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

HIGHLAND CONDOMINIUM )  
ASSOCIATION, )  
 )  
Petitioner and )  
Cross-Respondent, )  
 )  
vs. )  
 )  
CITY OF EUGENE, )  
 )  
Respondent, )  
 )  
and )  
 )  
HOWARD McCULLOCH, )  
 )  
Intervenor-Respondent, )  
and Cross-Petitioner. )

LUBA No. 98-082  
FINAL OPINION  
AND ORDER

Appeal from City of Eugene.

Daniel J. Stotter, Eugene, filed the petition for review and argued on behalf of petitioner/cross-respondent. With him on the brief was Bahr and Stotter Law Offices.

Glenn Klein, Eugene, filed a response brief. With him on the brief was Harrang Long Rudnick.

A. Richard Vial, Portland, filed a cross-petition and a response brief and argued on behalf of intervenor-respondent/cross-petitioner. With him on the brief was Vial Fotheringham.

BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

REMANDED 10/05/99

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

1 Opinion by Briggs.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the City of Eugene to approve a residential planned  
4 unit development (PUD).

5 **MOTION TO INTERVENE**

6 Howard McCulloch, the applicant below, moves to intervene on the side of  
7 respondent. There are no objections to this motion, and it is allowed.

8 **FACTS**

9 The subject property is 6.79-acre parcel located in the south hills of the City of  
10 Eugene. The parcel is on a hillside, with eastern facing slopes ranging from 15 to 50 percent.  
11 The average slope is 20 percent. The proposed area for development is above the 900-foot  
12 elevation line. The parcel is bordered on the east by the Highland Condominium complex.  
13 Two PUDs developed with single-family residences lie to the north. To the west and south of  
14 the subject property lie city-owned property and the ridgeline trail system.

15 The subject parcel was once part of a larger parcel. In 1990, intervenor converted  
16 sixteen residential units that occupied the larger parcel to condominium ownership (Highland  
17 Condominium). In the original condominium declaration, intervenor reserved the right to  
18 incorporate the other developed or undeveloped portions of the property into the Highland  
19 Condominium development. He also reserved the right to retain easements across the  
20 condominium property "as may be necessary for the access to any lands \* \* \* which are not  
21 annexed to the condominium." Record 252.

22 The Highland Condominium includes within its development a network of private  
23 roads, which connect to Willamette Street to the east. The applicant proposes to provide  
24 primary vehicular access to the subject property via Stonewood Drive, one of the Highland  
25 Condominium's private roads. The parties dispute whether the applicant has the right to use  
26 that access, absent the permission of the Highland Condominium Association, which is

1 comprised of the owners of the condominiums. The applicant proposes to provide  
2 emergency, bicycle, and pedestrian access to the property via Brookside Drive, which  
3 connects to the Edgewood PUD, one of the PUDs to the north.

4 In November 1997, intervenor submitted a proposal for a residential PUD (Alpine  
5 West) on the subject property. The PUD application was reviewed and approved, with  
6 conditions, by the Eugene hearings official. Highland Condominium Association appealed  
7 the hearings official's decision to the city planning commission, which approved the  
8 application, with modified conditions of approval.

9 This appeal followed.

#### 10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioner argues that the city erred in failing to consider or adopt findings addressing  
12 the applicability of Environmental Resource Policy 4 of the Eugene-Springfield Metropolitan  
13 Area General Plan. Intervenor contends that the city correctly determined that Environmental  
14 Resource Policy 4 is not a mandatory approval standard.

15 The Eugene Code (EC) requires that a tentative PUD application be consistent with  
16 "the Metropolitan Area General Plan (1) applicable land use references, (2) text related to the  
17 development, and (3) special elements related to the development." EC 9.512(6)(b).  
18 Petitioner argues that Environmental Resources Policy 4 applies because it is a special  
19 element related to the development as referred to in EC 9.512(6)(b).

20 Environmental Resources Policy 4 provides:

21 "Local governments shall require site-specific soil surveys and geologic  
22 studies where potential problems exist. When problems are identified, local  
23 governments shall require special design considerations and construction  
24 measures to be taken to offset the soil and geological constraints present, to  
25 protect life and property, and to protect environmentally-sensitive areas."

26 Petitioner cites to testimony in the record regarding the risk of landslides caused by  
27 additional runoff and erosion to support its claim that it, and others, identified problems that  
28 require a site specific soil survey prior to approval of the PUD application.

1 In addressing the issue below, we understand the planning commission to have  
2 determined that Environmental Resources Policy 4 is only to be applied in the context of  
3 governmental actions to adopt land use regulations. Record 17. The planning commission  
4 took the position that the provisions of the policy were implemented through the application  
5 of the "planned unit development procedures of the Eugene Code." *Id.* Accordingly, the  
6 planning commission determined that Environmental Resources Policy 4 is not an approval  
7 criterion the must be addressed in its challenged decision.

8 We do not give interpretations of the city planning commission the deference that is  
9 afforded governing bodies pursuant to ORS 197.829. *Watson v. Clackamas County*, 129 Or  
10 App 428, 431, 879 P2d 1309 (1994). The standard for reviewing decisions of the city  
11 planning commission is a determination of whether the interpretation is reasonable and  
12 correct. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). Policy 4 is couched  
13 in mandatory terms that appear to impose certain requirements in quasi-judicial decisions  
14 such as the present one. We might agree with the planning commission's interpretation of  
15 Environmental Resources Policy 4 if it had identified the Eugene Code provisions that  
16 implement that policy. However, absent such contextual support for its interpretation, we  
17 cannot agree that the clear requirement in its policy does not apply as an approval criterion.

