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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

HARD ROCK ENTERPRISES, LLC, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 WASHINGTON COUNTY, )  
 )  
 Respondent, )  
 )  
 and )  
 )  
 OMNI-WEST CONSTRUCTION, INC., )  
 )  
 Intervenor-Respondent. )

LUBA No. 98-073  
FINAL OPINION  
AND ORDER

Appeal from Washington County.

David C. Noren, Hillsboro, filed the petition for review and argued on behalf of petitioner.

No appearance by Washington County.

Andrew H. Stamp, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was O'Donnell, Ramis, Crew, Corrigan and Bacharach.

HOLSTUN, Board Chair.

REMANDED 04/02/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the county's hearings officer approving with  
4 conditions a planned development subdivision.

5 **MOTION TO INTERVENE**

6 Omni-West Construction, Inc. (intervenor), the applicant below, moves to intervene  
7 in this proceeding on the side of respondent. There is no objection to the motion, and it is  
8 allowed.

9 **MOTION TO FILE REPLY BRIEF**

10 Petitioner moves to file a reply brief pursuant to OAR 661-010-0039 to address three  
11 "new matters" allegedly raised in the response brief: (1) new evidence regarding the amount  
12 of open space proposed in the subdivision; (2) the applicability of Washington County  
13 Development Code (CDC) 502-14.1; and (3) official notice regarding Uniform Fire Code  
14 (UFC) 902.2.2.1. Intervenor concedes that its response brief raised a "new matter" regarding  
15 the proper calculation of open space proposed in the subdivision, and thus that petitioner is  
16 entitled to reply to that matter. However, intervenor objects to argument in the reply brief at  
17 page 2, lines 16-26, which intervenor contends, and we agree, is directed at a different  
18 subject than the new matter raised in the response brief. Intervenor also objects to the reply  
19 brief insofar as it addresses issues (2) and (3).

20 With respect to CDC 502-14.1, the challenged decision relied on that provision as an  
21 alternative basis for requiring only one sidewalk along an internal street within the  
22 subdivision. The petition for review challenged the county's primary finding regarding the  
23 sidewalk, but not its alternative finding regarding CDC 502-14.1. The response brief points  
24 out that the petition for review fails to challenge the county's alternative finding based on  
25 CDC 502-14.1. In its reply brief, petitioner contends that the response brief's discussion of  
26 CDC 502-14.1 is a "new matter" within the meaning of OAR 661-010-0039. We disagree.

1 A reply brief is not a means to assign error to findings in the challenged decision that were  
2 not challenged in the petition for review; and the arguments in intervenor's brief based on  
3 such findings do not constitute "new matters" for purposes of OAR 661-010-0039.

4 With respect to UFC 902.2.2.1, petitioner explains that in the response brief  
5 intervenor requests that the Board take official notice of that provision. Petitioner argues that  
6 intervenor's request is a "new matter" warranting a reply under OAR 661-010-0039.  
7 Intervenor objects to petitioner's reply regarding UFC 902.2.2.1, but its objection is directed  
8 solely at petitioner's arguments in the reply brief why that provision does not provide support  
9 for the challenged decision in the manner the response brief contends.<sup>1</sup> In other words,  
10 intervenor appears to concede that its request to take official notice of UFC 902.2.2.1 is a  
11 "new matter" for purposes of OAR 661-010-0039, and its objection is, in essence, a rebuttal  
12 to petitioner's arguments directed at the merits of whether UFC 902.2.2.1 supports the  
13 challenged decision. Our rules do not provide for such written rebuttal argument.

14 Accordingly, we allow petitioner's motion for a reply brief insofar as it addresses  
15 matters (1) and (3) identified above, with the exception of the argument at lines 16-26 at  
16 page 2 of the reply brief.

