, that a nonresident may use the leasing office to inquire and apply to lease

¹ Petitioners reference the “area adjacent to the bicycle trail,” but do not develop any argument that the open space area should be excluded from the net density calculation. Petition for Review 12. That argument is not sufficiently developed for our review and we do not address it. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982).

1 an apartment and the maintenance building is also not reserved for the exclusive
2 use of the residents.²

3 The planning commission reasoned that EC 9.2751(1)(c) provides a
4 specific manner to calculate net density and noted that, unlike subsection (1)(b),
5 subsection (1)(c) “excludes any references to resident-only exclusivity.” Record
6 26. The planning commission reasoned that the leasing office and maintenance
7 building support the residential use and will serve apartment complex residents
8 and “employees carrying out functions directly related to maintenance and
9 operations of the residential use.” Record 26. The planning commission observed
10 that those areas are “[i]n no way * * * public facilities for the purpose of
11 calculating density.” *Id.*

12 We disagree with petitioners that EC 9.2751(1)(b) contains independent
13 approval criteria. In *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or
14 LUBA 132, 140 (2014), *rev’d and rem’d on other grounds*, 269 Or App 176, 344
15 P3d 503 (2015), the opponents challenged the city’s net density calculation where

² In its response brief, Lombard argues that the net density standard in EC 9.2751 is ambiguous, not “clear and objective,” and thus cannot be applied to its application to develop housing in light of the limitation in ORS 197.307(4), which we set out below under the second assignment of error. See n 3. However, Lombard does not assign error to the city’s determination that EC 9.2751 constitutes applicable criteria in its cross-petition for review and Lombard may not challenge the applicability of EC 9.2751 in its response brief. We deny the first assignment of error and express no opinion on Lombards’ argument that the net density standard in EC 9.2751 cannot be applied.

1 the city included in the acreage calculation areas encumbered by easements for
2 sewer and water lines. The opponents argued that those easements should not be
3 counted as part of the residential use because they are “other public facilities”
4 and not “reserved for the exclusive use of the residents in the development.” *Id.*
5 We affirmed the city’s determination that those areas need not be excluded from
6 the density calculation because the sewer and water lines are not “public
7 facilities” contemplated in EC 9.2751(1)(c). *Id.* at 142. We agreed with the city’s
8 interpretation that EC 9.2751(1)(b) must be read together and applied in harmony
9 with EC 9.2751(1)(c). *Id.* We concluded that even though the areas of land that
10 included the easements were not in actual residential use (such as a dwelling) or
11 reserved for the exclusive use of the residents the development (such as a
12 common amenity area), those areas could be included in the net density
13 calculation. *Id.*

14 That same reasoning applies to the leasing office and maintenance building
15 areas in this case. The city’s decision harmonizes EC 9.2751(1)(b) and EC
16 9.2751(1)(c)(1) and correctly concludes that the maintenance area and leasing
17 office can be included in the net density calculation because those areas are not
18 open to the public, but instead are spaces used exclusively to support the
19 residential use of the property.

20 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 The entire property is within the Greenway, and subject to city standards
3 that implement Statewide Planning Goal 15 (Willamette River Greenway):

4 “To protect, conserve, enhance and maintain the natural, scenic,
5 historical, agricultural, economic and recreational qualities of lands
6 along the Willamette River as the Willamette River Greenway.”
7 OAR 660-015-0005.

8 Pursuant to Goal 15, the city adopted code criteria for new development
9 within the Greenway. EC 9.8800–9.8825. As pertinent to this appeal, a Greenway
10 Permit may be granted only if the proposal conforms to the following criteria:

11 “(1) To the greatest possible degree, the intensification, change of
12 use, or development will provide the maximum possible
13 landscaped area, open space, or vegetation between the
14 activity and the river.

15 “(2) To the greatest possible degree, necessary and adequate
16 public access will be provided along the Willamette River by
17 appropriate legal means.

18 “(3) The intensification, change of use, or development will
19 conform with applicable Willamette Greenway policies as set
20 forth in the Metro Plan.” EC 9.8815.

21 As explained in EC 9.8815(5), “the words ‘the greatest possible degree’
22 are drawn from Oregon Statewide Planning Goal 15 (F.3.b.) and are intended to
23 require a balancing of factors so that each of the identified Willamette Greenway
24 criteria is met to the greatest extent possible without precluding the requested
25 use.” Those standards do not prohibit development, but instead require site design
26 that preserves Greenway values.

