

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 WILLAMETTE OAKS LLC,  
5 *Petitioner,*

6  
7 vs.

8  
9 LANE COUNTY,  
10 *Respondent,*

11 and

12  
13  
14 GOODPASTURE PARTNERS, LLC  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2011-019

18  
19 WILLAMETTE OAKS LLC,  
20 *Petitioner,*

21  
22 vs.

23  
24 CITY OF EUGENE,  
25 *Respondent,*

26 and

27  
28  
29 GOODPASTURE PARTNERS, LLC  
30 *Intervenor-Respondent.*

31 LUBA Nos. 2011-020 and 2011-049

32  
33 FINAL OPINION  
34 AND ORDER

35  
36 Appeals from Lane County and City of Eugene.

37  
38 Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of  
39 petitioner. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock PC.

40  
41 Stephen L. Vorhes, County Counsel, Eugene, filed a joint response brief on behalf of  
42 respondent Lane County.

43  
44 Emily N. Jerome, Eugene City Attorney, Eugene, filed a joint response brief on  
45 behalf of respondent city of Eugene.

1  
2 Michael C. Robinson and Seth J. King, Portland, filed the response brief and argued  
3 on behalf of intervenor-respondent. With them on the brief was Perkins Coie LLP.  
4

5 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,  
6 participated in the decision.  
7

8 LUBA NOS. 2011-019/020 12/06/2011  
9 TRANSFERRED

10  
11 LUBA NO. 2011-049 12/06/2011  
12 REMANDED  
13

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

**NATURE OF THE DECISIONS**

In LUBA Nos. 2011-019 and 2011-020, Willamette Oaks, LLC (Willamette Oaks) appeals decisions by the city and the county that authorize Goodpasture Partners, LLC (Goodpasture) on behalf of the city and county to apply to the city for a Willamette Greenway Permit to construct off-site transportation improvements on property that is owned in part by the city and in part by the county.

In LUBA No. 2011-049, Willamette Oaks appeals the city’s decision approving Goodpasture’s Willamette Greenway Permit application.

**REPLY BRIEF**

Willamette Oaks moves for permission to file a reply brief to respond to new matters raised in the response briefs. The reply brief is allowed.

**FACTS**

A previous city decision approved Goodpasture’s application for a zone change and planned unit development to construct a 583-unit multi-family development on its 23-acre property located at the intersection of Goodpasture Island Road and Alexander Loop, east of the main channel of the Willamette River. That city decision required as a condition of its approval of the zone change that Goodpasture widen the existing Goodpasture Island Road bridge over Delta Highway, and construct a new bridge over Delta Highway located northeast of the existing bridge.<sup>1</sup>

---

<sup>1</sup> The condition provided:

“Mitigation #2 – Goodpasture Island Road Bridge – Widen Goodpasture Island Road to include dual left-turn lanes from Goodpasture Island Road to Northbound Delta Highway by: (a) constructing a second bridge structure north of the existing Goodpasture Island bridge over Delta Highway, such that the existing bridge would accommodate eastbound travel and the new bridge would accommodate westbound travel; (b) widening Goodpasture Island Road east of the existing bridge to provide four travel lanes that would accommodate two eastbound left-turn lanes and single through lanes in each direction; (c) widening the northbound Delta Highway on-ramp to two lanes to facilitate the two left-turn lanes and a

1 Those transportation facility improvements will be located on city and county owned  
2 property adjacent to the Delta Ponds wetlands, Debrick Slough, and the Goodpasture  
3 wetlands. The main channel of the Willamette River is located approximately 3,000 feet to  
4 the west of the subject property. Debrick Slough joins the Willamette River north of the  
5 project site.

6 Goodpasture applied to the city for a Willamette Greenway Permit to construct the  
7 off-site transportation improvements, and the hearings officer approved the application.  
8 Willamette Oaks appealed the hearings officer's decision to the planning commission, which  
9 affirmed the hearings officer's decision, incorporating the hearings officer's decision and  
10 adopting additional findings in support of its decision. This appeal followed.

11 **MOTIONS TO DISMISS LUBA NOS. 2011-019 AND 2011-020/SEVENTH**  
12 **ASSIGNMENT OF ERROR (LUBA NO. 2011-049)**

13 **A. Introduction**

14 Eugene Code (EC) 9.7010 provides:

15 “Applications shall be submitted on a form approved by the city manager, be  
16 accompanied by a fee established pursuant to EC Chapter 2 *and be signed by*  
17 *the property owner, unless the applicant is a public agency, in which case the*  
18 *signature of the property owner is not required. \* \* \**”

19 The proposed transportation improvements would be located on city and county owned  
20 property, but the city and county were not listed as “applicants,” and the application did not  
21 initially include the signature of a city and county official.<sup>2</sup> In August 2010, Goodpasture  
22 submitted its application for a Willamette Greenway Permit. On November 1, 2010, the city  
23 deemed the application complete. In January, 2011, Goodpasture submitted into the record  
24 authorizations from the city engineer, the acting county administrator and the director of the

---

lane drop to merge traffic into a single lane in advance of the existing weaving area; (d) tapering Goodpasture Island Road to the existing width; and (e) installing traffic signal modifications to accommodate the proposed roadway changes.” Record 711.

<sup>2</sup> Under EC 9.7010, listing the city and county as applicants would obviate any need for city and county signatures on the application.

1 county public works department that authorized Goodpasture to submit the application on the  
2 city's and county's behalf as the "property owner[s]" under EC 9.7010. Record 253-254.

3 Willamette Oaks then appealed the city and county authorizations to LUBA in LUBA  
4 Nos. 2011-019 and 2011-020. The city and Goodpasture moved to dismiss LUBA Nos.  
5 2011-019 and 2011-020 because, they argued, the city and county authorizations are not  
6 "land use decisions" within the meaning of ORS 197.015(10)(a) and also do not qualify as  
7 "significant impact" land use decisions as described in *City of Pendleton v. Kerns*, 294 Or  
8 126, 133-34, 653 P2d 996 (1982).<sup>3</sup> We suspended LUBA Nos. 2011-019 and 2011-020 in  
9 order to consider the motions to dismiss.