18 The first assignment of error is sustained.

19 **SECOND AND FOURTH ASSIGNMENTS OF ERROR (PETITIONER)**

20 **ASSIGNMENT OF ERROR (CROSS-PETITIONER)**

21 EC 9.512(6)(d) requires an applicant to show that:

22 "Public services and facilities are available to the site. If the public services  
23 and facilities are not presently available, an affirmative finding may be made  
24 if evidence indicates that they will be available prior to need by reason of:

25 "1. Prior commitment of public funds or planning by the  
26 appropriate public agencies, or

27 "2. A commitment by the applicant to provide private services and  
28 facilities acceptable to the appropriate public agencies; or

1                   "3.     Commitment by the applicant to provide for offsetting all  
2                   added public costs or early commitment of public funds made  
3                   necessary by the development."

4                   The parties agree that access to the property is one of the "public services and  
5 facilities" that must be provided to the site in order to comply with EC 9.512(6)(d). The  
6 hearings official's decision adopted the following condition of approval to ensure that access  
7 to the property is or will be available:

8                   "[Condition] 9. Documentation of shared access and maintenance agreement  
9 for the use of the existing private street system to access Willamette Street  
10 shall be provided prior to final PUD approval. Proof of right of access is  
11 subject to review by the Eugene City Attorney's Office. Right of access also  
12 must be established for the portion of Jenifer Drive proposed to extend from  
13 the intersection of the Trailside Loop and Stonewood Drive to the applicant's  
14 property. The applicant also must submit documentation of a 20-foot wide  
15 easement across adjacent property for secondary emergency access to  
16 Brookside Drive." Record 95-96.

17                   In its findings regarding compliance with EC 9.512(6)(d), the planning commission  
18 modified the hearings official's condition 9. The findings state:

19                   "The Planning Commission finds that in addressing the legal right of Alpine  
20 West to utilize the existing private street system through the Highland  
21 Condominium development for primary access, and the related approval  
22 criterion from Section 9.512(6)(d) of the Eugene Code, the Hearings Official's  
23 decision with respect to Condition #9 of the tentative approval shall be  
24 modified as follows:

25                   "Condition #9: Documentation of shared access and maintenance  
26 agreement for the use of the existing private street system to access  
27 Willamette Street shall be provided prior to final PUD approval. Proof  
28 of right of access shall also be established for the proposed  
29 construction and use of Jenifer Drive across Highland Condominium  
30 property, and for a 20-foot wide easement across adjacent property [to  
31 the west] for secondary emergency access to Brookside Drive. This  
32 proof of access rights and maintenance agreement shall consist of  
33 either: 1) a letter of agreement signed by an authorized representative  
34 of the adjacent homeowners' association, or 2) a judgment from the  
35 circuit court establishing the required access rights and maintenance  
36 responsibilities.'

37                   "This modification of Condition #9 of the Hearings Official's decision is  
38 justified in light of the potential need for a declaratory judgment from circuit

1 court on the matter of access rights, considering the likelihood that either  
2 party would be dissatisfied with an interpretation by the City Attorney on the  
3 issue, and given that this right of access is necessary for the applicant to  
4 develop Alpine West. The condition as modified will proved the clearest path  
5 to resolution of the contested issue of right of access, and in determining  
6 compliance with the related approval criterion from Section 9.512(6)(d) of the  
7 Eugene Code." Record 12-13.

8 **A. Legal Access**

9 **1. Impermissible Delegation**

10 Both petitioner and intervenor argue that the planning commission's condition of  
11 approval impermissibly delegated its responsibility to determine whether the site has  
12 adequate legal access pursuant to EC 9.512(6)(d) to the Lane County Circuit Court. The city,  
13 which otherwise did not appear in this matter, cites to the planning commission's minutes and  
14 the findings in its decision as support for its contention that the criterion was satisfied in one  
15 of two ways: (1) by submittal of a shared use agreement between Highland Condominium  
16 Association and the applicant, or (2) by a declaratory judgment by a circuit court.

17 The portion of the city's decision challenged here simply imposes a condition  
18 requiring that the answer to a discrete legal issue, *i.e.*, whether the applicant has a legal right  
19 to construct the proposed access, be obtained in one of two ways. That legal issue will be  
20 resolved by the homeowners' association agreeing that applicant has such a legal right or,  
21 failing that, a circuit court judgment that such a legal right exists. Such action does not defer  
22 a determination of compliance with EC 9.512(6)(d); rather it requires that an objecting party  
23 stipulate to a resolution of the legal issue or the circuit court resolve the issue. In that way,  
24 resolution of the issue will be final, in the sense it will not be susceptible to collateral  
25 litigation.<sup>1</sup>

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<sup>1</sup>We question whether, had the planning commission chosen to attempt to address the legal access issue itself, such a determination by the planning commission in this proceeding would preclude the applicant or one or more of the members of the condominium association from litigating that issue in a subsequent circuit court proceeding.