## 17 **FACTS**

18 The subject property is a .94-acre parcel that is rectangular in shape, approximately

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<sup>1</sup>Intervenor's confusion regarding the bases for a reply brief under OAR 661-010-0039 and argument regarding the merits of the alleged new matter is understandable. Although petitioner moved separately for permission to file a reply brief, the motion contains no argument regarding the bases for a reply brief under OAR 661-010-0039. That argument is contained in the reply brief itself, mixed in with arguments regarding the merits of the alleged new matters. As we suggested in D.S. Parklane Development, Inc. v. Metro, \_\_\_ Or LUBA \_\_\_ (LUBA No. 97-048 et al., Order On Motion to Set Deadlines for Reply Briefs, October 2, 1998):

"implicit in OAR 661-010-0039 is the requirement that the grounds for seeking permission of the Board to file a reply brief be stated in the motion accompanying the reply brief. In other words, the motion must identify the 'new matters' raised in the response briefs and explain why the Board should allow a reply brief confined to those new matters. A key element of OAR 661-010-0039 is undermined if the Board must read the reply brief itself in order to determine whether it responds to 'new matters' raised in the response brief." Slip op 2 (emphasis in the original).

1 90 feet wide by 440 feet long, and improved with a single-family dwelling. The narrow  
2 north end fronts onto Farmington Road, and the narrow south end adjoins an existing  
3 condominium development. The subject property is bordered on the east by a junior high  
4 school and on the west by undeveloped land. The parcel is zoned R-15, which allows  
5 development up to 15 dwelling units per acre.

6 Intervenor applied to the county for a planned unit development and preliminary  
7 subdivision approval for 14 lots, with development review approval for 13 attached  
8 townhomes on individual lots in addition to the existing detached single-family dwelling.  
9 The proposed subdivision and townhomes do not meet standards for street width, lot  
10 dimensions, lot size and yard setbacks applicable in the R-15 zone. However, under CDC  
11 404-4.4(A)(1) to (4) the county may modify these regulations for a planned unit  
12 development.

13 Intervenor's preliminary site plan proposes a 19-foot dedication along Farmington  
14 Road, and a private street running the length of the property along the western border. The  
15 application proposes three open spaces, a north space along Farmington Road (Tract A,  
16 4,579 square feet), a middle space between lots 7 and 8 (Tract B, 1,599 square feet), and a  
17 south space adjoining the condominium property (Tract C, 1,686 square feet). Tract A at the  
18 front is designated to address both drainage and open space requirements. Similarly,  
19 approximately 1,000 square feet of Tract B consists of a basketball half-court that also  
20 functions as an emergency vehicle turnaround. Tract C consists of small garden plots for  
21 each dwelling unit.

22 County staff approved intervenor's application, after which petitioner appealed and a  
23 de novo hearing was held before a county hearings officer. On April 3, 1998, the hearings  
24 officer approved the application, subject to conditions. This appeal followed.

25 **FIRST ASSIGNMENT OF ERROR**

26 Petitioner argues that the county misconstrued CDC 404-4.4(A)(1) to (4) when it

1 determined that the proposal complied with those provisions, and that the county's finding of  
2 compliance with those provisions is not supported by substantial evidence.

3 CDC 404-4.4 sets forth the permissible modification of standards for a planned  
4 development, and provides:

5 "Upon submission of an on- and off-site Site Analysis as described in Section  
6 404-1, when the request conforms to the standards of this code, the following  
7 modifications may be allowed:

8 "A. Standards regarding interior private streets, parking requirements,  
9 building lot coverage, yard requirements, building height, except the  
10 building height standards of Section 427-3, and landscaping may be  
11 varied if the applicant submits written evidence and there is a finding  
12 by the Review Authority that all of the following can be achieved by  
13 the submitted plans:

14 "(1) The site design utilizes progressive concepts which reduce  
15 such major alterations of the site, such as excavations,  
16 retaining walls, steep road cuts and fill, and extensive grading;

17 "(2) The site design provides for open space and recreational  
18 facilities such as playgrounds, bike and pedestrian trails,  
19 swimming pools, tennis courts and similar facilities in  
20 Commercial, Industrial and Residential Districts according to  
21 the following:

22 "(a) Twenty (20) percent on sites between zero (0) and ten  
23 acres;

24 "\* \* \* \* \*

25 "(3) This open space shall be improved and landscaped to reflect  
26 the intended character of the development, and as approved by  
27 the Review Authority and shall be in addition to that required  
28 by Section 405-1 (Open Space). \* \* \*

29 "(4) There is maximum retention of the natural topographic  
30 features, such as drainage swales, slopes, ridgelines, rock  
31 outcroppings, vistas, natural plant formations and trees."