10 Willamette Oaks subsequently appealed the city's decision approving Goodpasture's  
11 Willamette Greenway Permit application in LUBA No. 2011-049. In an order dated May 31,  
12 2011, we consolidated LUBA Nos. 2011-019, 2011-020 and 2011-049 and stated that we  
13 would decide all three appeals at the same time.

#### 14 **B. Motions to Dismiss**

15 The city and Goodpasture move to dismiss and point out that although the  
16 authorizations state that they are being executed "pursuant to EC 9.7010," neither  
17 authorization contains any findings by the local government employee signing the  
18 authorization that the authorizations themselves satisfy EC 9.7010 or any other provisions of

---

<sup>3</sup> As relevant here, LUBA's jurisdiction is limited to "land use decisions." ORS 197.015(10)(a)(A) defines "land use decision" to include:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- "(i) The goals;
- "(ii) A comprehensive plan provision;
- "(iii) A land use regulation; or
- "(iv) A new land use regulation[.]"

1 applicable law, nor were they required to adopt such findings. It follows, they argue, that the  
2 authorizations therefore do not concern the “application” of EC 9.7010 or any other land use  
3 standard within the meaning of ORS 197.010(10)(a)(A)(iii).

4 In its petition for review, Willamette Oaks repeats its contention that LUBA has  
5 jurisdiction over the appeals of the city and county authorizations because they are land use  
6 decisions. Willamette Oaks responds that the city and county authorizations to Goodpasture  
7 to file the Greenway permit application are land use decisions as described in ORS  
8 197.015(10)(a)(A), because the authorizations apply or were required to apply land use  
9 regulations and are the city and county’s final decisions on whether to authorize the permit  
10 application. According to Willamette Oaks, both authorizations refer to EC 9.7010 and  
11 therefore in executing the authorizations, the city engineer, the acting county administrator  
12 and the public works department director applied a land use regulation – EC 9.7010.  
13 Additionally, Willamette Oaks argues that the county employees who signed the county  
14 authorization were required to but did not apply provisions of the county’s Transportation  
15 System Plan to the authorization. Finally, Willamette Oaks argues in the alternative that the  
16 authorizations are “significant impact” land use decisions under *Kerns*.

17 We agree with the city and Goodpasture that the authorizations are not “land use  
18 decisions” within the meaning of ORS 197.015(10)(a)(A). Although 9.7010 is referenced in  
19 the authorizations and as a provision of the EC is a “land use regulation,” it does not “contain  
20 provisions that are standards or criteria for making the challenged decision” and therefore the  
21 authorizations do not “concern” the application of a land use regulation. *Knee Deep Cattle  
22 Company, LLC v. Lane County*, 28 Or LUBA 288, 298 (1994), *aff’d* 133 Or App 120, 890  
23 P2d 449 (1995). The city and county authorizations were executed by the respective city and  
24 county officials when Goodpasture asked the city and county in their capacities as property  
25 owners to demonstrate that Goodpasture was authorized to file an application to construct

1 improvements on city and county owned properties.<sup>4</sup> The authorizations do not apply any  
2 comprehensive plan provision or land use regulation as approval criteria.<sup>5</sup> Willamette Oaks  
3 has not pointed to any requirement in the EC that required the city engineer to apply a land  
4 use regulation to his decision to authorize Goodpasture to apply for the Greenway permit on  
5 the city’s behalf, or in the Lane County Code (LCC) that required the county employees who  
6 executed the authorization to apply any provisions of the LCC, or the county’s  
7 Transportation System Plan to their decision to authorize Goodpasture to apply for the  
8 Greenway permit. We also agree with the city and Goodpasture that the authorizations are  
9 not “significant impact” land use decisions under *Kerns*. While the outcome of the  
10 Greenway permit proceeding will significantly affect land uses on the property, Willamette  
11 Oaks has not pointed to any significant impact on present or future land uses from the  
12 *execution of the authorizations* to allow Goodpasture to apply for the Greenway permit.

13 **C. Motion to Transfer**

14 Willamette Oaks filed a precautionary motion under OAR 661-010-0075(11) to  
15 transfer LUBA Nos. 2011-019 and 2011-020 to circuit court in the event LUBA determines it  
16 does not have jurisdiction over the appeals.<sup>6</sup> Goodpasture objects to the motion to transfer,

---

<sup>4</sup> Whether the respective signers had the authority to execute the authorizations is the subject of Willamette Oaks’ fourth and seventh assignments of error.

<sup>5</sup> Further, it is doubtful whether the county either “applied” EC 9.7010 or was required to apply EC 9.7010, since EC 9.7010 is a city provision, not a county provision.

<sup>6</sup> OAR 661-010-0075(11) provides:

“(11) Motion to Transfer to Circuit Court:

- “(a) Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12).
- “(b) A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent’s brief or motion that challenges the Board’s jurisdiction is filed. If the Board raises a jurisdictional issue on its own motion, a motion to transfer to circuit court shall be

1 arguing that the authorizations are not “final” decisions and no purpose would be served by  
2 transferring a non-final decision to circuit court. In support, Goodpasture cites *Grabhorn v.*  
3 *Washington County*, 46 Or LUBA 672 (2004). However, in *Grabhorn*, we concluded that  
4 the challenged decision, a letter that announced that the local government will reconsider its  
5 original decision, and identified a future decision on reconsideration as the final appealable  
6 decision, rendered the original decision a tentative, non-final decision that is not within  
7 LUBA’s jurisdiction. In the present case, however, the city and county authorizations appear  
8 to have been provided to Goodpasture independent of the land use process that culminated in  
9 the approval of the Greenway permit, and to be the respective local governments’ last word  
10 on whether to authorize Goodpasture to apply for the Greenway permit on city and county  
11 owned property. In that respect, they differ considerably from the decision in *Grabhorn* that  
12 we found was an intermediate step in the land use proceeding.

