BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON DEPARTMENT OF TRANSPORTATION,
Petitioner,

vs.

CITY OF EUGENE
Respondent,

and

BLAZER CONSTRUCTION COMPANY,
Intervenor-Respondent.

LUBA No. 99-183

GLENWOOD STAR, INC. and DENNY'S, INC.,
Petitioners,

vs.

CITY OF EUGENE
Respondent,

and

BLAZER CONSTRUCTION COMPANY,
Intervenor-Respondent.

LUBA No. 99-185

LAUREL HILL VALLEY CITIZENS ASSOCIATION
Petitioner,

vs.

CITY OF EUGENE
Respondent,

and

BLAZER CONSTRUCTION COMPANY,
Intervenor-Respondent.

LUBA No. 99-186

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bonnie E. Heitsch, Assistant Attorney General, Salem, filed a petition for review and argued on behalf of petitioner Oregon Department of Transportation. With her on the brief was Hardy Myers, Attorney General.

William H. Sherlock, Eugene, filed a petition for review and argued on behalf of petitioners Glenwood Star, Inc. and Denny's, Inc. With him on the brief was Hutchinson, Anderson, Cox, Coons & DuPriest, P.C.

Daniel J. Stotter, Eugene, filed a petition for review and argued on behalf of petitioner Laurel Hill Valley Citizens Association. With him on the brief was Bahr & Stotter Law Offices, P.C.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Gleaves, Swearingen, Larsen, Potter, Scott & Smith, LLP. Pamela J. Beery, Portland, joined in the brief for respondent.

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

REMANDED 10/12/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners in this consolidated appeal challenge a city planning commission decision that approves (1) a zoning map amendment and (2) a tentative plan for a planned unit development (PUD).

MOTION TO INTERVENE

Blazer Construction Company, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent in these appeals. There is no opposition to the motion, and it is allowed.[1]

FACTS

The subject property includes approximately 83 acres. Intervenor's original proposal for a 394-unit PUD on the property was denied on April 27, 1998. Intervenor revised its plans in response to that denial and submitted a new application on May 20, 1999. That application was approved by the city land use hearings official on September 20, 1999. That decision was appealed to the planning commission, which affirmed the hearings official's decision on November 15, 1999. The planning commission's November 15, 1999 decision is the decision at issue in this appeal.

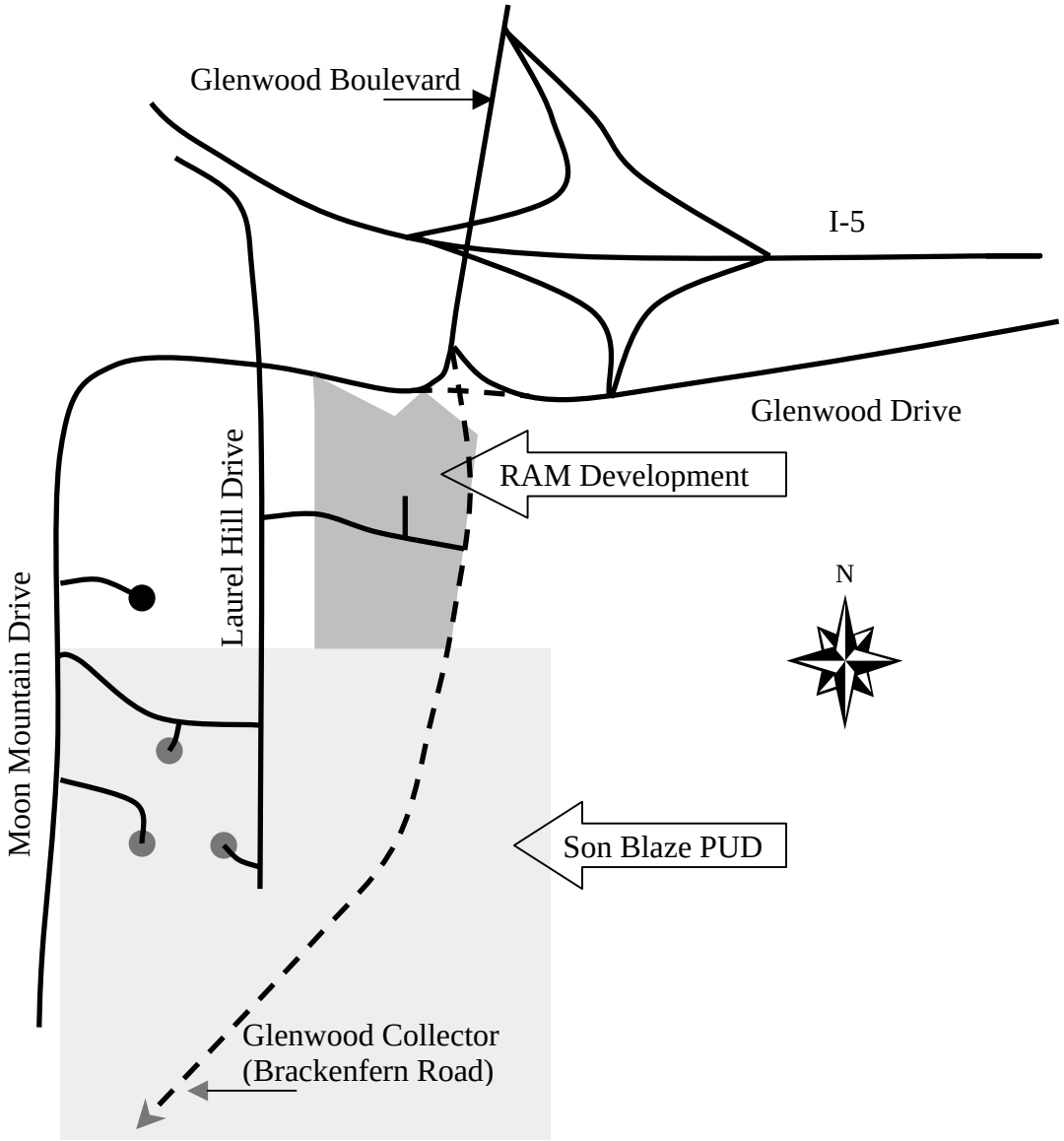
As approved, the multi-phase PUD will include as many as 285 single family and multifamily residential units.[2] One of the central issues in this appeal concerns the availability and adequacy of streets to carry the traffic that will be generated by the proposed PUD north to and through the Glenwood Boulevard interchange with Interstate Highway 5

[1]The city joins in the intervenor's brief.