32 **A. Application Of CDC 404-4.4(A)(1)**

33 With respect to CDC 404-4.4(A)(1), the challenged decision states:

1 "Because the site is flat and has no environmental constraints, the  
2 development of the project will not necessitate any major alterations to the  
3 site. [CDC 404-4.4(A)(1)] is only applicable in those situations where there is  
4 going to be major alterations of the site, and then it would be necessary to  
5 demonstrate that design concepts have been used to minimize the extent of the  
6 alterations. In cases such as this one, where there will be no major alterations  
7 of the Site, the standard is, in effect, satisfied per se." Record 14.

8 Petitioner argues that the above-quoted finding improperly construes CDC 404-  
9 4.4(A)(1), because that provision unequivocally requires that a project employ progressive  
10 concepts in site design that reduce major alterations of the site. According to petitioner,  
11 CDC 404-4.4(A)(1) to (4) should be interpreted in the context of the introductory paragraph  
12 to CDC 404-4.4, which provides that "[t]he Planned Development review process provides  
13 flexibility in standards and the location of permitted uses, compensated through innovative  
14 design and the dedication of public open space." Thus, petitioner argues the four elements of  
15 CDC 404-4.4(A)(1) to (4) represent a compromise allowing flexibility in design standards, in  
16 return for compensation through innovative design and open space requirements. Allowing  
17 flexibility in design standards without imposing the requisite compensation, petitioner  
18 contends, is contrary to the terms and purpose of CDC 404-4.4(A)(1).

19 Intervenor responds, and we agree, that the hearings officer's interpretation of  
20 CDC 404-4.4(A)(1) is reasonable and correct.<sup>2</sup> The more reasonable interpretation of  
21 CDC 404-4.4(A)(1), intervenor argues, is that its requirement for innovative site design is  
22 triggered only when development would otherwise require major site alteration, due to  
23 topographic and environmental features or other factors. While petitioner is correct that the  
24 introductory paragraph to CDC 404-4 provides context for the interpretation of CDC 404-  
25 4.4(A)(1) to (4), the text of neither provision requires compliance with the innovative site

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<sup>2</sup>LUBA's review of a hearings officer's interpretation of a local code provision is to determine whether the interpretation is reasonable and correct. Huiras v. Clackamas County, 28 Or LUBA 667, 668 (1995).

1 design requirement of CDC 404-4.4(A)(1) where no major site alterations would otherwise  
2 be required.

3 The first subassignment of error is denied.

4 **B. Open Space/Right-Of-Way Requirements**

5 Petitioner argues that the county improperly construed the open space requirements  
6 under CDC 404-4.4(A)(2)(a), because in calculating the amount of land needed for open  
7 space it treated the "site" as net buildable land and excluded the land that is to be dedicated  
8 for a right-of-way along Farmington Road. Petitioner notes that in calculating the site area  
9 for purposes of allowed density, the county used the gross site area of .94 acres. Petitioner  
10 contends that the relevant site area for purposes of calculating both open space and density  
11 should be based on the same site area, the gross site area of .94 acres.

12 Intervenor responds that, with one exception, CDC 300-2.1 requires that the gross site  
13 area is used for calculating allowed residential density, while no corresponding gross site  
14 area requirement exists for calculating the site area for purposes of the CDC 404-4.4(A)(2)  
15 open space requirement.<sup>3</sup> Intervenor contends that nothing in the CDC requires that the  
16 gross site area be used to calculate the site area for purposes of the open space requirement,  
17 and that had the county board of commissioners intended that result, it knew how to draft  
18 such language and could have included such a requirement in the CDC.