13 Accordingly, Willamette Oaks’ motion to transfer LUBA Nos. 2011-019 and 2011-  
14 020 is granted, and LUBA Nos. 2011-019 and 2011-020 are bifurcated from LUBA No.  
15 2011-049. We therefore do not reach Willamette Oaks’ seventh assignment of error, which  
16 argues that the authorizations must be reversed because the city and county employees who  
17 signed the authorizations lacked the authority to authorize Goodpasture to apply for the  
18 Willamette Greenway permit to construct the improvements on city and county owned  
19 property.

---

filed not later than 14 days after the date the moving party learns the Board has raised a jurisdictional issue.

- “(c) If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.”



1 **FIRST, SECOND, AND SIXTH ASSIGNMENTS OF ERROR (LUBA No. 2011-049)**

2 **A. Introduction**

3 Statewide Planning Goal 15 (Willamette River Greenway) requires that local  
4 governments map the boundaries of the Willamette River Greenway and develop a plan to  
5 manage land uses within the Greenway.<sup>7</sup> The Eugene-Springfield Metropolitan Area  
6 General Plan, known as the Metro Plan, adopted a map of the city’s greenway boundaries,  
7 and the Land Conservation and Development Commission acknowledged those boundaries  
8 in 1982. Metro Plan, III-D-1. The subject property is located within the Greenway  
9 boundary. The city also adopted a refinement plan for the area of the city in which the  
10 property is located, known as the Willakenzie Area, that is called the Willakenzie Area Plan  
11 (WAP).

12 The city’s program for managing land uses within the Greenway boundary is found at  
13 EC 9.8800 *et seq.*<sup>8</sup> EC 9.8815 provides in relevant part:

---

<sup>7</sup> The Court of Appeals recently summarized the requirements embodied in Statewide Planning Goal 15 (Willamette River Greenway):

“[T]he Oregon Legislature in 1973 declared it to be ‘in the public interest to develop and maintain a natural, scenic, historical and recreational greenway upon lands along the Willamette River to be known as the Willamette River Greenway.’ ORS 390.314(1). Statewide Planning Goal 15, which specifically pertains to the Willamette River Greenway, requires that local governments develop and implement a plan for (1) establishing the Greenway boundary, (2) managing uses of lands within the Greenway, and (3) acquiring land to serve the purposes of the Greenway. OAR 660-015-0005; Goal 15, Paragraph A(2) (Greenway Program shall ‘be composed of cooperative local and state government plans for the protection, conservation, enhancement and maintenance of the Greenway \* \* \*.’).” *Gunderson v. City of Portland*, 243 Or App 612, 615-16, 259 P3d 1007 (2011).

<sup>8</sup> EC 9.8800 provides:

“**Purpose of Willamette Greenway Permits.** Intensification of uses, changes in use, or developments require special consideration before being permitted within the boundaries of the Willamette River Greenway. Special consideration is required to implement Oregon Statewide Planning Goal 15, Willamette River Greenway which is designed to protect, conserve, enhance, and maintain the natural, scenic, historical, agricultural, economic, and recreational qualities of lands along the Willamette River. Urban uses may be allowed but conditions of approval may be imposed as are deemed necessary to carry out the purpose and intent of the Willamette River Greenway, and to insure that any intensification of uses,

1 **“Willamette Greenway Permit Approval Criteria and Standards.**

2 Willamette Greenway permit approval may be granted only if the proposal  
3 conforms to all the criteria in subsections (1) through (4), and the applicable  
4 standards of subsection (5) as follows:

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

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

11 “(3) The intensification, change of use, or development will conform with  
12 applicable Willamette Greenway policies as set forth in the *Metro*  
13 *Plan*.

14 “(4) In areas subject to the Willakenzie Area Plan, the intensification,  
15 change of use, or development will conform with that plan’s use  
16 management considerations. \* \* \*”

17 The language in EC 9.8815(1) and (2) is nearly identical to language in Goal 15. Goal  
18 15(F)(3)(b)(1) and (2).

19 One of the Metro Plan policies referenced in EC 9.8815(3) that applies to the  
20 proposed transportation improvements is Metro Plan Policy D-5, which provides that “[n]ew  
21 development that locates along river corridors and waterways shall be limited to uses that are  
22 compatible with the natural, scenic, and environmental qualities of those water features.”

23 The second applicable Metro Plan policy referenced in EC 9.8815(3) is Policy D-11, which  
24 provides that “[t]he taking of an exception shall be required if a non-water-dependent  
25 transportation facility requires placing fill within the Willamette River Greenway setback.”

26 **B. The City’s Decision**

27 In considering whether the application satisfies various approval criteria, the hearings  
28 officer and planning commission initially concluded that the phrase “the Willamette River”  
29 and its shorthand term “the river” as used in various provisions of the Metro Plan and WAP

---

changes in use, or developments within the Willamette Greenway boundaries are compatible  
with nearby uses within the Willamette Greenway.”