[2]The approved PUD does not include commercial development, although intervenor apparently intends to seek approval for commercial development in the future.

(I-5) (hereafter Glenwood interchange).[3] As an aid in describing the relevant facts, we include a map (not to scale) showing the Glenwood interchange and the subject property below.

[3]Although I-5 generally runs north and south, in this area of the City of Eugene it runs generally east and west.



Southbound traffic exiting and entering I-5 at the Glenwood interchange currently must negotiate a "T" intersection with Glenwood Drive, which is a frontage road that runs along the south side of I-5. Glenwood Drive provides access to a number of businesses located a short distance east of that "T" intersection, on the south side of Glenwood Drive. Glenwood Drive also provides access west to its intersection with Glenwood Boulevard and Moon Mountain Drive. At the Glenwood Drive/Glenwood Boulevard/Moon Mountain Drive intersection, traffic traveling west on Glenwood Drive may turn north on Glenwood Boulevard and cross a bridge over I-5 to the City of Springfield and the northbound on-ramp to I-5. Alternatively, that traffic may turn south on Moon Mountain Drive and immediately

negotiate a sharp dogleg turn to the west. A short distance west of the dogleg, Laurel Hill Drive intersects Moon Mountain Drive and provides access south to the subject property. A short distance further west, Moon Mountain Drive turns south and after some distance also provides access to the subject property. The Glenwood interchange will be used for access by approximately 90 percent of the traffic that will ultimately be generated by the PUD. There does not appear to be any dispute that the Glenwood interchange, as configured and improved on the date the challenged decision was adopted, would not be adequate to carry that additional traffic.

On March 19, 1999, the Oregon Department of Transportation (ODOT) granted the City of Eugene a "Permit to Construct Approach Road." Record 1299. That permit authorized two significant changes to the Glenwood interchange. First, it authorizes relocation of the current Glenwood Drive/Glenwood Boulevard/Moon Mountain Drive intersection southward to align Glenwood Drive and Moon Mountain Drive. This change will allow westbound traffic on Glenwood Drive to proceed directly west through the intersection onto Moon Mountain Drive. Second, it authorizes an extension of Glenwood Boulevard south approximately 600-700 feet through a 20-acre property owned by the RAM Corporation. This would allow the RAM property to be developed commercially, with access to the Glenwood interchange via the extension of Glenwood Boulevard to the south.[4]

The subject property lies immediately south of the RAM property. Petitioners take the position that the March 19, 1999 permit is expressly limited to allow access to the RAM property. According to petitioners, a new or amended ODOT permit will be required before Glenwood Boulevard can be extended south to connect the PUD with the improvements

[4]This extension of Glenwood Boulevard is also referred to as the Glenwood Collector. The proposed extension of the Glenwood Collector into intervenor's property will be known as Brackenfern Road.

authorized by the March 19, 1999 permit.[5] The city and intervenor dispute petitioners' interpretation of the March 19, 1999 permit. The planning commission's decision that grants tentative plan approval for the disputed PUD is based, in part, on its conclusion that it may rely on the street and intersection improvements authorized by the March 19, 1999 permit in finding that a number of relevant PUD approval criteria are satisfied. Because petitioners view the scope of that permit differently, they dispute that conclusion and raise other related and unrelated issues.

POST ORAL ARGUMENT MOTIONS

Following oral argument in this appeal, ODOT filed a motion requesting that LUBA take official notice that the March 19, 1999 ODOT permit described above was *not* extended and that it expired on March 30, 2000. In support of that motion, ODOT requests that we

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[5]The record includes two letters that explain ODOT's position in this matter. The first is a June 10, 1999 letter from an ODOT planner to the city planning division, which explains:

> "The existing road approach permit for RAM Construction, that builds a small portion of the Glenwood Collector, pertains only to the RAM development; the Son Blaze Village proposal will require a new road approach permit from the City of Eugene. From our discussions with the City and Son Blaze, it appeared the need for a road approach was evident with some form of an intergovernmental agreement. If there is some confusion, it was not intended and [ODOT] will gladly continue to work with the City and Developers to clarify our requirements about road approach permits.
>
> "As you know, ODOT, the City of Eugene, and Son Blaze are working together to arrive at acceptable conditions for a road approach permit for the Son Blaze development. These discussions are [ongoing] and very useful, but no agreed sets of conditions or possible intergovernmental agreement are yet decided." Record 922.

A second letter from the ODOT district manager to the city planning division, dated October 18, 1999, restates the above position:

> "In March of this year * * * ODOT, through the actions of myself as District Manager issued an approach road permit to the City of Eugene in order to facilitate the construction of the first segment of the Glenwood Blvd. extension. This permit was expressly issued to enable only the [RAM] Development commercial project to proceed while we resolved issues surrounding the impact of Son Blaze PUD. The conditions of the permit were intended to preclude any development other than [RAM] from gaining access to the interchange without amendment or issuance of a new permit. We issued the current permit to the City in an effort to separate the impact of the [RAM] Development from the larger issues and greater impacts of the Son Blaze PUD and enable [RAM] to finally proceed with their much delayed project." Record 162.

take official notice of OAR 734-055-0060(4).[6] In the alternative, ODOT moves to introduce evidence that is not currently in the record. OAR 661-010-0045.[7] In support of its alternative motion, petitioner attaches two documents. The first is a March 28, 2000 letter signed by ODOT's District 5 Manager, which (1) acknowledges receipt of a letter from the city requesting an extension of the March 19, 1999 permit and (2) denies that request. The second attachment is an affidavit signed by ODOT's attorney stating that the ODOT manager sent the letter to the city and had authority to do so.