19 The hearings officer's decision does not explain why the site area for purposes of the  
20 density and open space requirements is calculated differently. The inference that intervenor  
21 urges us to draw from CDC 300-2.1 and the absence of a definition of the site area for  
22 purposes of the open space requirement cuts both ways. CDC 300-2.1 provides a limited  
23 exception for areas "currently dedicated for public right-of-way" to the general rule that the

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<sup>3</sup>CDC 300-2.1 provides that, in calculating residential density, "[s]ite size shall include the area of the subject lot(s) or parcel(s), in acres or portion thereof, excluding all areas currently dedicated for public right-of-way."

1 "site" for purposes of calculating density is the area within the boundaries of the subject  
2 property. The absence of a similar exception for proposed rights-of-way with respect to the  
3 open space requirement of CDC 404-4.4(A)(2)(a) implies that the county board of  
4 commissioners intended that the "site" for purposes of calculating open space is the area  
5 within the boundaries of the subject property, without reductions or exceptions for such  
6 dedications. Nothing in CDC 404-4.4(A)(2) suggests that the relevant "site" is anything less  
7 than the gross site area, or indicates that the site area should be reduced in size to account for  
8 various dedications. In short, we perceive no basis in the CDC to reduce the relevant site  
9 area, as the challenged decision does. Accordingly, we agree with petitioner that the  
10 hearings officer erred in calculating the amount of required open space.

11 The second subassignment of error is sustained.

12 **C. Evidence To Support Open Space Requirement**

13 Petitioner contends that the county's finding that the proposal will provide more than  
14 20 percent open space is not supported by substantial evidence in the record. The challenged  
15 decision states in relevant part:

16 "The supplemental evidence submitted by the Applicant's engineer on  
17 February 26 contains a revised map showing the location and size of the open  
18 space. After deducting the amount of the Applicant's property that has to be  
19 dedicated to the State of Oregon for improvements to Farmington Road, the  
20 total Site being developed is about .80 acres (34,800 square feet), which  
21 means that there must be at least .16 acres (6,960 square feet) of open space.  
22 There are three open space tracts totaling 7,845 square feet of open space,  
23 more than enough to satisfy the twenty-percent standard." Record 14.

24 Petitioner argues, and intervenor concedes, that the above-quoted finding is based on  
25 incorrect data indicating that the net developable area is .80 acres after subtracting the  
26 required dedication. Intervenor explains that the map on which the hearings officer relied  
27 contained a typographic error, and that the correct figure for the net developable area is .90  
28 acres. Intervenor goes on to argue that, notwithstanding that erroneous calculation, the  
29 Board can affirm the finding of compliance with CDC 404-4.4(A)(2)(a), because the record

1 contains evidence from which the Board can calculate the appropriate amount of open space  
2 and determine for itself that the proposed open space exceeds 20 percent of the site.  
3 Intervenor submits that such evidence "clearly supports" a finding of compliance with  
4 CDC 404-4.4(A)(2)(a), and thus that the Board may affirm that part of the county's decision.  
5 ORS 197.835(11)(b).<sup>4</sup>

6 Our determination above that the county erred in reducing the relevant site area to  
7 account for the right-of-way dedication makes it unnecessary to consider intervenor's  
8 argument that we may affirm that part of the decision under ORS 197.835(11)(b). Intervenor  
9 does not contend, and we do not otherwise perceive it to be the case, that the proposed open  
10 space exceeds 20 percent of the entire .94-acre subject property. We conclude that the  
11 county's finding of compliance with CDC 404-4.4(A)(2)(a) is not supported by substantial  
12 evidence.