1 Willamette River Greenway policies and the EC refer to the main channel of the Willamette  
2 River, which, as noted, is approximately one-half mile to the west of the subject property. In  
3 evaluating the meaning of the “Willamette River,” the hearings officer first noted that the EC  
4 does not define “the Willamette River.” He explained that “[a]t its closest point the existing  
5 channel of the Willamette River is approximately 3,200 feet (0.6 miles) to the southwest of  
6 the project site.” Record 17. He next looked to provisions of the transportation element of  
7 the WAP as relevant context for interpreting the phrase “the Willamette River.” He noted  
8 that the transportation element of the WAP describes “river crossings,” that the  
9 transportation element does not mention the existing bridge over Delta Highway as a “river  
10 crossing,” and that the transportation element base map contains a notation delineating the  
11 location of the “Willamette River” that appears only over the main channel of the river. The  
12 hearings officer concluded that “[c]ontext indicates that the term ‘the river’ refers to only the  
13 current channel of the Willamette River.” *Id.* He also relied on staff testimony that the city  
14 has previously applied the criteria at EC 9.8815(1)-(4) to the “current channel of the  
15 Willamette River, not to former channels.” Record 18. He concluded that “[b]ased on all of  
16 this context, the hearing official concludes that the term ‘the river’ as used in this criterion  
17 refers to the mainstem of the Willamette River, not to former channels.” *Id.*

18 The planning commission adopted the hearings officer’s findings and adopted  
19 additional findings that:

20 “[t]he hearings official correctly interprets the term ‘the river’ to refer only to  
21 the current channel of the Willamette River not to a (possible) former channel  
22 of the river as the appellant asserts. While [Willamette Oaks] refers to  
23 ‘former river channels’ and various reaches of the Willamette River  
24 throughout the testimony, [Willamette Oaks] has not provided evidence  
25 establishing that the project location is in the area of a former river channel.”  
26 Record 6-7.

### 27 **C. Assignments of Error**

28 The city relied on its construction of the phrase “the Willamette River” as referring  
29 only to the main channel of the Willamette River that is located approximately one-half mile

1 from the subject property to conclude that numerous provisions of the EC and the Metro Plan  
2 were met. In its first, second, and sixth assignments of error, Willamette Oaks argues that  
3 the city’s misconstruction of the phrase “the Willamette River” as referring only to the main  
4 channel of the Willamette River means that it erred in finding that EC 9.8815(1) was met, EC  
5 9.8815(3) and Metro Plan Policies D-5 and D-11 were met, and that EC 9.8815(2) and (4)  
6 did not apply.<sup>9</sup> According to Willamette Oaks, the Delta Ponds/Debrick Slough area that is  
7 located east of the subject property is part of the Willamette River.

8 Willamette Oaks also argues that the provisions of the WAP that the hearings officer  
9 relied on are not relevant context for determining what the “Willamette River” means,  
10 because the Greenway protections embodied in the city’s ordinances implementing Goal 15  
11 have no substantive or meaningful relationship to the WAP’s transportation element’s  
12 description of “river crossings” or to the maps contained in the WAP’s transportation  
13 element that label the Willamette River. Willamette Oaks also argues that the fact that the  
14 position that staff may have taken in the past regarding the meaning of “the Willamette  
15 River” does not provide support for the hearings officer’s decision. The city and  
16 Goodpasture (respondents) respond that the city’s determination that “the Willamette River”  
17 means the main channel of the Willamette River is correct.

18 We review the city’s interpretation to determine whether it is correct. *McCoy v. Linn*  
19 *County*, 90 Or App 271, 275, 752 P2d 323 (1988). Initially, we agree with Willamette Oaks  
20 that the provisions of the WAP’s transportation element cited and relied on by the city are  
21 not particularly persuasive context for ascertaining the meaning of the phrase “the  
22 Willamette River” and “the river” as used in the city’s ordinance implementing Goal 15. The  
23 WAP provisions referred to by the hearings officer are the city’s decision on how

---

<sup>9</sup> In its first assignment of error, Willamette Oaks challenges the city’s finding that EC 9.8815(1) is met. In its second assignment of error, Willamette Oaks challenged the city’s finding that EC 9.8815(3) and Metro Plan Policies D-5 and D-11 are met. In its sixth assignment of error, Willamette Oaks challenges the city’s findings that EC 9.8815(2) and (4) do not apply.

1 transportation uses and improvements within the Willakenzie area should be planned and  
2 managed, but those provisions do not appear to consider transportation uses and  
3 improvements in relation to the Greenway protections that are embodied in the city’s Goal 15  
4 program. We also agree with Willamette Oaks that past practices of city staff in evaluating  
5 greenway permit applications are not particularly helpful in ascertaining the meaning of the  
6 term.

7 As explained above, EC 9.8815 implements the statutory requirement in Goal 15 that  
8 the city manage land uses within the Willamette River Greenway, and the criteria at EC  
9 9.8815(1) are the same as the implementation measures of Goal 15. The use of the word  
10 “river” in city provisions implementing Goal 15 has the same meaning as that term is used in  
11 Goal 15. Goal 15 does not include a definition of “Willamette River,” but the Goal requires  
12 review of uses within the Greenway boundary to ensure compatibility with the Willamette  
13 River Greenway statutes, at ORS 390.310 to 390.368. ORS 390.310, part of the Willamette  
14 River Greenway Statutes, provides a definition of “Willamette River:”

15 **“Definitions for ORS 390.310 to 390.368.** As used in ORS 390.310 to  
16 390.368, unless the context requires otherwise:

17 “(3) ‘Willamette River’ means that portion of the Willamette River,  
18 *including all channels of the Willamette River*, from its confluence with the  
19 Columbia River upstream to Dexter Dam and the Coast Fork of the  
20 Willamette River upstream to Cottage Grove Dam.” (Bold in original, italics  
21 added.)