1 In the second assignment of error, petitioners argue that the planning
2 commission misconstrued applicable law and made findings not supported by
3 substantial evidence in approving the Greenway Permit under the standards in
4 EC 9.8815.

5 In the sole cross-assignment of error, Lombard Apartments and HBA
6 (collectively, cross-petitioners) argue that the planning commission violated ORS
7 197.307(4) by subjecting the application for housing to the Greenway standards
8 because those standards are not clear and objective.³

9 OAR 661-010-0030(7) provides, in part:

10 “Any respondent or intervenor-respondent who seeks reversal or
11 remand of an aspect of the decision on appeal *regardless of the*
12 *outcome under the petition for review* may file a cross petition for
13 review that includes one or more assignments of error. A respondent
14 or intervenor-respondent who seeks reversal or remand of an aspect

³ ORS 197.307(4) provides:

“(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

“(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

“(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

1 of the decision on appeal only if the decision on appeal is reversed
2 or remanded under the petition for review may file a cross petition
3 for review that includes contingent cross-assignments of error,
4 clearly labeled as such.” (Emphasis added.)

5 Cross-petitioners request that LUBA affirm the planning commission
6 decision with respect to the Greenway Permit because, according to cross-
7 petitioners, the planning commission correctly determined that the application
8 meets those standards. Cross-petitioners also ask that LUBA reverse the planning
9 commission’s determination that the Greenway standards apply to an application
10 to develop housing. Lombard’s Cross-Petition for Review 2–3, 20 (“The
11 [planning commission] decision should be affirmed in part and reversed in
12 part.”).

13 The remedy that cross-petitioners seek is an obstacle to our review of the
14 cross-assignment of error. LUBA lacks authority to grant the sort of mixed relief
15 that cross-petitioners seek. *See* ORS 197.835(1) (LUBA “shall * * * prepare a
16 final order affirming, reversing or remanding”); *Dreyer v. City of Eugene*, ___
17 Or LUBA ___, ___ (LUBA Nos 2018-074/80, Nov 20, 2018), *aff’d*, 296 Or App
18 490, ___ P3d ___ (2019) (slip op at 11) (“LUBA may resolve the merits of an appeal
19 only by affirming, reversing, or remanding the decision on review.”). Cross-
20 petitioners seek an order affirming, not reversing, the approval. Even assuming
21 that the city erred by applying the Greenway standards, the city’s decision
22 approving the development could not be reversed because it is not “prohibited as
23 a matter of law.” *See* ORS 197.835(1) (“The board shall adopt rules defining the
24 circumstances in which it will reverse rather than remand a land use decision or

1 limited land use decision that is not affirmed.”); OAR 661-010-0071(1)(c) (“The
2 Board shall reverse a land use decision when * * * [t]he decision violates a
3 provision of applicable law and is prohibited as a matter of law.”). If we agree
4 with cross-petitioners that the city erred in determining that the Greenway
5 standards are applicable criteria, then the correct disposition is remand for the
6 city to decide the application without applying those standards. Cross-petitioners
7 do not request such a remand, and we do not understand that such a remand order
8 would have any effect on the city’s decision approving this application.

9 Based on the foregoing, we view cross-petitioners’ assignment of error as
10 a contingent cross-assignment of error, although it is not “clearly labeled as
11 such.” OAR 661-010-0030(7); *Devin Oil v. Morrow County*, 70 Or LUBA 420,
12 436 (2014). Thus, we would resolve the contingent cross-assignment of error
13 only if we sustain petitioners’ second assignment of error. For reasons explained
14 below, we deny the second assignment of error and thus do not resolve the
15 contingent cross-assignment of error.

16 **A. Area between the development and the river**

17 Petitioners do not clearly state the standard of review under this
18 subassignment of error, but we understand petitioners to argue that the city’s
19 findings are insufficient to support the conclusion that “to the greatest possible
20 degree” the development design will maximize the open space between the
21 development and the river. EC 9.8815(1).

1 The shape of the property provides a larger area in the eastern portion,
2 closer to the river. The planned open space is oriented parallel to the riverfront
3 path, which maximizes space between the development and the river. The city
4 reasoned that the lot configuration restricts site design alternatives that could
5 support the requested number of units. The city reasoned that a 94-unit multi-
6 family apartment complex is a permitted use in the R-2 zone, and that the site
7 design locates “all of the development in the western portion of the property—as
8 far away from the river as possible.” Record 39.