1           As relevant here, the only question about the adequacy of the proposed access to  
2 comply with EC 9.512(6)(d) is whether the applicant has a legal right to construct the access.  
3 There is no factual dispute that if the applicant has the legal right to access, that access will  
4 satisfy the requirements of EC 9.512(6)(d) insofar as that provision requires access. If the  
5 ultimate legal determination on that question is in the applicant's favor, the standard is met. If  
6 the ultimate legal determination is not in applicant's favor, the condition is not met and the  
7 project may not go forward without modifying the application and additional local  
8 proceedings. In either event, we reject petitioner's and intervenor's arguments that there has  
9 been an impermissible delegation of decision making. The scope and nature of any property  
10 right the applicant may have to utilize the disputed property for access easily could involve  
11 complicated issues of real property law that the planning commission is ill suited to answer.  
12 We see nothing inappropriate in this proceeding with the planning commission deciding that  
13 it will assume the applicant has the asserted property right and conditioning the decision on a  
14 subsequent settlement among the parties of the issue or judicial confirmation of the asserted  
15 property right.

16           **2. Findings/Substantial Evidence**

17           Both petitioner and intervenor challenge the adequacy of the planning commission's  
18 findings concerning access, and the evidentiary support for those findings. Petitioner argues  
19 that intervenor cannot obtain access through Brookside Drive absent its approval, because  
20 the provisions of the Highland Condominium declaration only permit the intervenor to obtain  
21 access for additional phases of the Highland Condominium, not for unrelated PUDs. As a  
22 result, petitioner argues that intervenor may only obtain access with its permission, and that  
23 permission would not be granted. In response, intervenor argues that the declaration is clear  
24 that intervenor may use Brookside Drive as an access, whether the development accessing  
25 Brookside Drive is a separate development or merely a phase of the Highland Condominium.  
26 With one possible exception, those arguments are resolved by our conclusion above that it

1 was not improper for the planning commission to impose Condition 9 to ensure a stipulated  
2 or judicial resolution of the access issue. The possible exception is intervenor's argument that  
3 he provided substantial evidence in his application to show that access is currently available  
4 to the site and his further contention that LUBA should modify the city's decision to delete  
5 that portion of Condition #9 that requires additional proof.

6 It is reasonably clear that the planning commission found that EC 9.512(6)(d) was  
7 satisfied, if intervenor has the claimed legal right to construct the proposed access across the  
8 intervening property.<sup>2</sup> However, the planning commission was not entirely convinced by  
9 intervenor's evidence that he in fact has the claimed legal access. At least it is clear that the  
10 planning commission believed there was sufficient question regarding the point that it  
11 imposed Condition #9 to ensure compliance with EC 9.512(6)(d).

12 Where a party challenges the evidentiary support for a condition of approval we must  
13 determine "whether the evidence in the record would lead a reasonable person to conclude  
14 that there is a need for the condition to further a relevant planning purpose." *Carter v.*  
15 *Umatilla County*, 29 Or LUBA 181, 184-85 (1995); *see Sellwood Harbor Condo Assoc. v.*  
16 *City of Portland*, 16 Or LUBA 505, 522 (1988) (same). We have reviewed the evidence cited  
17 by the parties and conclude that planning commission could reasonably have concluded that  
18 there was sufficient question raised concerning the intervenor's asserted legal right to  
19 construct the proposed access to justify imposing Condition #9 to assure compliance with EC  
20 9.512(6)(d).

21 Intervenor's cross-assignment of error is denied.

22 The second assignment of error is denied.

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<sup>2</sup>We note that EC 9.512(6)(d) does not expressly require that the city find that intervenor has the property rights that will be necessary to construct the access required by EC 9.512(6)(d). The legal access issue is only relevant because without such a legal right the access required by EC 9.512(6)(d) cannot be constructed and petitioner asserts that intervenor lacks the required legal right.

1           **B.       Emergency Access**

2           In petitioner's fourth assignment of error, it argues that the city failed to make a  
3 decision demonstrating that emergency access is available to the property, especially during  
4 snowy or icy conditions.

5           EC 9.512(6)(g) requires that PUD proposals show:

6           "There will be adequate on-site provision for utility services, emergency  
7 vehicular access, and, where appropriate, public transportation facilities."

8           Intervenor argues that the hearings official adopted a finding that it is feasible to  
9 satisfy an applicable standard and imposed conditions necessary to ensure that the standard  
10 will be satisfied by requiring that the applicant provide documentation of secondary  
11 emergency access via Brookside Drive. We believe that the findings the city made show that  
12 legal access may be feasible over Brookside Drive, provided the applicant submits either an  
13 access agreement with the Edgewood PUD homeowners association, or by a decision made  
14 by a circuit court. However, we agree with petitioner that the city failed to adopt findings  
15 regarding petitioner's arguably relevant issue as to whether it is physically possible for  
16 emergency vehicles to access the property via either the primary or secondary access during  
17 inclement weather.<sup>3</sup> *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198, 215  
18 (1991) (local government must respond to opponent's traffic concerns where traffic impacts  
19 are part of an approval criterion).

20           The fourth assignment of error is sustained, in part.

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<sup>3</sup> We do not mean to suggest that potential problems with emergency vehicle access to the property in inclement weather necessarily mean that EC 9.512(6)(g) is violated by the proposal. However, the city's findings fail to address the issue.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner argues that the city failed to make adequate findings regarding alternative  
3 transportation as required by EC 9.512(6)(J), by improperly deferring its decision and by  
4 making a decision that is not supported by substantial evidence in the record.

5 EC 9.512(6)(J) requires that PUD proposals show that:

6 "[t]here will be adequate provision of public pedestrian and bicycle  
7 connections to and from nearby and adjacent residential areas, transit stops,  
8 neighborhood activity centers, commercial areas and office and industrial  
9 parks. At a minimum, 'nearby' is interpreted to mean uses within ¼ mile  
10 which can reasonable be expected to be used by pedestrians, and uses within  
11 one to two miles which can reasonably be expected to be used by bicyclists."