22 “Channel” is also defined at ORS 390.310(1) as including “\* \* \* any channel that flows  
23 water at ordinary low water.” At a minimum, those definitions appear to provide more  
24 relevant context than the context cited and relied on by the hearings officer and planning  
25 commission, which must be considered in interpreting the term “river” as used in the city’s  
26 ordinances implementing Goal 15, if indeed those statutory definitions do not directly control  
27 the meaning of that term. The city’s conclusion that the phrase “the Willamette River” (or  
28 the shorthand term “the river”) means only the main channel of the Willamette River located

1 to the west of the subject property does not appear to be consistent with the statutory  
2 definition of “Willamette River” as including channels of the river, and fails to consider  
3 whether the Delta Ponds/Debrick Slough is a “channel” of the Willamette River, as defined  
4 by ORS 390.310(1), and thus part of the Willamette River. We note that there is some  
5 evidence in the record indicating that water in the Debrick Slough flows throughout the year,  
6 but that evidence does not identify whether the water flows at “ordinary low water.” Record  
7 425, 872. On remand, the city should consider the statutory definitions and determine  
8 whether under those definitions the Delta Ponds/Debrick Slough is part of the “Willamette  
9 River.”

10 **1. EC 9.8815(1), (2) and (4)**

11 As noted, the city concluded that “the Willamette River” refers only to the main  
12 channel of the Willamette River, and found that, as relevant here, EC 9.8815(1) is met and  
13 that EC 9.8815(2) and (4) do not apply.<sup>10</sup> For the reasons explained above, we agree with  
14 Willamette Oaks that remand is necessary for the city to reconsider whether the slough area  
15 is a “channel” and hence part of the “river” for purposes of Goal 15 and EC 9.8815.

---

<sup>10</sup> The hearings officer found that EC 9.8815(1) is satisfied, and the planning commission adopted his findings. Record 6-7, 18. Regarding EC 9.8815(2), the hearings officer found in relevant part:

“As noted above, the proposed transportation improvements are located over half a mile northeast of the Willamette River. \* \* \* Willamette Oaks argues that the proposal must provide public access along the river. The basis of this argument is the same as for its argument that the proposal does not comply with EC 9.8815(1) – that the development would be within the Willamette River. The [hearings officer] responded to that point above, concluding that the term ‘the river’ refers to the current channel, not to the former mainstem; the proposed transportation improvements are not occurring within or adjacent to the river. The proposed transportation improvements are more than a half-mile from the river; this provision does not require the applicant to provide access along the river as part of this application.” Record 18-19.

The planning commission adopted those findings. Record 12.

Regarding EC 9.8815(4), the hearings officer found that provisions of the WAP that require public pedestrian access and bicycle access along the river do not apply because the proposed improvements are located more than one-half mile from the Willamette River. Record 22. The planning commission adopted those findings. Record 6-7.

1                                   **2.       EC 9.8815(3) - Metro Plan Policy D-11**

2           EC 9.8815(3) provides that a Greenway permit may be approved if “[t]he  
3 intensification, change of use, or development will conform with applicable Willamette  
4 Greenway policies as set forth in the Metro Plan.” One of the “applicable Willamette  
5 Greenway policies” from the Metro Plan is Policy D-11, which provides that “[t]he taking of  
6 an exception shall be required if a non-water-dependent transportation facility requires  
7 placing fill within the Willamette River Greenway setback.” The city relied on its  
8 construction of the phrase “Willamette River” to conclude that Metro Plan Policy D-11 is  
9 met:

10           “The Willamette River Greenway setback is a line separately established  
11 within the Willamette Greenway Boundary (\* \* \*) to keep structures  
12 separated from the river. \* \* \* As noted elsewhere in this report, the proposed  
13 transportation improvements are occurring more than one-half mile (0.6 mile)  
14 from the Willamette River. As such, no fill is proposed within the 35-foot  
15 Willamette Greenway setback line. \* \* \*” Record 20-21.

16 The planning commission adopted those findings. Record 7.

17           Goodpasture responds to Willamette Oaks’ second assignment of error by arguing  
18 that the city properly determined that the proposed improvements would not be located  
19 within the setback. However, that determination hinges on the city’s understanding that the  
20 proposed improvements are located more than one-half mile away from the Willamette River  
21 and consequently are not located within the 35’ setback from the top of the riverbank that is  
22 established by the WAP. As explained above, that understanding may be erroneous.

23           We also understand Goodpasture to argue that the city adopted alternative findings  
24 that EC 9.8815(3) is not applicable because the proposed transportation improvements are  
25 not an “intensification, change of use or development” under EC 9.8815(3). Goodpasture  
26 Response Brief 16-17. However, the city’s decision concludes that EC 9.8815(3) applies to  
27 the proposal, and that the applicable Metro Plan policies are Policy D-5 and D-11. Record 6-  
28 7. The city did not determine, as Goodpasture argues, that the proposed transportation

1 improvements are not an “intensification, change of use or development” under EC  
2 9.8815(3).

3 **3. EC 9.8815(3) - Metro Plan Policy D-5**

4 Metro Plan Policy D-5 provides that “[n]ew development that locates along river  
5 corridors and waterways shall be limited to uses that are compatible with the natural, scenic,  
6 and environmental qualities of those water features.” In his findings regarding Metro Plan  
7 Policy D-5, the hearings officer concluded that “as noted elsewhere, the proposed  
8 transportation improvements are completely within existing right-of-way and located over a  
9 half mile from the Willamette River. \* \* \*” Record 19. However, the hearings officer also  
10 concluded in the alternative that Policy D-5 was satisfied:

11 “[t]o the extent this policy applies to the new bridge and transportation  
12 improvements at the interchange, [Goodpasture] has provided additional  
13 findings that show how the use is compatible with the natural, scenic, and  
14 environmental qualities of the nearby ponds. These findings are \* \* \*  
15 incorporated herein by reference.” Record 20.

16 The planning commission found that “the [hearings officer’s decision] provides adequate  
17 findings that the development is compatible with the various qualities of the water features,  
18 \* \* \* and affirms, adopts and incorporates the Hearings Official’s findings and conclusions  
19 on this issue set forth on [Record 19-20] of the [hearings officer’s] decision.” Record 12.