With regard to the motion to take official notice, we routinely take official notice of relevant administrative rules and take official notice of OAR 734-055-0060(4). However, that rule does not assist ODOT, since it only establishes that the March 19, 1999 permit *would* expire on March 30, 2000, *unless* a written extension is granted. Neither the rule nor the permit itself nor anything else in the record tells us whether the construction was completed by March 30, 2000 or whether an extension was granted.[8]

We also deny petitioner's motion to introduce evidence that is not currently in the record. None of the grounds for considering evidence that is not in the record are present here. *See* n 7. The hearings official rendered her decision on September 20, 1999, and the

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[6]OAR 734-055-0060(4) provides:

> "If the applicant fails to commence installation of the facility covered by the permit within the period specified in the permit, the permit shall be deemed null and void and all privileges thereunder forfeited, unless a written extension of time is obtained from the [District Manager]."

[7]OAR 661-010-0045(1) provides, in part:

> "The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.428 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

[8]The evidentiary record was closed on August 31, 1999.

planning commission rendered the challenged decision on November 15, 1999. Intervenor contends that both the hearings official and planning commission were entitled to assume that the improvements that were authorized by the March 19, 1999 permit would be completed on or before March 30, 2000, or would be completed pursuant to authorized extensions of that permit. Intervenor argues that even if those improvements were not constructed before March 30, 2000, and the permit expired, it does not render the November 15, 1999 decision legally erroneous or mean that the decision was not supported by substantial evidence in the record as it existed at the time of the decision.

We agree with intervenor. Our review of the planning commission's decision under ORS 197.835(9) to determine whether it is legally correct and supported by substantial evidence is generally unaffected by events that occur after the decision becomes final. One potentially relevant exception to this general rule is where subsequent events render the challenged decision moot. *See Century 21 Properties v. City of Tigard*, 17 Or LUBA 1298, 1302-03 (1989) (LUBA will consider evidence outside the record to determine whether an appeal is moot); *1000 Friends of Oregon v. Dept. of Environmental Quality*, 7 Or LUBA 84, 85-6 (1982) (appeal of building permits dismissed as moot where subsequent permit authorized the same improvements). However, the expiration of the March 19, 1999 permit without the authorized improvements being constructed does not render this appeal moot, and petitioner does not argue that it does.[9]

FIRST ASSIGNMENT OF ERROR

Under their first assignments of error, petitioners ODOT, Glenwood Star, Inc. and Denny's, Inc. (Glenwood Star and Denny's) and Laurel Hill Valley Citizens Association (LHVCA) separately challenge the adequacy of the city findings addressing City of Eugene

[9]For example, the March 19, 1999 permit could yet be extended. *See Martin v. Dept. of Transportation*, 122 Or App 271, 857 P2d 225 (1993) (affirming ODOT decision to grant a permit extension after the permit expired under a rule substantially similar to OAR 734-055-0060(4)). Even if it is not extended, ODOT could issue a new permit for those improvements.

Code (EC) 9.512(6)(d) and the evidentiary support in the record for the planning commission's findings that the proposal complies with EC 9.512(6)(d).[10] EC 9.512(6)(d) provides as follows:

> "Public services and facilities are available to the site. If the public services and facilities are not presently available, *an affirmative finding may be made if evidence indicates that they will be available prior to need by reason of*:
>
> "1. *Prior commitment of public funds or planning by the appropriate public agencies*, or
>
> "2. A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or
>
> "3. Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development." (Emphases added.)

There is no dispute that the "[p]ublic services and facilities" referenced in EC 9.512(6)(d) include transportation services and facilities. We understand the hearings official and planning commission to have found that although the facilities authorized by the March 19, 1999 ODOT permit are not "presently available," the "evidence indicates that they will be available prior to" the date they are needed, due to "[p]rior * * * planning by the appropriate public agencies[.]"[11]

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[10]We discuss all petitioners' first assignments of error together.

[11]Intervenor's brief can be read to argue that the city alternatively found that required transportation facilities are "available," making it unnecessary to rely on EC 9.512(6)(d)(1)-(3). That position is impossible to reconcile with other parts of the decision that state that the extension of Glenwood Boulevard and the other improvements that are authorized by the March 19, 1999 ODOT permit are needed to serve the PUD. In fact, the decision is specifically conditioned on completion of those improvements. Record 346-47 (conditions 6 and 7). At oral argument, intervenor and the city also suggested that the findings at Record 56 and conditions 6 and 7 of the decision show the city also found compliance with EC 9.512(6)(d) based on EC 9.512(6)(d)(3), because the applicant has committed to construct certain improvements. The findings at Record 56 do not say that, and the applicant has committed to construct some, but not all, of the improvements that will be required. Most significantly, the applicant has not committed to extend Glenwood Boulevard south from its intersection with Glenwood Drive. In sum, while there is room for some possible confusion regarding EC 9.512(6)(d), the only clearly articulated theory in support of the city's conclusion concerning EC 9.512(6)(d) relies on EC 9.512(6)(d)(1).