12 The application proposes that pedestrian and bicycle access would be provided on-  
13 site, but does not identify any separate connections to nearby and adjacent residential areas.  
14 The hearings official adopted a condition of approval to require an improved pedestrian-  
15 bicycle path or sidewalk access to Brookside Drive. In his findings, the hearings official  
16 commented that a bicycle/pedestrian connection to Willamette Avenue would also be  
17 acceptable, but that it was unlikely to be available to the developer.

18 During the course of its review, the planning commission modified the hearings  
19 official's condition of approval to delete the reference to Brookside Drive, and merely require  
20 that an "improved pedestrian and bicycle path or sidewalk shall be provided to access an  
21 adjacent public street from the development site." Record. 12.

22 Petitioner argues that the lack of pedestrian and bicycle access was an issue at the  
23 staff level and that during public testimony on the matter, various parties testified as to the  
24 lack of safe alternatives for such access. Petitioner further argues that the city's condition of  
25 approval admits as much, because it requires that the applicant provide a connective path  
26 from the development to an adjacent street, without indicating where the connection is going  
27 to be, and without determining whether the proposed connection is feasible.

1           Intervenor argues that the city determined that the connection was feasible, otherwise  
2 it would not have imposed the condition of approval. In addition, intervenor argues that he  
3 provided evidence to the city to show that pedestrian and bicycle access via Brookside Drive  
4 is available, and relies on testimony by an Eugene Public Works Department employee, who  
5 stated that it was possible to construct a bicycle/pedestrian connection within the fire access  
6 lane to demonstrate that the Brookside Drive access is feasible.

7           The problem with intervenor's response is that it relies on the determination of the  
8 hearings official, and not on the planning commission's finding and conclusion. From the  
9 record, we see no evidence of bicycle or pedestrian connections to adjacent and nearby  
10 residential development, and a requirement that the intervenor provide them is not evidence  
11 that the connections are feasible or "adequate."

12           Petitioner's third assignment of error is sustained.

### 13 **FIFTH ASSIGNMENT OF ERROR**

14           Petitioner argues that the city failed to adopt appropriate findings to address  
15 landslides, soil erosion, flood hazards, and storm water runoff, as required by EC 9.512(6)(f).

16           EC 9.512(6)(f) requires that:

17           "Proposed buildings, roads, and other uses are designed and sited to assure  
18 preservation of significant on-site vegetation, topographic features, and other  
19 unique and worthwhile natural features, and to prevent soil erosion or flood  
20 hazard."

21           Petitioner cites to various portions of the record to show that the hearings official and  
22 planning commission received testimony regarding the potential for landslides, flooding, and  
23 soil erosion, and that the city failed to adopt *any* findings addressing the stated concerns.  
24 Further, petitioner argues that the findings that the city did make which purport to respond to  
25 the relevant issues are inadequate, are not supported by substantial evidence, or improperly  
26 defer consideration to the final approval stage where no public hearing or opportunity for  
27 petitioner to participate will be provided.

1 The planning commission's finding in response to petitioner's issues states in part:

2 "The Hearings Official was correct in finding that the clustered design of the  
3 development along existing topographical contours will assist in minimizing  
4 grade disturbance and ensure the preservation of significant on-site vegetation  
5 to the extent possible, while still allowing development. Additionally,  
6 numerous conditions of approval have been established by the Hearings  
7 Official which adequately address concerns related to storm drainage,  
8 geotechnical engineering, flood hazard, soil erosion, and the preservation of  
9 vegetation and natural features." Record 15.

10 The findings of the hearings official, which were adopted by reference by the  
11 planning commission, state in relevant part:

12 "\* \* \* moderately steep slopes exist throughout the site. Nevertheless, the  
13 proposal generally clusters development in the areas characterized by the  
14 shallowest of slopes. The units will be clustered horizontally and vertically  
15 and the other developed areas, such as access drives and parking areas, will be  
16 closely clustered around the buildings. Cut slopes will also be clustered  
17 around the developed areas. The areas proposed for development impacts do  
18 tend to follow the existing topographical contours of the site, minimizing  
19 overall disturbance of the site.

20 "The clustering of development on the site is not at the site's lowest elevation  
21 in that the lower elevations on the site are inaccessible and largely  
22 characterized by steeper slopes. These areas will remain undisturbed." Record  
23 100.

24 "A preliminary reconnaissance and geotechnical report has been prepared  
25 indicating that the site is stable and suitable for development, finding that  
26 basalt rock is expect to exist at shallow depths. A condition has been imposed  
27 requiring expansion of the geotechnical report to include an analysis of soil  
28 types in proposed public utility easements, and to provide recommendations  
29 for construction of public improvements. Also, a condition is imposed  
30 requiring the retention of a geotechnical engineer to be on-site during  
31 construction. \* \* \*

32 "Substantial testimony was presented concerning slides and drainage  
33 difficulties that exist in the general area of this development. Under the  
34 condition requiring the involvement of a geotechnical engineer throughout  
35 development on the site and the conditions pertaining to treatment of  
36 stormwater, the problems that have arisen as a result of previous development  
37 can be avoided. Record 101.