20 Although Willamette Oaks argues in its second assignment of error that the hearings  
21 officer erred in concluding that the proposed improvements are located “over a half mile  
22 from the Willamette River,” Goodpasture responds that the hearings officer and the planning  
23 commission adopted alternative findings that Policy D-5 was met. We agree with  
24 Goodpasture that the city adopted alternative findings that Policy D-5 was met. Willamette  
25 Oaks does not acknowledge or challenge those findings. Absent any challenge to those  
26 findings, the portion of Willamette Oaks’ second assignment of error challenging the city’s  
27 decision regarding Policy D-5 is denied.



1 The first and sixth assignments of error are sustained, and the second assignment of  
2 error is sustained, in part.

3 **THIRD ASSIGNMENT OF ERROR (LUBA No. 2011-049)**

4 EC 9.4900 *et seq.* regulate development within the city's /WR - Water Resources  
5 Conservation Overlay Zone. EC 9.4920(2) provides that for protected wetlands, uses and  
6 development are restricted within the "Goal 5 Water Resource Site" and "[t]he area within  
7 the applicable conservation setback." Filling, grading, and excavating, and removal of native  
8 vegetation are prohibited within the conservation setback. EC 9.4930(4). The applicable  
9 conservation setback of 50 feet, 25 feet or 0 feet is based on whether the wetland is a  
10 Category A, B, or C wetland, respectively. The Goodpasture Wetlands located to the west of  
11 the proposed improvements and the Delta Ponds Wetlands to the southeast of the proposed  
12 improvements are Category A wetlands and require a 50-foot setback. The Delta Ponds  
13 Wetlands to the northeast of the proposed improvements are Category B wetlands and  
14 require a 25-foot setback.

15 **A. Wetland Boundary Delineation**

16 EC 9.4920(2)(b) provides:

17 "[c]onservation setback distances for wetlands are measured horizontally from  
18 wetland boundaries established under the 'Goal 5 Locally Significant Wetland  
19 Sites Within the Eugene Urban Growth Boundary' map or if provided by the  
20 property owner, from the jurisdictional wetland boundary accepted by the  
21 Oregon Department of State Lands."

22 As part of a concurrent application for standards review that was later withdrawn,  
23 Goodpasture initially provided a wetland delineation to the city. However, the hearings  
24 officer and the planning commission concluded that where Goodpasture also provided maps  
25 that measured the setback distances from wetland boundaries established on the city's  
26 adopted Goal 5 maps and requested that the city base its determination on those maps, the  
27 city could not rely on the previously introduced wetland delineation:

1            “[The hearings officer] found that while the applicant initially provided a  
2 wetland delineation, it never provided the City a jurisdictional wetland  
3 boundary formally accepted by the Oregon Department of State Lands  
4 (ODSL). [Goodpasture] instead relied on the setback distance as measured  
5 horizontally from wetland boundaries established on the City’s adopted Goal  
6 5 maps, \* \* \* as specifically allowed by EC 9.4920(2)(b).

7            “ \* \* \* \* \*

8            “[The hearings officer] correctly found that there is no restriction in the  
9 Eugene Code requiring an applicant to use a wetland delineation that it  
10 prepares. Again, EC 4.920(2)(b) states that the distances are measured from  
11 wetland boundaries as determined by the City’s ‘Goal 5 Locally Significant  
12 Wetland Sites Within the Eugene Urban Growth Boundary’ map, or if  
13 provided by the property owner a jurisdictional wetland boundary accepted by  
14 ODSL. The applicant in this case chose the Goal 5 map option to determine  
15 the wetland boundary and the [hearings officer] correctly found this to comply  
16 with applicable standards.” Record 10-11.

17            In the third assignment of error, Willamette Oaks challenges the city’s reliance on the  
18 city’s Goal 5 maps to establish the jurisdictional boundaries of the wetlands from which the  
19 setbacks are measured. First, Willamette Oaks argues that the planning commission erred in  
20 failing to rely on the wetland delineation prepared by Goodpasture’s consultants that is in the  
21 record. According to Willamette Oaks, the planning commission’s interpretation of EC  
22 9.4920(2)(b) as not requiring the city to rely upon a wetland delineation provided by the  
23 applicant that is part of the record is inconsistent with the purpose of the /WR zone to protect  
24 Goal 5 Water Resource sites.

25            Goodpasture responds, and we agree, that EC 9.4920(2)(b) does not require that the  
26 city rely upon the wetland delineation provided by Goodpasture. EC 9.4920(2)(b) is framed  
27 in the disjunctive, and the setback can be measured from either the city’s Goal 5 maps or a  
28 wetland delineation, if provided by the property owner. Initially, Goodpasture is not the  
29 owner of the property that is the subject of the application. Therefore any wetland boundary  
30 delineation provided by Goodpasture is not a boundary delineation “provided by the property  
31 owner.” Even if Goodpasture is understood to act for the property owner, the text of EC  
32 9.4920(2)(b) does not elevate either the Goal 5 map or the property owner’s delineation, or

1 require the city to rely upon one or the other. A setback determined from the city's Goal 5  
2 map is clearly sufficient to protect identified Goal 5 Water Resources.

3 **B. Goal 5 Map**

4 Willamette Oaks next argues that the city erred in relying on Goodpasture's maps that  
5 depict the wetland boundary based on the city's Goal 5 map because the maps were prepared  
6 based on GIS information from the city's GIS database, and were not based directly on the  
7 city's Goal 5 map. Goodpasture responds that a staff report explains that a GIS map of the  
8 wetland boundaries at 1" = 500' Scale is an accurate depiction of the city's Goal 5 map  
9 wetland boundaries as long as the GIS map is not a smaller scale than the city's Goal 5  
10 Setbacks Map, which is included in the record. Record 938, 943. Willamette Oaks offers no  
11 reason to believe that maps based on the city's GIS database, which are derived from the  
12 city's Goal 5 map, are inaccurate or differ in any material respect from the city's Goal 5 map.  
13 Absent such an argument, we agree with Goodpasture that the map at Record 943 provides  
14 substantial evidence regarding the location of the wetland boundaries, and that the city did  
15 not err in relying on it to determine the wetland boundary and the setback distances, at least  
16 where the map is not a smaller scale than the city's adopted Goal 5 map.