A. ODOT Permit Condition 1

EC 9.512(6)(d)(1) requires that the disputed facilities "will be available prior to" the date they are needed, due to "[p]rior * * * planning by the appropriate public agencies[.]" The concept of extending Glenwood Boulevard southward has been included in relevant acknowledged planning documents for years.[12] Unless those planning documents are changed, it would appear that there is no question that Glenwood Boulevard will be extended southward. The only questions that appear to remain concern when that extension will occur, along what specific alignment, and the improvements that will be needed to make the extension of Glenwood Boulevard function properly. Had ODOT unconditionally approved a permit that specifically authorized construction of the needed extension to connect the subject property to the Glenwood interchange via the extended Glenwood Connector, it would be entirely reasonable for the city to conclude under EC 9.512(6)(d)(1) that those facilities will be available as needed because they are "planned" "by the appropriate public agencies" and would thereby be available before the permit expired on March 30, 2000, or any approved extensions of that permit.

However, ODOT's March 19, 1999 permit is not unconditional. Condition 1 is as follows:

> "This permit requires modifications to the Glenwood interchange due to development of commercial property abutting the interchange. This permit applies to the first phase of commercial development of Glenwood Boulevard. Any future developments that access Moon Mountain [Drive], Glenwood Boulevard or Glenwood Drive are not allowed under this permit." Record 1301.

The question presented in petitioners' first assignments of error is whether this condition makes it factually and legally incorrect for the planning commission to find that the

[12]Intervenor alleges the Glenwood Collector "extension has been identified in all relevant land use plans for this area, including Metro Plan * * *, TransPlan * * * and the Laurel Hill Refinement Plan, adopted over 20 years ago." Intervenor's Brief 21.

needed transportation facilities will be available in the future *when they are needed* because they are "plann[ed] by the appropriate public agencies." In addressing this question it is important to recognize that EC 9.512(6)(d) expressly imposes a timing requirement. Under EC 9.512(6)(d) the required facilities must be "plann[ed] by the appropriate public agencies" so that they will be available "prior to need."

B. The Planning Commission's Findings

The findings adopted by the hearings official addressing EC 9.512(6)(d), which were also adopted by the planning commission, include the following:

> "* * * ODOT expressed concern regarding adequate access via the Glenwood connector. ODOT urged that other improvements related to the Glenwood interchange are desirable, or perhaps necessary. However, ODOT has presented no evidence to establish that the impacts from the proposed PUD relate to those desired improvements. A Road Approach permit has been issued, which authorizes improvements and extension of Glenwood Blvd. through the commercial property north of the proposed PUD, and which will facilitate connection of Glenwood Blvd. to Brackenfern Road. While ODOT testified that it was requiring an additional 'legal mechanism' or perhaps another permit between ODOT and the city to allow other development to benefit from the improvements authorized by that permit, ODOT has not established either (1) any impacts from the proposed development that would necessitate additional improvements to that portion of Glenwood Blvd. within ODOT's jurisdiction; or (2) any authority or jurisdiction to limit use of the section of Glenwood Blvd. improved pursuant to that previously granted approach permit. As the applicant correctly observed in its rebuttal testimony:
>
> > "'The fact that a portion of the traffic from the PUD will use the interchange has no bearing on ODOT's jurisdiction. Once the street improvements are made that are presently authorized by the Road Approach Permit, no further improvements are required in order for traffic throughout the Laurel Hill Valley to use the improved interchange. Traffic from the PUD will either use Glenwood Boulevard (Phases 4, 5, 6 and 7) or Laurel Hill Drive (Phases 1, 2, 3 and 8). ODOT is not involved with these streets, either legally or financially.' August 31, 1999 Rebuttal Testimony of Patrick Kilby, Blazer Construction * * *.
>
> "As stated above, improvements to Glenwood Blvd., which will connect Glenwood Blvd. to the northern property boundary of the PUD, have been authorized through an approach permit. Once the Glenwood Blvd.

> improvements are completed, the site has adequate street access from Glenwood. All other proposed streets accessing the site are currently developed to the site boundaries. Thus provision of transportation facilities is feasible." Record 386.

The additional findings adopted by the planning commission include the following:

> "Even though we only have the limited record of this application before us, it is still obvious there have been substantial discussions between City staff, ODOT staff, the Applicant and representative of the RAM commercial site. Whatever has taken place in those discussions is not readily apparent from the evidence and reports presently in the record.
>
> "Based on the information that is in the record, we agree with the Hearings Official's conclusion that public transportation facilities, including Glenwood Boulevard, are both available and adequate to serve build-out of the entire PUD. We agree with the Hearings Official's conclusion that ODOT did not submit any evidence to support its repeated argument that the Son Blaze PUD will have traffic impacts on the Glenwood Interchange that cannot be accommodated by the improvements described in and required by the Road Approach permit issued on March 19, 1999, by ODOT to the City of Eugene. In the absence of evidence, traffic impact analyses, statistics or any other information that would support its argument, we must reject it as unsubstantiated.
>
> "In addition, the City cannot accept ODOT's request to require the Applicant to construct additional traffic improvements the need for which cannot be attributed to the Applicant's PUD. This is not fair and it is not constitutionally supportable * * *[.]" Record 18-19.

The primary problem with the above findings is that they never directly address what we believe is the threshold question in this case under EC 9.512(6)(d)(1). Is the access that is authorized by the March 19, 1999 ODOT permit, as conditioned, limited to the RAM development? Assuming the answer to that question is yes, a second question that the city's findings do address may be relevant. Did ODOT exceed its jurisdiction by imposing such a condition? If the access that is authorized by the March 19, 1999 ODOT permit is expressly limited to the RAM development, as petitioners argue, then access to the PUD is not "plann[ed] by the appropriate public agencies" "prior to need," and the city's finding of compliance with EC 9.512(6)(d)(1) is erroneous and unsupported by substantial evidence. In that event we would be required to sustain petitioners' first assignments of error unless the

city is correct in its theory that condition 1 of the March 19, 1999 permit (condition 1) exceeds ODOT's jurisdiction and for that reason may be ignored. We first consider the threshold question.