9 Petitioners argue that the city failed to consider different configurations,
10 such as taller buildings in the western portion of the property that could maximize
11 open space between the development and the river. Lombard responds that, in
12 fact, the development cannot be redesigned to create more open space near the
13 river because the western portion of the site, which is planned for two-story
14 buildings, is narrow and could not accommodate the number of units that would
15 need to be relocated to obviate the need to develop the improvements that are
16 closer to the river. Further, Lombard points out, a shift in units would also create
17 parking planning and circulation problems due to the shape of the lot.

18 The city’s decision demonstrates that the city balanced factors and
19 determined that the site design provides the maximum open space between the
20 activity and the river. The city balanced factors such as the shape of the property,
21 the number of units allowed on the property, and the configuration of the

1 development. We conclude that that city’s findings are sufficient to support the
2 decision that EC 9.8815(1) is satisfied.

3 This subassignment of error is denied.

4 **B. Public access along the river**

5 EC 9.8815(2) requires, “[t]o the greatest possible degree, necessary and
6 adequate public access will be provided along the Willamette River by
7 appropriate legal means.” As mentioned above, a public riverfront path is located
8 on city property adjacent to the eastern boundary of the subject property. The
9 public can access the riverfront path by passing through a public park at the end
10 of Fir Lane, a short distance from the development. The city decided that EC
11 9.8815(2) does not require direct public access to the river from the subject
12 property and that there is adequate public access along the river provided by the
13 riverfront path. The city reasoned that the subject property is not adjacent to the
14 river and that the public can access the river along the riverfront path. The city
15 found that the proposed development, which includes fencing the open space area
16 near the riverfront path, “includes no changes or impacts to the existing riverfront
17 path, a public park which provides adequate public access along the river.”
18 Record 23.

19 Petitioners argue that the city misconstrued the applicable law in deciding
20 that the site need not provide direct access to the river. Petitioners argue that the
21 fact that there is access along the river is irrelevant and that Lombard is required
22 to provide public access from the subject property to the riverfront path “and/or

1 river.” Petition for Review 24. Petitioners argue that the city’s construction of EC
2 9.8815(2) as requiring access only “along” the river instead of “to” the river is
3 inconsistent with Goal 15 guidelines.⁴

4 Lombard responds, and we agree, that EC 9.8815(2) implements Goal 15
5 and is part of the city’s acknowledged code; thus, Goal 15 is not directly
6 applicable to the application. More importantly, Goal 15 guidelines and EC
7 9.8815(2) focus on “adequate public access” along the river. That provision does
8 not require public access to the river from or across the subject property where
9 public access is otherwise adequate. The city properly determined that current
10 public access along the river provided by the public riverfront path is adequate.
11 Petitioners do not argue or explain why the current public access is not adequate.

12 This subassignment of error is denied.

13 **C. Willamette Greenway policies**

14 EC 9.8815(3) requires development within the Greenway to conform with
15 applicable Willamette Greenway policies as set forth in the Metro Plan. Metro

⁴ OAR 660-015-005(C)(3)(c) provides:

“3. Use Management Considerations and Requirements.
Plans and implementation measures shall provide for the
following:

“* * * * *

“c. **Access** -- Adequate public access to the river shall be
provided for, with emphasis on urban and urbanizable
areas[.]” (Boldface in original.)

1 Plan Willamette River Greenway, River Corridors, and Waterways Element,
2 Section III-D, Policy D.5 provides: “New development that locates along river
3 corridors and waterways shall be limited to *uses* that are compatible with the
4 natural, scenic, and environmental qualities of those water features.” (Emphasis
5 added.)

6 Petitioners argue that the city misconstrued EC 9.8815(3), made
7 inadequate findings, and made findings not based on substantial evidence.
8 Petitioners argue that Lombard did not provide evidence demonstrating
9 compatibility, and that the proposed 35-foot buildings are incompatible with the
10 natural, scenic, and environmental qualities of the river.

11 The city reasoned that Policy D.5 regulates “uses” that are allowed within
12 the corridor and that, in zoning the subject property for residential use (R-2), the
13 city determined that multi-family residential *use*, and 35-foot building height
14 maximums allowed in the R-2 zone, are compatible with Greenway standards.
15 We agree with the city on that point. Policy D.5 limits “new development” along
16 the river to “uses” that are compatible with river corridors and waterways. In
17 zoning the property R-2, the city determined that the residential uses allowed in
18 the R-2 zone are compatible with the river corridor. The city did not err in finding
19 that EC 9.8815(3) is satisfied.