13 This third subassignment of error is sustained.

14 **D. Application Of CDC 404-4.4(A)(3)**

15 Petitioner argues that the county improperly allowed land that is to be dedicated as  
16 open space to serve dual purposes, in one instance as a vehicle turnaround and in another as  
17 water quality facility. Petitioner explains that part of Tract B will function both as a  
18 basketball half-court and emergency vehicle turnaround, and that almost all of Tract A will  
19 be a steeply graded drainage swale that is unusable for any purpose other than a drainage  
20 swale.

21 With respect to Tract A, petitioner further states that, according to a county staff

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<sup>4</sup>ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 report, the county generally requires that open space and water quality facilities be in  
2 separate tracts, except where the water quality facility features recreational open space, such  
3 as an open lawn. Supplemental Record 1. The county staff report recommended that the  
4 water quality facility in Tract A be redesigned to provide shallower slopes suitable for  
5 recreational use. Id.<sup>5</sup> Notwithstanding that recommendation, the hearings officer failed to  
6 require redesign of the water quality facility to provide usable open space. Petitioner  
7 contends that the challenged decision should be remanded for findings explaining why the  
8 hearings officer chose to abandon the county's policy requiring that water quality facilities  
9 functioning as open space feature usable recreational space.

10 The challenged decision addresses the dual function of open spaces in the context of  
11 CDC 404-4.4(A)(3):

12 "[CDC 404-4.4(A)(3)] requires that the open space be improved and  
13 landscaped in such a manner that it reflects 'the intended character of the  
14 development.' In this case, the narrow configuration of the property being  
15 developed, along with the attached dwellings and the use of reduced setbacks,  
16 create an urban in-fill character to the development. The types of open space  
17 being called for, a basketball hoop, playground structure, and the more natural  
18 open area around the drainage swale are the kind of improvements and  
19 landscape areas that reflect the character of the project and thus satisfy  
20 [CDC 404-4.4(A)(3)]. Contrary to [petitioner's] argument, there is nothing in  
21 CDC 404-4.4 or elsewhere in the Code that prohibits a portion of a private  
22 roadway or turnaround being incorporated into the open space. For this  
23 development, such use of paved areas is consistent with the intended character  
24 of the project." Record 15.

25 Petitioner provides no support for the general proposition that open space cannot  
26 serve dual functions under the county's code. Moreover, the staff report that petitioner cites

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<sup>5</sup>The staff report states that

"The County generally requires [water quality] facilities in separate tracts. However, should the water quality facility design allow for the use as a recreational open space, i.e. open lawn area, then the County's policy is to allow them to be located within the Planned Development Open Space. Consequently, Staff finds that the proposed water quality facility can be located within Tract A, provided that the water quality facility is redesigned to maintain flatter slopes and bottom." Supplemental Record 1.

1 indicates that the county has in other cases applied the CDC to allow open space to serve  
2 dual functions, at least where recreational opportunities are retained. Accordingly, we reject  
3 petitioner's argument that the hearings officer erred in allowing Tract B to serve as both a  
4 basketball half-court and an emergency vehicle turnaround.

5 Petitioner's contention regarding Tract A is more difficult to resolve. We understand  
6 petitioner to contend, based on the staff report, that the open space requirement of CDC 404-  
7 4.4(A)(2) is intended to provide open space that is usable by the public or residents of the  
8 development, not a drainage ditch too steep for any use other than drainage. This view is  
9 supported by CDC 405-3.2, which defines public open spaces as "[a]reas intended for  
10 common and public use[.]" Further, the maintenance requirements for each of the five types  
11 of open space described in CDC 405-4 emphasize the removal of hazards, which implies that  
12 open spaces are intended to be used in some manner.

13 Intervenor responds that Tract A meets the purpose of the open space requirement  
14 because it provides an opportunity for "passive" recreation, apparently meaning that the  
15 public can look at the landscaped drainage swale in Tract A, even if the public cannot  
16 otherwise actively use Tract A, and that CDC 404-4.4 does not require more.