C. Condition 1 Allows Access to the RAM Property Only

Intervenor's strongest argument is that condition 1 is poorly worded and that in other circumstances condition 1 may be problematic or impossible for ODOT to enforce as written. Again, that condition provides:

> "This permit requires modifications to the Glenwood interchange due to development of commercial property abutting the interchange. This permit applies to the first phase of commercial development of Glenwood Boulevard. Any future developments that access Moon Mountain [Drive], Glenwood Boulevard or Glenwood Drive are not allowed under this permit." Record 1301.

Intervenor's arguments focus on the last sentence of the condition. Moon Mountain Drive, Glenwood Boulevard north of its intersection with Glenwood Drive and Glenwood Drive are all existing roads. Moon Mountain Drive in particular is a city-owned road that serves a significant number of developed properties that are some distance from the Glenwood interchange. Intervenor contends that it could not have been intended that new development accessing those existing roads, no matter how distant that development may be from the Glenwood interchange, would require an additional or amended access permit.

We conclude the last sentence must be read in context with the first two sentences of the condition. The first sentence states the *purpose* of the permit, which is to require modifications to the Glenwood interchange that are needed "due to development of commercial property abutting the interchange." In other words, the modifications are required to accommodate the RAM development. The second sentence specifically states that it "applies to the first phase of commercial development of Glenwood Boulevard," *i.e.*, RAM's commercial development. Admittedly this sentence does not expressly state that the permit applies "only" to the RAM development, but it is reasonably clear that such is the

intent. The last sentence, although awkwardly and perhaps overbroadly written, simply makes it clear that no development other than RAM is allowed access to the Glenwood interchange by virtue of the improvements authorized by the March 19, 1999 permit.

At oral argument, the city suggested a way that condition 1 could be interpreted to avoid what the city believes is both an unintended result and a result that exceeds ODOT's authority.[13] The record includes a map that shows the proposed extension of Glenwood Boulevard south to intervenor's property. Record 454. On that map, a dashed line is drawn down either side of the extended Glenwood Boulevard right of way. *Id*. Where the right of way is shown crossing into intervenor's property, the dashed lines continue a short distance into intervenor's property so that the end of the Glenwood Boulevard right of way extension remains open at the northern border of intervenor's property. *Id.* The city argues that these dashed lines show what the parties refer to as access control lines.[14] The parties informed us at oral argument that ODOT secured an access control line in the approximate location of those dashed lines along the Glenwood Boulevard extension at the time the right of way for the extension was deeded. According to the city, condition 1 should be interpreted to require a new or amended access permit only if development would be required to cross such access control lines to obtain access to the Glenwood interchange. The city and intervenor argue that because the extension of Glenwood Boulevard south into intervenor's property will not cross such an ODOT access control line, it is not affected by condition 1.

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[13]ODOT contends the city's suggested interpretation was advanced for the first time at oral argument, and should not be considered because it is not included in intervenor's brief. OAR 661-010-0040(1). Although it is a reasonably close question, we believe it is appropriate to consider the city's argument as an elaboration of the arguments concerning ODOT's jurisdiction, which appear at the bottom of page 8 of intervenor's brief. As previously noted, the city joined in intervenor's brief.

[14]Apparently an access control line results when ODOT purchases real property interests that allow it to control access from abutting properties. ORS 366.320 provides, in part, that ODOT may "acquire all right of access from abutting property[.]" ORS 366.340 provides, in part, that ODOT "may acquire * * * real property, or any right or interest therein, including any easement or right of access, deemed necessary[.]"

The city's proffered interpretation of condition 1 has the virtue of making the scope of that condition much clearer. It also would mean that Glenwood Boulevard could be extended south to serve intervenor's property, without a new or amended ODOT permit, because the extension of Glenwood Boulevard south is not closed at the end by an access control line. It would also mean that future development of other properties along Glenwood Drive, Glenwood Boulevard and Moon Mountain Drive would only require a new or amended ODOT permit if it was necessary to cross an ODOT access control line to provide access to those properties.

However, the city's interpretation reads a limitation into condition 1 that is not expressed in the condition. There is nothing in either the March 19, 1999 permit itself or the record of this appeal that suggests condition 1 was intended to be so limited.[15] A second difficulty, as we have explained above, is that the wording of the condition seems to envision a broader limitation. A final difficulty is that there seems to be no doubt that the condition was specifically written to ensure that, without an additional or modified permit, intervenor's PUD would not be allowed to access the Glenwood interchange via the Glenwood Boulevard extension authorized by the March 19, 1999 permit. Intervenor appears to concede the point.

> "ODOT's first condition, while obviously targeted at the Blazer project, is so broadly worded that it applies, on its face, to '[A]ny future developments' that will use the interchange. This could mean a remodel project for a house located a half mile away as well as the Blazer project." Intervenor's Brief 8.

In sum, we agree with intervenor and the city that condition 1 is awkwardly written and may be difficult to enforce in some circumstances. However, that awkwardness and any potential problems with enforcement in other contexts notwithstanding, condition 1

[15]We also note that the map at Record 454 does not label the dashed lines as access control lines, and it is somewhat unclear what that map is intended to demonstrate. A larger engineering drawing of the Glenwood Boulevard extension was provided by the city at oral argument and the city stated at oral argument that the map at Record 454 is a smaller-scale map prepared from that engineering drawing.

precludes extension of Glenwood Boulevard southward from the RAM property into intervenor's property without a new or amended access permit.

We next turn to intervenor's and the city's position that condition 1 exceeds ODOT's statutory authority if it is interpreted in the manner petitioners argue and, therefore, may be ignored.