17 **C. WAP Standard 7**

18 Finally, Willamette Oaks also challenges the planning commission's finding that  
19 WAP Standard 7, which requires the city to protect significant fish and wildlife habitat, is  
20 met through compliance with the provisions of the /WR zone. Petition for Review 21. The  
21 hearings officer recognized that the Delta Ponds and the Goodpasture Ponds have been  
22 determined to be significant habitat by the Oregon Department of Fish and Wildlife, and  
23 found that the /WR conservation overlay codifies the requirement in WAP Standard 7 to  
24 protect significant fish and wildlife habitat. Record 23. The planning commission adopted  
25 those findings. Record 13. Willamette Oaks does not develop its argument or otherwise

1 explain why the city’s decision that compliance with the /WR provisions will protect  
2 significant habitat is incorrect.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR (LUBA No. 2011-049)**

5 In its fourth assignment of error Willamette Oaks challenges the city and county  
6 authorizations that we conclude above are not land use decisions. In its fourth assignment of  
7 error, Willamette Oaks argues that the city erred in approving the Greenway permit  
8 application where the applicant was not a public agency and the application was not signed  
9 by the city and county, the owners of the property. According to Willamette Oaks, EC  
10 9.7010 requires the application to be “signed by the property owner” and the city erred in  
11 relying on the city and county authorizations discussed above to demonstrate that the  
12 signature requirement was met.

13 We previously determined that the authorizations are not land use decisions and  
14 transferred Willamette Oaks’ appeals of the authorizations themselves to the circuit court.  
15 However, the issue Willamette Oaks presents above—whether the city erred by approving a  
16 Greenway permit application that allegedly does not comply with EC 9.7010—is not an issue  
17 the circuit court will be required to address, because the city’s Greenway permit decision is  
18 the decision that is before us in this appeal. The city and Goodpasture respond, and we  
19 agree, that the planning commission and the hearings officer correctly concluded that the  
20 authorizations are the equivalent of signatures on the application and that EC 9.7010 is  
21 satisfied.<sup>11</sup> The purpose of the signature requirement appears to be to ensure that the owner  
22 of the property knows about and consents to the application for development on the property.

---

<sup>11</sup> EC 9.7010 provides:

“Applications shall be submitted on a form approved by the city manager, be accompanied by a fee established pursuant to EC Chapter 2 *and be signed by the property owner, unless the applicant is a public agency, in which case the signature of the property owner is not required.* \* \* \*.”

1 The authorizations demonstrate that the city engineer and the acting county administrator, as  
2 the agents of the local governments, have agreed to allow the application. *Womble v. Wasco*  
3 *County*, 54 Or LUBA 68, 79-80 (2007).

4 Willamette Oaks next argues that the city engineer and the acting county  
5 administrator and the county public works director had no authority to execute the  
6 authorizations. We understand Willamette Oaks to argue that no reasonable decision maker  
7 would rely on the authorizations as evidence that EC 9.7010 is met because as a matter of  
8 law the persons issuing the authorizations did not have authority to issue them. Whether the  
9 city engineer and the acting county administrator and the county public works director  
10 actually have authority to execute the authorizations is presumably one of the issues or  
11 possibly the only issue that Willamette Oaks will present to the circuit court in the  
12 transferred appeals. We express no view here concerning the answer to that question.  
13 However, the related question Willamette Oaks asks under this assignment of error - whether  
14 a reasonable decision maker would rely on the authorizations as evidence that EC 9.7010 is  
15 met - is an evidentiary issue that is properly presented in this appeal and is not likely to be an  
16 issue that the circuit court would entertain. We turn to that question.

17 Each of the authorizations includes a statement at the beginning that the person or  
18 persons executing it has the authority to do so. We agree with the city and Goodpasture that  
19 a reasonable decision maker could conclude that the city engineer and the county  
20 administrator and public works director had the authority to provide the authorizations and  
21 did not err in relying on the authorizations to find that EC 9.7010 is met, where there is no  
22 evidence in the record indicating that the persons who issued the authorizations did not have  
23 that authority.<sup>12</sup>

---

<sup>12</sup> The hearings officer concluded:

“The hearings official does not believe the level of information that Willamette Oaks asserts  
is necessary in the record. \* \* \* EC 9.7010 simply does not require this level of

1 The fourth assignment of error is denied.

2 **FIFTH ASSIGNMENT OF ERROR (LUBA No. 2011-049)**

3 The subject property is designated in the Metro Plan, and in the WAP Land Use  
4 Diagram and Public Facilities Plan as Parks and Open Space. The subject property is not  
5 assigned a zoning designation on the city’s zoning map, and right of way in the city that is  
6 not designated on the zoning map is “deemed to be unzoned.” EC 9.1070(3). Willamette  
7 Oaks argues that a decision to approve the improvements on land designated Parks and Open  
8 Space on the Metro Plan map and the WAP Land Use Diagram and Public Facilities Plan is  
9 not consistent with the WAP Goal that the city “[p]rovide for the protection and  
10 enhancement of land designated park and open space in the Metro Plan and the Park and  
11 Recreation Plan \* \* \*.” WAP p. 6. Willamette Oaks also argues that the proposed  
12 improvements are inconsistent with Metro Plan Policy H-1, which provides:

13 “Develop a system of regional-metropolitan recreational activity areas based  
14 on a facilities plan for the metropolitan area that includes acquisition,  
15 development, and management programs. The *Metro Plan* and system should  
16 include reservoir and hill parks, the Willamette River Greenway, and other  
17 river corridors.” Metro Plan III-H-4.