17 The above-quoted finding focuses on Tract B, and does not address petitioner's  
18 concerns raised below that some or all of Tract A must be suitable for more than passive use  
19 in order to qualify as "open space" under CDC 404-4.4(A). The county's findings must  
20 address and respond to specific issues raised in the local proceedings that are relevant to  
21 compliance with approval standards. Thomas v. Wasco County, 30 Or LUBA 302, 310  
22 (1996); Canby Quality of Life Committee v. City of Canby, 30 Or LUBA 166, 173-74  
23 (1995). Accordingly, we agree with petitioner that remand is necessary for the county to  
24 respond to petitioner's argument, based on the staff report, that CDC 404-4.4(A) requires  
25 some or all of Tract A to be suitable for active common and public use.

26 The fourth subassignment of error is sustained.

1 The first assignment of error is sustained, in part.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner argues that the challenged decision improperly approves a 20-foot wide  
4 private street with a sidewalk on only one side, contrary to CDC 409-3.3(9), which requires a  
5 24-foot minimum width and sidewalks on both sides of a private street serving nine or more  
6 units. Petitioner explains that the hearings officer modified the street width standard at  
7 CDC 409-3.3(9) pursuant to CDC 404-4.5, which limits modifications to certain prescribed  
8 limits. CDC 404-4.5 provides, in relevant part:

9 "Upon a finding that the applicant's plan substantially achieves all of the  
10 preceding criteria, the Review Authority may modify the identified standards  
11 within the following prescribed limits:

12 "\* \* \* \* \*

13 "B. The reduction of private roadway pavement width may be made if  
14 provisions are made to provide off-street parking in addition to that  
15 required in the Off-Street Parking Section of this Code. In no event  
16 can the reduction exceed that approved by the appropriate fire  
17 district[.]"

18 Thus, petitioner contends that while CDC 404-4.5 authorizes the county to modify the  
19 street width requirement, it does not authorize the county to modify the requirement that  
20 certain private streets have sidewalks on both sides.

21 Intervenor responds that the hearings officer did not modify the sidewalk standard  
22 pursuant to CDC 404-4.5, but rather under two alternative provisions, CDC 404-4.4(A) and  
23 CDC 502-14.1. The challenged decision finds as follows:

24 "\* \* \* [T]he modification to allow a curb and sidewalk on one side are also  
25 justified pursuant to CDC 404-4.4A. \* \* \* In addition, the Hearings Officer  
26 finds that these modifications, particularly as to the curb and sidewalk being  
27 on only one side of the road, are not necessary for this approval because they  
28 can be accommodated when the adjoining property develops. CDC 502-14.1  
29 creates an alternative basis for the modification or exemption from the  
30 requirement for sidewalks on both sides. CDC 502-14.1A or C provide  
31 alternative grounds for allowing this development with a single sidewalk until  
32 such time as the adjoining property develops and there is an opportunity for a

1 second sidewalk. The narrow configuration of the subject property is the kind  
2 of topographic constraint that justifies a single sidewalk exemption under  
3 subsection 14.1A. The lack of adequate right-of-way at this time to allow for  
4 the second sidewalk is also grounds for an exemption under subsection  
5 14.1C." Record 20.

6 Petitioner does not address the hearings officer's alternative findings under CDC 404-  
7 4.4(A), 502-14.1(A), or 502-14.1(C). Where a local government's approval rests on  
8 independent alternative grounds, petitioner must successfully challenge each of those  
9 alternative grounds in order to obtain reversal or remand of the decision; notwithstanding  
10 that petitioner demonstrates error in one of the alternative bases. See Port Dock Four, Inc. v.  
11 City of Newport, \_\_\_ Or LUBA \_\_\_ (LUBA No. 98-061, March 25, 1999) slip op 7  
12 (challenge to a finding of compliance with a local provision provides no basis to reverse or  
13 remand where petitioner fails to challenge an alternative finding that the provision does not  
14 apply). Accordingly, petitioner's second assignment of error provides no basis to reverse or  
15 remand the challenged decision.