D. The Condition is Within ODOT's Authority

ORS 374.310 provides, in part:

> "(1) The Department of Transportation with respect to state highways * * * shall adopt reasonable rules and regulations and may issue permits, not inconsistent with law, for the use of the rights of way of such highways and roads * * *.
>
> "(2) Such rules and regulations and *such permits shall include such provisions, terms and conditions as in the judgment of the granting authority may be in the best interest of the public for the protection of the highway or road and the traveling public* * * *[.]" (Emphasis added.)

This is a very broad grant of authority to ODOT. It authorizes ODOT to issue permits and condition those permits "in the best interest of the public for the protection of the highway or road and the traveling public." The city's and intervenor's argument appears to be if condition 1 requires that the city seek and obtain a new or amended permit before it extends Glenwood Boulevard south to serve intervenor's property, and that requirement has the *effect* of precluding development of intervenor's property under EC 9.512(6)(d) until the city obtains the required access permit or permit modification, such a condition impermissibly encroaches on the city's land use planning authority and is beyond ODOT's statutory authority. We reject the argument.

We understand ODOT to take the position that the interchange improvements that are authorized by the March 19, 1999 permit are sufficient to accommodate the additional traffic that will be generated by commercial development of the RAM property, but that more improvements or mitigation measures may be needed to permit additional access to the

Glenwood interchange. The disputed March 19, 1999 permit condition apparently was inserted to reflect this position. In our view, such action on ODOT's part easily falls within its statutory authority under ORS 374.310. Admittedly that action may have the indirect effect of delaying intervenor's PUD approval until whatever additional deliberations among the relevant parties occurs and a new or amended permit that does not include the disputed condition is issued by ODOT. However, we do not agree that such an indirect effect means ODOT exceeded its statutory authority in imposing condition 1. Until ODOT issues a new or modified access permit, we agree with petitioners that it was error for the planning commission to conclude, under EC 9.512(6)(d), that transportation facilities "will be available prior to need by reason of" "[p]rior * * * planning by the appropriate public agencies[.]"

Finally, even if the disputed condition did exceed ODOT's statutory authority, we do not believe it is permissible for the city to take the position in this proceeding that the permit condition exceeds ODOT's authority and for that reason can be ignored. Rather than appealing the March 19, 1999 permit and seeking to have the disputed condition amended or removed, the City of Eugene signed the March 19, 1999 permit. Record 1299. Had the city appealed the March 19, 1999 permit, it is possible that ODOT would have deleted or modified condition 1 in ways that would have permitted the city to approve the disputed PUD. Having failed to do so, we do not believe the city may achieve that same result by fiat in this land use proceeding.

Petitioners' first assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR (ODOT)

Under its fourth assignment of error, ODOT extends the argument presented under its first assignment of error. According to ODOT, EC 9.512(6)(d) not only requires that the city find that needed transportation facilities will be *available*, it also requires that the city find that those transportation facilities will be *adequate*. ODOT argues that the transportation

study prepared by intervenor's traffic engineer does not constitute substantial evidence that the transportation facilities improvements that were approved in the March 19, 1999 ODOT permit, once they are constructed and available, will be adequate to serve the disputed PUD once the PUD is fully developed.

ODOT is concerned about traffic conflicts at two intersections: (1) the "T" intersection at Glenwood Drive where traffic exits from and returns to southbound I-5 and (2) the realigned Glenwood Drive/Glenwood Boulevard/Moon Mountain Drive intersection. ODOT is concerned that a potentially significant amount of additional traffic will enter and leave the Glenwood interchange, principally via the Glenwood Collector and Brackenfern Road, as property to the south is developed. ODOT is also concerned that the roadway improvements and Glenwood Boulevard extension that are authorized by the March 19, 1999 permit, by themselves, will not be sufficient to accommodate that additional traffic without leading to queuing problems at one or both of the intersections, causing traffic to back up onto I-5. We understand the city and intervenor to dispute those concerns and to take the position that the improvements authorized by the March 19, 1999 ODOT permit, by themselves, will be sufficient to accommodate the disputed PUD. Moreover the parties dispute the necessity for mitigating measures to address ODOT's concerns.[16]

Regardless of the *adequacy* of the improvements that were authorized by the March 19, 1999 ODOT permit to provide transportation services and facilities to the disputed PUD, we have already concluded under the first assignment of error that the city's findings that those facilities will be *available* when they are needed due to "prior * * * planning by

[16]The mitigation measure that has drawn the most fire is one that would affect traffic exiting the commercial areas on the south side of Glenwood Drive and turning west on Glenwood Drive. One proposal would require this traffic to turn north at the "T" intersection onto the approach lane for southbound I-5. Such traffic would not have the option that it now has, of continuing west through the "T" intersection to the Glenwood Boulevard/Moon Mountain Drive intersection. That would mean that traffic wishing to travel in that westerly direction would have to negotiate a detour to the south via I-5 or be rerouted via an indirect route through the neighborhood to the south and then westerly to the proposed Glenwood Collector.

appropriate public agencies" are erroneous and unsupported by substantial evidence. In addition, it is clear that the question of the *adequacy* of those improvements to provide transportation services and facilities to the developing area to the south, and whether additional mitigation measures are required, will be the central question in any proceedings to extend or modify the March 19, 1999 permit or to issue a new access permit. We therefore conclude it would be inappropriate for us to attempt to answer that question here.[17]

ODOT's fourth assignment of error is denied.