20 This subassignment of error is denied.

21 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 EC 9.6780, as applicable site review approval criteria under EC 9.8445,
3 provides:

4 **“Vision Clearance Area. *Development sites* shall have triangular
5 vision clearance areas on all street corners to provide for
6 unobstructed vision consistent with American Association of State
7 Highway and Transportation Officials (AASHTO) standards. (See
8 **Figure 9.0500 Vision Clearance Area**). Vision clearance areas
9 shall be kept free of all visual obstructions from 2 ½ feet to 9 feet
10 above the curb line. Where curbs are absent, the crown of adjacent
11 streets shall be used as the reference point. These vision clearance
12 requirements may be adjusted if consistent with the criteria of EC
13 9.8030(11) of this land use code.” (Boldface and underscoring in
14 original; emphasis added.)**

15 In the third assignment of error, petitioners argue that because the
16 development will extend Lombard Street onto the subject property, EC 9.6780
17 requires a triangular vision clearance area off-site at the corner of Lombard Street
18 and Fir Lane. Record 220 (vicinity map). Petitioners do not contend that Lombard
19 owns or controls the properties surrounding the intersection of Fir Lane and
20 Lombard Lane or that the intersection is otherwise within the “development site.”
21 See EC 9.0500 (defining “development site”).⁵ The development will create

⁵ EC 9.0500 defines “development site”:

“A tract of land under common ownership or control, either undivided or consisting of two or more contiguous lots of record. For the purpose of land use applications, development site shall also include property under common ownership or control that is bisected by a street or alley.”

1 access points on River Road and the Lombard Street extension, and it is
2 undisputed that Lombard is required to provide adequate vision clearance at those
3 access points. However, the city did not err in concluding that EC 9.6780 does
4 not require Lombard to ensure adequate vision clearance area at the off-site
5 intersection of Fir Lane and Lombard Lane.

6 The third assignment of error is denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Buildings in the R-2 zone are limited to 100 feet in length, but that
9 limitation may be adjusted upon a finding that the design provides “multiple
10 entrances to buildings or yards” and creates “a vibrant street facade with visual
11 detail.” EC 9.5500(6); EC 9.8030(8)(a).⁶ The city approved one building length

⁶ EC 9.5500(6) provides, in part:

“(a) Maximum Building Dimension. Neither the maximum length nor width of any building within 40 feet of a front lot line can exceed 100 feet in the R-1 and R-2 zones * * *.

“* * * * *

“(c) Criteria for Adjustment. Adjustments to the standards in this subsection may be made, based on criteria of EC 9.8030(8)(a).” (Underscoring in original.)

EC 9.8030(8)(a) provides:

“(8) **Multiple-Family Standards Adjustment**. Where this land use code provides that the multiple-family standards may be adjusted, the standards may be adjusted upon finding that the design achieves all of the following:

1 adjustment to allow one of the four buildings, Building 2, to be built to 131 feet
2 in length based upon a finding that Lombard Apartments proposal “provides
3 evidence of articulation, multiple building entrances, private patios, and decks.”
4 Record 30.

5 In the fourth assignment of error, petitioners argue that the planning
6 commission’s findings are not supported by substantial evidence in the record.
7 Petitioners argue that the above-referenced architectural features are not depicted
8 in the building elevations and, thus, the city’s finding is not supported by
9 substantial evidence. Petitioners also argue that those architectural features are
10 common to all four buildings in the development.

11 The city relied on Lombard’s adjustment review application narrative,
12 which described architectural features for Building 2. Record 384–85. Lombard’s
13 application narrative constitutes substantial evidence upon which a reasonable
14 person would rely. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262
15 (1988) (setting out substantial evidence standard). The fact that other buildings

“(a) Maximum Building Dimension. The requirements set forth in EC 9.5500(6)(a) may be adjusted if the proposal creates building massing and/or facades that:

“1. Create a vibrant street facade with visual detail.

“2. Provide multiple entrances to building or yards.”
(Boldface and underscoring in original.)

1 in the development share common architectural elements does not undermine the
2 conclusion that Building 2 is designed with architectural features sufficient to
3 satisfy the adjustment criteria.