16 The second assignment of error is denied.

### 17 **THIRD ASSIGNMENT OF ERROR**

18 Petitioner argues that the hearings officer erred in modifying the street width pursuant  
19 to CDC 404-4.5(B), without ensuring that there is appropriately sited off-street parking, in  
20 addition to that required under CDC section 413, to make up for the reduced street width.  
21 Petitioner explains that the decision approves four off-street parking spaces, located next to  
22 Tract A, in addition to the off-street parking spaces required by CDC section 413. However,  
23 petitioner argues that those additional parking spaces fail to comply with CDC 413-2.2,  
24 which requires that all off-street parking be located "on or within one hundred (100) feet of  
25 the site of the primary use, with distance measured in a straight line from the property line to  
26 the nearest space." According to petitioner, the "site of the primary use" here is the  
27 individual lots to be created by the subdivision, and thus additional off-street parking spaces  
28 must be located within 100 feet from each of the individual lots in the subdivision. Because

1 the four additional parking spaces are located together next to Tract A, petitioner asserts,  
2 they are more than 100 feet from some of the individual lots.

3 The challenged decision states in relevant part:

4 "To the extent that CDC 413-2.2 is applicable to those additional off-street  
5 parking spaces, the standard is satisfied because the spaces are all on the same  
6 site as the primary use, which is the fourteen units being created by this  
7 approval. [Petitioner] appears to argue that each of the four additional off-  
8 street spaces must be within 100 feet of each lot being created. The Hearings  
9 Officer does not concur with that interpretation. The 100-foot requirement is  
10 only at issue when parking is not on the same site as the primary use, which is  
11 not the situation in this case. Moreover, in these situations, the measurement  
12 is from the border of the site of the primary use, not from each individual unit  
13 within a site." Record 17.

14 Intervenor defends the hearings officer's interpretation of CDC 413-2.2, arguing that  
15 the relevant "site of the primary use" here is the .94-acre subject property and the "primary  
16 use" is the townhomes considered as a whole, not the individual lots and townhomes  
17 proposed, and thus the proposed parking spaces comply with CDC 413-2.2, because those  
18 spaces are on or within 100 feet of site of the primary use.

19 If we understand the hearings officer's interpretation of CDC 413-2.2 correctly, we  
20 agree with intervenor that that interpretation is reasonable and correct. For purposes of the  
21 two off-street parking spaces associated with each individual attached dwelling under  
22 CDC 413-9.1(B)(3), the "site of the primary use" is the site of each individual dwelling. We  
23 do not understand the hearings officer or intervenor to contend otherwise. However, as  
24 intervenor suggests, the hearings officer interprets CDC 413-2.2 concerning the "site of the  
25 primary use" for purposes of the additional off-street parking required by CDC 404-4.5(B)  
26 differently. For purposes of those additional parking spaces, the hearings officer determines  
27 that the townhomes considered as a whole are the "primary use." Because the additional off-  
28 street parking required under CDC 404-4.5(B) replaces on-street parking lost when the  
29 private road width was decreased under CDC 404-4.5(B), that additional parking is not  
30 associated with any particular individual dwelling. The four additional parking spaces are

1 associated with the townhomes as a whole. Accordingly, we disagree with petitioner that  
2 CDC 413-2.2 requires that the additional off-street parking spaces must be located within  
3 100 feet of each individual dwelling.

4 The third assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Petitioner argues that there is not substantial evidence to support the finding that the  
7 appropriate fire district approved or will approve the reduction in street width allowed under  
8 CDC 404-4.5(B). That provision provides in relevant part that "[i]n no event can the  
9 reduction [in street width] exceed that approved by the appropriate fire district[.]" Petitioner  
10 contends that the only evidence in the record from the fire district is a statement of service  
11 availability that, by its terms, is not an approval of the proposed private street or turnaround.  
12 Further, petitioner argues that there is evidence in the record that the proposed private street  
13 will not comply with applicable standards of the UFC, particularly UFC 902.2.1, because the  
14 emergency vehicle turnaround is closer to two structures than permitted by that provision.<sup>6</sup>