SECOND AND FIFTH ASSIGNMENTS OF ERROR (ODOT)

Under its fifth assignment of error, ODOT argues the planning commission erred by failing to address EC 9.678(2).[18] Under its second assignment of error, ODOT argues the

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[17]An additional problem under this assignment of error is that we have some question whether EC 9.512(6)(d) expressly requires the city to address "adequacy" of transportation facilities. EC 9.512(6)(d), which is quoted in full under our discussion of the first assignment of error, only expressly requires that facilities "[be] available" or "that they will be available prior to need." An additional inquiry beyond *availability* into the *adequacy* of facilities is not expressly required by EC 9.512(6)(d). Petitioner appears to rely entirely on the following finding in the planning commission's decision for its view that EC 9.512(6)(d) requires that the city consider the adequacy of transportation facilities:

> "Based on the information that is in the record, we agree with the Hearings Official's conclusion that public transportation facilities, including Glenwood Boulevard, are both available and adequate to serve build-out of the entire PUD." Record 19.

Intervenor notes the lack of an explicit reference in EC 9.512(6)(d) to *adequacy* but goes on to say "[a]dequacy of services and facilities is an important factor in determining whether they are available to serve a particular development." Intervenor's Brief 22. Intervenor then argues why it believes the needed facilities are adequate. Although the quoted finding appears to embrace the idea that available facilities must also be adequate, it is not entirely clear that the planning commission interpreted EC 9.512(6)(d) to require a finding that available facilities will also be adequate.

[18]As relevant, EC 9.678(2) provides:

> "The [planning] commission or hearings official shall review [an application for a zone change] and receive pertinent evidence and testimony as to why or how the proposed change is consistent with the following criteria required for approval:
>
> "(a) The uses and density that will be allowed in the location of the proposed (zone) change (1) can be served through the orderly and efficient extension of key urban facilities and services prescribed in the Metropolitan Area General Plan * * *[.]"

record does not include substantial evidence that would support a finding of compliance of EC 9.678(2).

Our review of quasi-judicial land use decisions is subject to ORS 197.835(3), which provides that a petitioner must have raised the issues it attempts to raise at LUBA "before the local hearings body as provided by ORS * * * 197.763[.]" ORS 197.763(1) provides that an issue may not be raised at LUBA unless it is raised "not later than the close of the record at or following the final evidentiary hearing * * *." Intervenor argues that ODOT did not raise any issue concerning EC 9.678(2) before the hearings official and did not raise any issue concerning EC 9.678(2) in its appeal of the hearings official's decision to the planning commission. Record 409-12. According to intervenor, the first time any issue concerning EC 9.678(2) was raised was in ODOT's "written legal argument that was submitted to the Planning Commission on October 21, 1999." Intervenor's Brief 33. The final evidentiary hearing in this matter was conducted by the hearings official. As noted earlier, the local evidentiary record closed on August 31, 1999. Intervenor argues that under ORS 197.763(1) and 197.835(3), ODOT waived its right to raise any issue concerning EC 9.678(2). We agree.

ODOT's second and fifth assignments of error are denied.

THIRD ASSIGNMENT OF ERROR (ODOT)

In its third assignment of error, ODOT argues there is not substantial evidence to show the challenged decision complies with the East Laurel Hill Transportation Policy, which provides as follows:

> "The Glenwood Collector shall be designed to avoid breaking up large and existing properties, improve the intersection alignment of the Laurel Hill—Glenwood overpass and maintain safe sight distance. It shall serve as the primary access to future residential development south of the floating node, but terminate and diffuse into other roads serving the area. No connection to 30th Avenue shall be made." Record 11.

ODOT's only cognizable argument under this assignment of error is that the city erred in finding compliance with the plan policy because it erroneously concluded the Glenwood Collector may be extended to serve the subject property by virtue of the March 19, 1999 ODOT permit. For the reasons explained under our discussion of petitioners' first assignments of error, we agree with ODOT that the city erroneously assumed the March 19, 1999 ODOT permit authorizes the disputed PUD to connect to the Glenwood Collector. Accordingly this assignment of error must be sustained.[19]

ODOT's third assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR (GLENWOOD STAR AND DENNY'S)

Under their second assignment of error, Glenwood Star, Inc. and Denny's, Inc. argue the city's decision fails to demonstrate compliance with Policy 3 of the East Laurel Hill section of the Laurel Hill Plan, which provides in part:

> "The East Laurel Hill development node shall be designed to take into consideration the existing community commercial development and tourist needs along the frontage road south of Interstate 5; the Glenwood collector; * * * and the future neighborhood commercial needs of Laurel Hill residents * * *." Record 29.

Glenwood Star and Denny's are concerned that a likely consequence of the challenged decision is that traffic that exits their properties on the south side of Glenwood Drive in a westerly direction toward the Glenwood Boulevard/Moon Mountain Drive intersection will be barred in the future from doing so, as a mitigation measure to compensate for additional traffic from the disputed PUD. *See* n 16.

[19]Intervenor alleges ODOT waived this issue by failing to raise it to the planning commission. ODOT did not respond to intervenor's waiver argument. We note that unlike intervenor's waiver argument under the second and fifth assignments of error, intervenor does not claim ODOT failed to raise any issue concerning this plan policy before the hearings official. We therefore decline to find that ODOT waived its right to challenge the evidentiary support for the city's finding concerning the East Laurel Hill Transportation Policy.

The city took the position that the facilities authorized by the March 19, 1999 permit were by themselves adequate to provide traffic services and facilities to the PUD, without any necessity for the feared mitigation measures that would affect petitioners' businesses.

The city's central premise in this appeal is that it could proceed to grant tentative approval for the disputed PUD without first obtaining a modification of the March 19, 1999 permit or a new ODOT access permit. As we have already explained in sustaining petitioners' first assignment of errors, that central premise is erroneous. The issue of whether a mitigation measure such as the one Glenwood Star and Denny's identify under this assignment of error is needed will likely be resolved during the process of obtaining the required new or amended ODOT permit. In view of our resolution of petitioners' first assignments of error, it is at best premature for this Board to consider whether the challenged decision violates the cited Laurel Hill Plan policy.

Glenwood Star, Inc. and Denny's, Inc.'s second assignment of error is denied.