38 "As discussed above, the clustering of the residential units and siting of the  
39 structures and streets parallel to existing topographical contours will minimize

1 grade disturbance and ensure the preservation of significant on-site vegetation  
2 to the extent possible while allowing development of the site. The steepest  
3 areas of the site are avoided, allowing preservation of vegetation and  
4 lessening the potential for soil erosion or flood hazard.

5 "A condition has been imposed requiring a stormwater drainage impact study  
6 to thoroughly address the capacity of the exiting public stormwater system  
7 and the feasibility of connecting drainage from this site to that system. This  
8 study can address the concern with erosion with the open drainageways at the  
9 lower elevations and may require additional measures to mitigate erosion. The  
10 study will be required to be submitted prior to final approval of the  
11 development.

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

13 "The preservation of vegetation and the requirement of a further geotechnical  
14 report and supervision of a geotechnical engineer in development on this site  
15 will further assist in preventing soil erosion or flood hazard." Record 107.

16 Intervenor argues that there is substantial evidence in the record to support the city's  
17 findings that the proposed development is designed and sited to prevent soil erosion and  
18 flood hazard. Intervenor contends that the evidence he presented to respond to the opponents'  
19 issues regarding flooding, erosion, and landslides is uncontroverted.

20 Contrary to petitioner's assertions, we find that the city did adopt findings to address  
21 the issues raised with regard to this criterion. The city found that the site design would  
22 minimize erosion hazard by clustering the dwellings onto the shallower slopes. In addition,  
23 the clustering would retain more vegetation, as required by the standard. The preliminary soil  
24 studies indicate that the basalt rock is stable, and suitable for development. However, we  
25 agree with petitioner that the findings are inadequate with regard to the effect of stormwater  
26 drainage on the on-site erosion potential. The findings merely require the applicant to  
27 provide further studies to show that the stormwater runoff from the proposed development  
28 can be mitigated. The findings do not show that the applicant's proposal is, as currently  
29 designed, sufficient to prevent flooding or erosion. Nor do the conditions of approval require  
30 the applicant to develop the property according to the mitigation measures identified in the  
31 stormwater study.

1           Because the city's findings are inadequate, we do not consider petitioner's substantial  
2 evidence challenge. *DLCD v. Columbia County*, 15 Or LUBA 303, 305 (1987).

3           The fifth assignment of error is sustained, in part.

#### 4 **SIXTH ASSIGNMENT OF ERROR**

5           Petitioner asserts that the city failed to adopt findings addressing the adequacy of  
6 utilities and facilities to the proposed site, as required by EC 9.512(6)(d) and EC 9.512(6)(g).

7           As stated in the second assignment of error, but repeated here for ease of reference,  
8 EC 9.512(6)(d) requires an applicant to show that the proposed PUD ensures:

9           "Public services and facilities are available to the site. If the public services  
10 and facilities are not presently available, an affirmative finding may be made  
11 if evidence indicates that they will be available prior to need by reason of:

12                   "1.    Prior commitment of public funds or planning by the  
13                           appropriate public agencies, or

14                   "2.    A commitment by the applicant to provide public services and  
15                           facilities acceptable to the appropriate public agencies; or

16                   "3.    Commitment by the applicant to provide for offsetting all  
17                           added public costs or early commitment of public funds made  
18                           necessary by the development."

19           EC 9.512(6)(g) requires that the applicant show that:

20           "There will be adequate on-site provision for utility services, emergency  
21           vehicular access, and, where appropriate, public transportation facilities."

22           Petitioner identifies three areas where the city failed to adopt findings to show that  
23 the proposed PUD satisfies these standards: availability of stormwater facilities, availability  
24 of sewer facilities, and the availability and capacity of Stonewood Drive to serve as the  
25 primary vehicular access. We will address each in turn.

#### 26           **A.    Stormwater Facilities**

27           Petitioner argues that various parties testified as to flooding caused by inadequate  
28 stormwater facilities in the area. Opponents argued before the hearings official and the  
29 planning commission that the addition of more development on a steep hillside could only

1 exacerbate an existing problem. The opponents also questioned whether the developer had  
2 the expertise to ensure that stormwater runoff from his development would be dealt with  
3 effectively. Petitioner claims that the findings the planning commission adopted are  
4 inadequate to show that the stormwater facilities are or will be available.

5 The planning commission found that:

6 " \* \* \* the Hearings Official did not err in his findings and decision with  
7 respect to the applicable approval criterion, related to the availability of \* \* \*  
8 storm sewer facilities \* \* \*. Concerns raised regarding the capacity and  
9 feasibility of connecting to \* \* \* storm sewer facilities, and erosion problems  
10 due to increased stormwater runoff, have been appropriately addressed in the  
11 findings made and conditions established by the Hearings Official." Record  
12 13.

13 The hearings official adopted the following findings with regard to stormwater facilities:

14 "All public utilities and services needed for this residential planned unit  
15 development are available or can be extended to serve the development site."  
16 Record 106.

17 "A condition has been imposed requiring a stormwater drainage impact study  
18 to thoroughly address the capacity of the existing public stormwater system  
19 and the feasibility of connecting drainage from this site to that system. This  
20 study can address the concern with erosion within the open drainageways at  
21 the lower elevations and may require additional measure to mitigate erosion.  
22 The study will be required to be submitted prior to final approval of the  
23 development." Record 107.

24 "Approval requires that there be clear identification of public and private  
25 portions of the proposed \* \* \* storm sewer systems, as well as all private or  
26 public utility easements existing and proposed." Record 108.