4 The fourth assignment of error is denied.

5 **FIFTH ASSIGNMENT OF ERROR**

6 EC 9.6815(2)(f) provides:

7 “In cases where a required street connection would result in the
8 extension of an existing street that is not improved to city standards
9 *and the street has an inadequate driving surface*, the developer shall
10 construct a temporary barrier at the entrance to the unimproved
11 street section with provision for bicycle, pedestrian, and emergency
12 vehicle access. The barrier shall be removed by the city at the time
13 the existing street is improved to city standards or to an acceptable
14 standard adopted by the public works director. In making a
15 determination of an inadequate driving surface, the public works
16 director shall consider the street rating according to Eugene’s
17 Paving Management System and the anticipated traffic volume.”
18 (Emphasis added.)⁷

⁷ In its response brief, Lombard argues that the “inadequate driving surface” standard in EC 9.6815(2)(f) is not “clear and objective” and thus cannot be applied to its application to develop housing in light of the limitation in ORS 197.307(4). See n 3. Lombard’s Response Brief 24–25. However, Lombard does not assign error to the city’s determination that EC 9.6815(2)(f) constitutes applicable criteria in its cross-petition for review. Even if Lombard had cross-assigned error, we would not reach it, for the same reasons explained under the second assignment of error, because we deny the fifth assignment of error. Thus, we express no opinion about Lombard’s argument that EC 9.6815(2)(f) cannot be applied.

1 It is undisputed that Lombard Street has a 16-foot paved width, but is not
2 developed to city standards, at least with respect to width. Petitioners contend
3 that the road surface is “experiencing pavement distress.” Petition for Review 40
4 (quoting Record 296). Lombard concedes that the street is generally “substandard
5 but not unimproved.” Lombard’s Response Brief 26. Petitioners argue that
6 Lombard should be required to install a temporary barrier, such as removable
7 bollards, at the entrance of Lombard Street at the property’s southern boundary.

8 The city decided that a temporary barrier was not required because
9 Lombard Street does not have an “inadequate driving surface.” Record 28. The
10 planning commission relied on city public works engineering staff’s opinion that
11 the road surface is adequate and that, in context of the proposed development,
12 “‘inadequate’ would equate to nearly impassible or dangerous conditions.”
13 Record 28.

14 Petitioners argue that the city misconstrued EC 9.6815(2)(f) by failing to
15 address the road rating and anticipated traffic volume and, further, that there is
16 no evidence in the record to support the conclusion that the existing paved driving
17 surface is adequate. Lombard responds that EC 9.6815(2)(f) delegates to the
18 public works department the determination of whether a particular street is
19 “adequate.” The city responds that, because the public works director did not
20 determine that the driving surface was inadequate, the public works director was
21 not required to consider the street rating and anticipated traffic volume. The city
22 further responds that the public works department correctly determined that

1 Lombard Street does not have an “inadequate driving surface,” because no
2 evidence in the record indicates that the driving surface is impassable.

3 We agree with Lombard and the city that EC 9.6815(2)(f) delegates to the
4 public works director the responsibility to determine whether a street is
5 inadequate. It is undisputed that Lombard Street is paved and passable. Contrary
6 to the city’s argument, EC 9.6815(2)(f) specifically requires the public works
7 director to *consider* the street rating and anticipated traffic volume. However, we
8 agree with Lombard that EC 9.6815(2)(f) does not require specific findings or
9 analysis from the public works director or the city. Implicit in the engineer’s
10 assessment of the adequacy of the driving surface is the engineer’s conclusion
11 that anticipated traffic volume can be accommodated by a road surface that does
12 not meet city standards for width and surface condition. That assessment included
13 consideration of the residential use of the subject property and the characteristics
14 of Lombard Street, which is a relatively short street within a residential area.

15 To be sure, the public works determination in this case could have been
16 more detailed and explained the specific street rating and anticipated traffic
17 volume. Nevertheless, the city did not misconstrue EC 9.6815(2)(f) by accepting
18 the public works department’s determination that “inadequate,” in context of this
19 development, means impassable and that, because Lombard Street is paved and
20 passable—facts that are undisputed—Lombard Street does not have “an
21 inadequate driving surface.”

1 Petitioners argue that the city's determination is not supported by
2 substantial evidence, in part, because there is no professional pavement evaluation
3 in the record. Nothing in EC 9.6815(2)(f) requires a professional pavement
4 evaluation. The undisputed evidence in the record indicates that Lombard Street
5 is paved and passable. Accordingly, petitioners' substantial evidence challenge
6 provides no basis for remand.

7 The fifth assignment of error is denied.

8 The city's decision is affirmed.