15 Intervenor concedes that there is no evidence in the record that the fire district  
16 approved the proposed private street or turnaround, and also concedes that the hearings  
17 officer made no specific finding that it is feasible for the proposed private street and  
18 turnaround to satisfy the applicable fire district standards and obtain the fire district's  
19 approval. However, intervenor requests that the Board take official notice of UFC 902.2.2.1,  
20 which provides that "[f]ire apparatus access roads shall have an unobstructed width of not  
21 less than 20 feet (6096 mm) and an unobstructed vertical clearance of not less than 13 feet 6  
22 inches (4115 mm)." We understand intervenor to contend that the Board can apply  
23 UFC 902.2.2.1 and make its own determination, pursuant to ORS 197.835(11)(b), whether  
24 the width of the private road conforms to the fire district standards.

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<sup>6</sup>According to testimony in the record, UFC 902.2.1 provides that "[A]ccess roadways shall not be closer than 20 feet to a structure unless topographical restrictions dictate the location." Record 34.

1 Even if we take official notice of UFC 902.2.2.1, the task intervenor asks us to  
2 perform greatly exceeds the scope of our review authority under ORS 197.835(11)(b).  
3 Regardless of what UFC 902.2.2.1 provides, intervenor's argument ignores the point of this  
4 assignment of error, which is that CDC 404-4.5(B) requires a finding that the reduction in  
5 road width (which presumably includes the turnaround) does not exceed that approved by the  
6 appropriate fire district. Intervenor does not contend that the hearings officer made that  
7 finding, and does not identify any evidence in the record that "clearly supports" a finding that  
8 the private road and turnaround would meet the fire district's approval.

9 The fourth assignment of error is sustained.

10 **FIFTH ASSIGNMENT OF ERROR**

11 Petitioner argues that the hearings officer erred in concluding that the access to and  
12 from the subdivision onto Farmington Road complies with the interim access requirements of  
13 CDC 501-8.5(D). Petitioner explains that the proposed access does not meet the access  
14 spacing requirements of CDC 501-8.5(B), and that its approval thus depends on compliance  
15 with the exception to those requirements at CDC 501-8.5(D), which provides:

16 "No development shall be denied a Development Permit for the sole reason  
17 that the parcel for which it is sought cannot physically accommodate the  
18 access spacing requirements of this Code. In such an event, the use may be  
19 issued an interim access permit which shall expire when access as required  
20 under Article V becomes available. An interim access permit may be granted  
21 based upon the following:

22 "(1) The site is situated such that adequate access cannot otherwise be  
23 provided in accord with the access spacing requirements of this Code."

24 "\* \* \* \* \*"

25 The hearings officer made the following findings regarding CDC 501-8.5(D):

26 "\* \* \* Because the development Site has no other road frontage or any other  
27 access, the Hearings Officer agrees with the Staff that it satisfies the interim  
28 access standard in [CDC 501-8.5(D)(1)]. [Petitioner] argues that [CDC 501-  
29 8.5(D)(1)] is not satisfied because there has been no evidence introduced  
30 about [intervenor's] attempts to acquire an access through one of the adjoining  
31 properties. Such an evidentiary showing is not necessary to satisfy

1 [CDC 501-8.5(D)(1)]. The standard is concerned with how the 'site is  
2 situated.' In other words, it is concerned with the physical location of a piece  
3 of property; is the property situated in such a way that it has legal access to a  
4 public roadway at a location that would satisfy the access spacing  
5 requirements? If the answer is no, as is the answer for this property, then the  
6 standard is satisfied. \* \* \*" Record 17-18.

7 In this assignment of error, petitioner repeats the argument made below to the  
8 hearings officer, that CDC 501-8.5(D)(1) requires a showing that the applicant cannot  
9 acquire suitable access through adjoining properties. We reject that argument for the same  
10 reasons expressed in the hearings officer's finding, quoted above.

11 The fifth assignment of error is denied.

12 The county's decision is remanded.