27 The applicant provided evidence to show that stormwater service to Alpine West  
28 would need to be extended from the public system in the Edgewood PUD approximately 125  
29 feet along an existing public utility easement to the subject property's boundary. The  
30 applicant committed to a downstream impact study to determine the capacity of the system,  
31 and provided that if the study determined that the system is inadequate, then an on-site  
32 detention system will be provided to maintain post-development peak discharges at or below  
33 the existing peak discharges.

1 The relevant conditions of approval state:

2 "3. A stormwater drainage impact study shall be provided to determine the  
3 capacity and feasibility of connecting to the existing public stormwater  
4 system and the effects of peak flow increases. The study is subject to  
5 review and approval by the Public Works Engineering Division prior  
6 to final PUD approval, and due to concerns regarding accelerated  
7 erosion within open drainageways at lower elevations, additional  
8 measures may be required to mitigate erosion. The developer shall be  
9 responsible for any needed improvements to accommodate the  
10 additional stormwater run-off, both on and off-site. If an on-site  
11 detention system is required the design must also be reviewed and  
12 approved by the Public Works Engineering Division."

13 " \* \* \* \* \*

14 "5. The proposed \* \* \* storm sewer systems shall be reviewed for  
15 approval under the privately engineered public improvement process  
16 by the Public Works Engineering Division."

17 "6. Documentation of recorded easements across adjoining property for  
18 gaining \* \* \* storm sewer access shall be provided prior to final PUD  
19 approval.

20 " \* \* \* \* \*

21 "8. The tentative utility plan shall be revised to clearly differentiate  
22 between the existing and proposed \* \* \* storm sewer systems. Clear  
23 identification of public and private portions of the proposed systems  
24 must be provided on the utility plan, as well as all private or public  
25 utility easements existing and proposed. Clear identification and  
26 details of all off-site connection points of the proposed systems to the  
27 existing system must also be provided, as well as all pipe sizes. Some  
28 of the required information has been provided on the tentative utility  
29 plan, but the applicant shall work with Public Works Engineering staff  
30 to revise these plans accordingly, prior to final PUD approval." Record  
31 94-95.

32 Petitioner does not cite to evidence in the record to show that a stormwater system  
33 cannot be made available to serve the subject property. Neither does petitioner argue that  
34 stormwater capacity is unavailable to support the proposed development, assuming the city's  
35 conditions of approval are complied with. EC 9.512(6)(d) and (g) requires that facilities are  
36 or will be available. The planning commission relied on the hearings official's findings and

1 conditions to conclude that adequate stormwater facilities are or will be available to serve the  
2 development at the time the facilities are needed. Once the issue of feasibility is addressed,  
3 the city could properly defer the implementation of the conditions to staff. *Rhyme v.*  
4 *Multnomah County*, 23 Or LUBA 442, 446-48 (1992).

5 This subassignment of error is denied.

6 **B. Sewer Facilities**

7 Petitioner argues that the applicant failed to adopt adequate findings to show that  
8 existing sewer facilities have the capacity to support the proposed development. Petitioner  
9 cites to testimony regarding past sewer backups within the Highland Condominiums as  
10 evidence that insufficient sewer capacity exists.

11 The planning commission stated:

12 "\* \* \* the Hearings Official did not err in his findings and decision with  
13 respect to the applicable approval criterion, related to the availability of  
14 sanitary \* \* \* sewer facilities \* \* \*. Concerns raised regarding the capacity and  
15 feasibility of connecting to sanitary \* \* \* sewer facilities, \* \* \* have been  
16 appropriately addressed in the findings made and conditions established by  
17 the Hearings Official." Record 13.

18 The hearings official adopted the following findings with regard to sanitary sewers:

19 "All public utilities and services needed for this residential planned unit  
20 development are available or can be extended to serve the development site."  
21 Record 106.

22 "Approval requires that there be clear identification of public and private  
23 portions of the proposed sanitary \* \* \* sewer systems, as well as all private or  
24 public utility easements existing and proposed." Record 108.

25 The hearings official's conditions of approval require:

26 "4. A sanitary sewer service analysis shall be provided to demonstrate the  
27 capacity of the downstream system to handle contributions from the  
28 site. The analysis is subject to review and approval by the Public  
29 Works Engineering Division prior to final PUD approval.

30 "5. The proposed sanitary \* \* \* sewer systems shall be reviewed for  
31 approval under the privately engineered public improvement process  
32 by the Public Works Engineering Division.

1 "6. Documentation of recorded easements across adjoining property for  
2 gaining sanitary \* \* \* sewer access shall be provided prior to final  
3 PUD approval.

4 " \* \* \* \* \*

5 "8. The tentative utility plan shall be revised to clearly differentiate  
6 between the existing and proposed sanitary \* \* \* sewer systems. Clear  
7 identification of public and private portions of the proposed systems  
8 must be provided on the utility plan, as well as all private or public  
9 utility easements existing and proposed. Clear identification and  
10 details of all off-site connection points of the proposed systems to the  
11 existing system must also be provided, as well as all pipe sizes. Some  
12 of the require information has been provided on the tentative utility  
13 plan, but the applicant shall work with Public Works Engineering staff  
14 to revise these plans accordingly, prior to final PUD approval." Record  
15 95.