18 As a result, Willamette Oaks argues, the decision is inconsistent with ORS 197.175(2)(d).<sup>13</sup>

19 In response to the argument below, the hearings officer found that the Metro Plan  
20 open space policies and the WAP goals do not apply to the proposal:

---

information. It requires a signature. The applicant received the needed signatures from the city and county officials who assert they have authority to provide the signatures. The application complies with EC 9.7010.” Record 31-32.

<sup>13</sup> ORS 197.175(2)(d) provides in relevant part that:

“Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

“ \* \* \* \* \*

“(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations[.]”

1           “The Metro Plan \* \* \* notes that [the] diagram is a ‘generalized map and  
2 graphic;’ however, the plan text states that it is drawn at a ‘metropolitan scale,  
3 necessitating supplementary planning on a local level;’ and the land use  
4 designations shown in the diagram ‘provide direction for decisions pertaining  
5 to appropriate reuse (redevelopment), urbanization of vacant parcels and  
6 additional use of underdeveloped parcels.’ Metro Plan II-G-1, II-G-2. *These*  
7 *statements indicate that it is necessary to look at the refinement plan and*  
8 *zoning map to determine if the Delta Highway right-of-way is subject to*  
9 *Metro Plan open space policies. If the refinement plan and zoning map apply*  
10 *to the Delta Highway right-of-way, then it would be appropriate to apply*  
11 *Metro Plan policies.*

12           “The [WAP] land use diagram \* \* \* shows the area of the proposed  
13 development in dark green, corresponding to a Parks/Open Space designation.  
14 However, Land Use Finding No. 4 (WAP p. 10) states that the WAP study  
15 area excludes streets and alleys. The plan text thus indicates that the Delta  
16 Highway right of way is not subject to the plan policies.

17           “City staff stated that the land is not zoned open space, rather it is not zoned.

18           “ \* \* \* \* \*

19           “Willamette Oaks’ argument that transportation improvements are prohibited  
20 within the existing Delta Highway right-of-way has no basis in state law, the  
21 Metro Plan or Eugene Code.” Record 32-33 (underline in original; italics  
22 added).

23           The planning commission adopted those findings. Record 9.

24           According to Willamette Oaks, WAP Finding No. 4 that the hearings officer relies on  
25 to conclude that the proposed transportation improvements are not subject to any WAP goals  
26 or Metro Plan policies does not support the hearings officer’s conclusion because the finding  
27 is merely describing the total net area included in the Willakenzie area as “exclud[ing] streets  
28 and alleys.”<sup>14</sup> Goodpasture responds by pointing out that the subject property is not zoned,

---

<sup>14</sup> Finding number 4 at WAP p. 10 that the hearings officer relies on is replicated at Petition for Review App. 46 and provides:

“The following findings apply to the Willakenzie planning area as a whole or to generalized land use categories within the Willakenzie area.

“\* \* \* \* \*

1 that the Metro Plan map designation and the WAP land use designations are implemented by  
2 city zoning, and that Willamette Oaks has not explained how the proposal is inconsistent  
3 with city zoning.<sup>15</sup>

4 We understand the city to have determined that the Metro Plan and the WAP have no  
5 goals or policies that apply to the proposed development of the subject property that is right-  
6 of-way that is deemed by EC 9.1070(3) to be unzoned, but that is designated Parks and Open  
7 Space by the city’s Metro Plan. Record 32-33. We agree with Willamette Oaks that the  
8 description in finding number 4 of the total acreage of the study area as “exclud[ing] streets  
9 and alleys” is not dispositive of the question of whether the city intended that the subject  
10 property that is not zoned be excluded from the WAP’s open space policies. In general,  
11 where property is unzoned, the city must make decisions regarding the property in  
12 compliance with the comprehensive plan. *84 Lumber Company v. City of Phoenix*, 4 Or  
13 LUBA 14, 17, n 5 (1981); ORS 197.175(2)(d). We do not understand why the city  
14 determined that the proposal does not need to be consistent with the Metro Plan open space  
15 policies or the WAP’s open space policies, or what the city thought was the significance, if  
16 any, of the fact that the property is unzoned. The fact that the right-of-way is unzoned does  
17 not necessarily mean that Metro Plan and WAP policies applicable to the proposed  
18 development of land designated Open Space and Parks do not apply. There may be other  
19 reasons why the Metro Plan and WAP goals and policies cited by Willamette Oaks either do

---

“4. Within the study area there are 5,708 net acres (excludes streets and alleys).  
Approximately 83 percent of this total (4,732 acres) is within the corporate limits of  
the city of Eugene. The remainder, 17 percent (976 acres), is unincorporated.”

<sup>15</sup> Goodpasture also argues that to the extent Willamette Oaks argues that the proposed improvements are inconsistent with Metro Plan *findings* from sections of the Metro Plan that are not the Willamette Greenway policies and with WAP *goals*, Willamette Oaks has not provided a basis for reversal or remand of the decision, because EC 9.8815(3) requires the proposal to conform to “applicable *Willamette Greenway policies* as set forth in the Metro Plan,” and EC 9.8815(4) requires the proposal to conform to “[WAP] *use management considerations*.” However, we do not understand Willamette Oaks’ argument to be an argument under EC 9.8815(3) and (4). Rather, we understand Willamette Oaks to argue that ORS 197.175(2)(d) requires the city’s decision on the Greenway permit to be consistent with its acknowledged comprehensive plan and that it is not consistent with one of the WAP goals and with Metro Plan Policy H-1.



1 not apply to the proposed development or do not apply in the way Willamette Oaks suggests,  
2 but neither the decision nor the response briefs cite any such reasons. Accordingly, remand  
3 is necessary for the city to consider whether any Metro Plan and WAP goals and policies  
4 apply to the proposed development, and if so whether the development is consistent with  
5 such goals and policies.

6 The fifth assignment of error is sustained.

7 The city's decision is remanded.