16 The findings addressing the issue of sanitary sewer availability present a closer  
17 question regarding adequacy than the findings addressing stormwater capacity. Neither the  
18 findings nor the conditions of approval expressly assign responsibility for any needed  
19 improvements to the pubic sanitary sewer system should there be a gap between current  
20 availability and projected needs. Requiring that the applicant provide a sanitary sewer  
21 capacity study and identify the location and ownership of utility infrastructure and easements  
22 does not demonstrate that adequate public utility systems are available or could be extended  
23 to service the proposed development. We conclude the findings are inadequate.

24 This subassignment of error is sustained.

25 **C. Inadequate access via Stonewood Drive**

26 Petitioner argues that EC 9.512(6)(d) and (g) require the city to find that legal access  
27 exists and that the infrastructure is in place to support additional traffic loads. Petitioner  
28 argues that Stonewood Drive is currently hazardous during extreme winter conditions and  
29 that by adding more cars to the street there is more opportunity for accidents and for an  
30 increase in abandoned cars during snowy and icy conditions. In addition, petitioner cites to

1 statements from a Highland Condominium resident regarding the complete inability of  
2 emergency vehicles to access the Highland Condominiums during inclement weather.

3 Intervenor argues that petitioner misunderstands the requirements of EC 9.512(6)(d)  
4 and (g), because those provisions only apply to public facilities. Intervenor argues that  
5 Stonewood Drive is a private road, and therefore it does not fall under the scope of those  
6 provisions. Even if the provisions do apply, intervenor argues that the issues petitioner raise  
7 relate to extreme conditions, which "are no different than those suffered by any other  
8 roadway of even slight incline during such icy or heavy snow conditions." Intervenor's Brief  
9 19.

10 In the absence of a contrary interpretation by the city, we do not believe that EC  
11 9.512(6)(d) and (g) should be interpreted so narrowly as to be limited to those utilities and  
12 services that are publicly owned and maintained. EC 9.512(6)(d)(2) specifically permits  
13 commitments by an applicant to provide public services and facilities acceptable to the  
14 appropriate public agencies to be sufficient to satisfy this criterion. We find that the planning  
15 commission failed to adopt findings addressing whether the facilities provided by Stonewood  
16 Drive are adequate to satisfy EC 9.512(6)(d) and (g).

17 The sixth assignment of error is sustained, in part.

18 **SEVENTH ASSIGNMENT OF ERROR**

19 EC 9.512(6)(a) requires that the proposed development be "consistent with related  
20 policies and development standards in applicable, adopted refinement plans and special area  
21 studies." There is no dispute that a document entitled the "South Hills Study" is an area study  
22 with which the proposed PUD must be consistent.<sup>4</sup>

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<sup>4</sup>According to the findings of the hearings official, the South Hills Study is applicable to this development because the property is "at an elevation greater than 500 feet and is located south of 18<sup>th</sup> Avenue.

1           In the South Hills Study, the city adopted seven purpose statements.<sup>5</sup> The study also  
2 contains a specific development recommendation that requires that all vacant property above  
3 an elevation of 901 feet be *preserved* from an intensive level of development (hereafter 901-  
4 foot Preservation Policy). The study recommends that planned unit development may be  
5 permitted as an exception to the 901-foot Preservation Policy "when it can be demonstrated  
6 that a proposed development is consistent with the *purposes*" of the South Hills Study. The  
7 South Hills Study also contains development standards to ensure that new development  
8 address known natural factors, to ensure maximum preservation of the natural character of  
9 the south hills, and to ensure adequate review of the public consequences of development in  
10 the south hills.

11           Petitioner argues that the city failed to adopt findings addressing the seven purpose  
12 statements and, further, that the failure to adopt such findings requires a remand. Intervenor  
13 argues that the general-purpose statements contained in the South Hills Study do not  
14 constitute standards that apply to the proposed PUD. Intervenor argues that the purpose  
15 statements are general compatibility statements and that the reference to "related policies and  
16 development standards" in EC 9.512(6)(a) does not transform the purpose statements into

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<sup>5</sup>The South Hills Study provides that development within the study area should achieve the following purposes:

- "1. To insure preservation of those areas most visibly a part of the entire community;
- "2. To protect areas of high biological value in order to provide for the continued health of native wildlife and vegetation;
- "3. To insure provision of recreational areas in close proximity to major concentrations of population;
- "4. To provide connective trails between major recreational areas;
- "5. To provide connective passageways for wildlife between biological preserves;
- "6. To contribute to Eugene's evergreen forest edge; and
7. To provide an open space area as a buffer between the intensive level of urban service area and the rural level of development occurring outside the urban service area."

1 mandatory approval standards. Intervenor relies on our analysis of the South Hills Study as it  
2 relates to PUD applications in *McGowan v. City of Eugene*, 24 Or LUBA 540, 545-547  
3 (1993) to support his contention that the city is not required to address the purpose  
4 statements individually.

5 Intervenor's reliance is misplaced. In *McGowan*, the city adopted findings to  
6 addressing the purpose statements. 24 Or LUBA at 546-547. Here, the planning commission  
7 determined that the development standards implement the purpose statements, and therefore,  
8 that the purpose statements do not have to be individually addressed. More importantly, the  
9 planning commission failed to consider that the 901-foot Preservation Policy requires that all  
10 PUD applications for development above the 901-foot elevation be evaluated to determine if  
11 the development is consistent with the seven "purposes" of the South Hills Study cited by  
12 petitioner. *See* n 3. In other words, the 901-foot Preservation Policy expressly requires that  
13 the city adopt findings addressing the purpose statements.

14 The seventh assignment of error is sustained.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 EC 9.512(6)(c), in relevant part, requires the PUD to disperse traffic onto "more than  
17 one public local street," "unless a finding is made that it is not feasible due to physical  
18 constraints, such as topography, the previous layout of the surrounding area, or similar  
19 constraints." Petitioner argues that the proposed PUD, as designed, will disperse traffic from  
20 more than 19 units onto Willamette Street, a designated local street. Petitioner claims that,  
21 despite the fact that Willamette Street functions as a collector, the street is designated as a  
22 local street in the Eugene Code and Eugene Local Street Plan.

23 The Eugene Code provides a two-pronged process for street classifications. The city  
24 council may adopt a street classification map by ordinance or, as an alternative, the city  
25 council may, on a street-by-street or project basis, classify streets as local, collector, or  
26 arterial. EC 9.045(1)(c). The Eugene Local Street Plan defines a "local street" as "all streets

1 that are not specifically designated collectors or arterials." Petitioner argues that the city has  
2 not adopted a classification map by ordinance, nor has it named Willamette Street as a  
3 collector or arterial. Because Willamette Street is a local street rather than a collector street,  
4 petitioner argues, the proposed PUD is subject to EC 9.512(6)(c). Therefore, petitioner  
5 claims the city must adopt findings that show that there are site constraints that preclude  
6 requiring dispersal of traffic onto more than one local street.

7 Intervenor argues that Willamette Street functions as an arterial street, and that the  
8 street's nominal classification as a public local street in the Eugene Street Plan is incorrect,  
9 because the Eugene Code defines a "local street" as a "street used primarily for access to  
10 abutting property," and Willamette Street clearly functions more as a arterial than as a local  
11 street. Intervenor argues that petitioner's reliance on the Eugene Local Street Plan as the  
12 arbiter of street classifications in this case is wrong, because the city council did not adopt  
13 the statement which identifies a "default" designation for local streets, and therefore, the  
14 planning commission could look to other references, such as the *Design Standards for*  
15 *Eugene Streets, Sidewalks, Bikeways, and Access Ways*, the ODOT classification maps and  
16 the City Transportation Division's proposed street classification map to determine that  
17 Willamette Street is an arterial street, and therefore, EC 9.512(6)(c) does not apply. To  
18 support his argument, intervenor relies on a memorandum from planning staff where staff  
19 stated that the portion of the local street plan that petitioner rely upon was never officially  
20 adopted by the city council.

21 In the alternative, intervenor argues that the planning commission addressed EC  
22 9.512(6)(c) and determined that an alternative access was not feasible because of topography,  
23 and the existing layout of adjoining streets and development. Petitioner argues that the city's  
24 findings regarding alternative access are inadequate, because if Brookside Drive is available  
25 and feasible for pedestrian, bicycle and emergency access, it should also be feasible to permit  
26 primary vehicular access.

1 The planning commission adopted the following finding in response to this issue:

2 "The Planning Commission finds that the Hearings Official did not err in his  
3 decision with respect to the approval criterion from Section 9.512(6)(c)(3) of  
4 the Eugene Code, but that his findings shall be modified to delete the first  
5 portion of the third sentence on page 13, which reads: 'While it is  
6 acknowledged the Eugene Local Street Plan includes Willamette Street...'.  
7 The Hearings Official's interpretation was otherwise correct that the  
8 requirement for secondary dispersal of motor traffic is not applicable because  
9 Willamette Street is not a local street, and furthermore, a specific exception to  
10 the secondary dispersal requirement was allowed due to existing constraints  
11 including topography and the existing layout of surrounding streets and  
12 development." Record 13.

13 Thus, the planning commission's modified finding reads:

14 "This planned unit development will disperse traffic by means of the existing  
15 street system within the Highland Condominiums Development, utilizing  
16 Stonewood Drive onto Willamette Street. Willamette Street functions as a  
17 minor arterial street in this location. Contrary to the argument made,  
18 Willamette Street is not a 'local street' within the meaning of [EC] Section  
19 9.512(6)(c). The term 'local street' is defined at Eugene Code Section 9.015  
20 as:

21 "(a) Street used primarily for access to abutting property(s)."

22 "Willamette Street is obviously not a local street within the meaning of the  
23 code. Beyond the plain meaning of the language of the code, as staff points  
24 out, when the Local Street Plan was adopted, the 'Design Standards for  
25 Eugene, Streets, Sidewalks, Bikeways and Access Ways' was also adopted.  
26 This document classified streets based upon how they function. Willamette  
27 Street obviously functions as an arterial street rather than a local street.

28 "The development is consistent with the street connectivity standards. Those  
29 standards do not require that a public street connection be made to Brookside  
30 Drive as that street does not abut or pass through any portion of this site.  
31 Public street connections in other directions are not feasible due to the  
32 topography and the surrounding layout of streets and development. The  
33 private street system, therefore, is found to be acceptable." *Cf.* Record 106.

34 The planning commission adopted a finding that the definition of "local street" in the  
35 Eugene Code is the definition that the planning commission will use in determining the  
36 applicability of EC 9.512(6)(c). Pursuant to that definition, Willamette Street is not a local

1 street. We agree with intervenor that the planning commission's interpretation of this code  
2 provision is reasonable and correct.

3 Because we determine that EC 9.512(6)(c) does not apply to this development, we do  
4 not address petitioner's alternative argument that the findings concerning feasibility of  
5 requiring access to more than one local street are not supported by substantial evidence in the  
6 record.

7 The seventh assignment of error is denied.

8 The city's decision is remanded.