SECOND ASSIGNMENT OF ERROR (LHVCA)

Intervenor was given until August 31, 1999 to submit final written legal arguments. ORS 197.763(6)(e). Under ORS 197.763(6)(e), an applicant's final written arguments may not include new evidence. Paper copies of two e-mail messages, dated July 29, 1999, and August 5, 1999, were attached to intervenor's final written legal argument. Both of those e-mail messages critique ODOT's position concerning the need for traffic mitigation measures in addition to the facilities approved by the March 19, 1999 permit.[20] LHVCA argues these e-mail messages constitute new evidence that petitioner was not allowed an opportunity to rebut. Petitioner contends the city's acceptance of this allegedly new evidence without

[20]The July 29, 1999 e-mail questions certain ODOT assumptions concerning performance of the southbound deceleration lanes. That e-mail suggests ODOT's concerns that traffic from the PUD would cause traffic to back up onto the southbound lane of I-5 may be overstated. Record 778. The August 5, 1999 e-mail questions ODOT's suggestions for mitigation, based on various provisions in the Oregon Highway Plan. Record 779.

allowing petitioner an opportunity to rebut that evidence constitutes error. *Brome v. City of Corvallis*, 36 Or LUBA 225, 235, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999).[21]

The challenged e-mail messages include both legal argument and allegations of fact. The *legal* argument included in the e-mails regarding meaning of the cited provisions of the Oregon Highway Plan is not prohibited by ORS 197.763(6)(e). We believe our resolution of petitioners' first assignments of error and ODOT's fourth assignment of error means that any procedural error the city may have committed under ORS 197.763(6)(e) by accepting and considering the *factual* allegations in those e-mail messages did not prejudice LHVCA's substantial rights. As we have already explained, the *adequacy* of the facilities approved by the March 19, 1999 permit to serve the PUD without additional mitigation measures appears to be the central issue that will be presented in securing the new or amended ODOT access permit that will be required before the disputed PUD may be approved. In rejecting ODOT's fourth assignment of error, we concluded it would not be appropriate for us to consider the city's findings concerning the adequacy of those facilities, or the evidentiary support for those findings, as part of this appeal.

LHVCA will have an opportunity to participate in any ODOT proceedings that will be necessary to modify the March 19, 1999 permit or issue a new permit. To the extent the *adequacy* of any facilities that may be approved through such ODOT proceedings is a relevant legal issue in any city decision on remand to approve the disputed PUD, and the city relies on the disputed e-mail messages, LHVCA must be given an opportunity to rebut those e-mail messages. With these understandings, and because we do not consider the question of the "adequacy" of those facilities in this appeal, we conclude that LHVCA's substantial

[21]We have some question whether the city relied on those e-mail messages in reaching its decision, but we are offered no reason to believe they did not do so. Intervenor speculates the factual information in the e-mail messages or the e-mail messages themselves may have already been included in the record. However, intervenor offers no citations to the record that would support that speculation.

rights were not violated by accepting the disputed e-mail messages after the evidentiary record leading to the decision at issue in this appeal was closed.

LHVCA's second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR (LHVCA)

One of the approval criteria for tentative PUD approval is EC 9.512(6)(f), which provides:

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

LHVCA argues the city failed to identify and assure preservation of "significant on-site vegetation" and "worthwhile natural features." In particular, petitioner argues a number of areas on the subject property that include significant stands of trees, vegetation and wetlands will be cleared and developed with buildings and streets. According to petitioner the city erred by allowing "the destruction of significant vegetation, wetlands, and other worthwhile natural features, so long as the values were 'balanced' against 'other public interests such as street connectivity and street standards.'" LHVCA Petition for Review 11.

There is no dispute that in developing the subject property trees, other vegetation and wetlands will be removed or destroyed.[22] However, intervenor argues that LHVCA fails to acknowledge the significant modifications that were made to reduce the impacts on these resources.[23] More importantly, intervenor disputes petitioner's apparent view that EC

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[22]Of the 598 trees that range from 20 to 29 inches in diameter, 359 will be removed. Of the 108 trees that range from 30 to 39 inches in diameter, 66 will be removed. Of the seven trees that are 40 inches or more in diameter, six will be removed. Record 1050. Some lots will be located in wetlands. Record 934.

[23]The hearings official's findings explain:

> "[S]taff expressed concern that insufficient attention had been paid to buffering and preserving the riparian areas adjacent to streambanks and wetlands. Staff asserted that the city had recognized 'a suitable buffer area for intermittent streams as a minimum of 20 feet measured from top of bank.' While the code does not mandate such a 20 foot buffer area, the applicant responded by revising the site plan to clearly depict the top of bank along all

9.512(6)(f) imposes an absolute requirement that significant vegetation and other natural features must be preserved in all cases, notwithstanding other comprehensive plan and code provisions that provide for residential development of the subject property and require provision of supporting infrastructure. Intervenor argues it was entirely appropriate for the hearings official and planning commission to balance the vegetation and natural feature preservation requirement of EC 9.512(6)(f) with other relevant comprehensive plan and code requirements. The requirement for such balancing and some of the balances that were struck in this case to both achieve development and design requirements and preserve natural resources on the site is explained at length in the hearings official's findings:

> "* * * Streets are planned to minimize impacts on natural drainage way and wetlands and follow the site's natural contours, while also achieving the Plan's transportation policies[.] * * * Building lots are proposed to maximize tree preservation. Larger lots, with greater conservation easements, are proposed for the areas with the greatest concentration of trees, particularly in the southwest corner of the site. Smaller lots, and hence greater density, are proposed in less forested areas." Record 358.

> "* * * In partial response to staff and neighborhood concerns regarding lack of east-west movement within the PUD and the lack of secondary access to some areas of the PUD, the applicant revised the site plan to connect two streets that had originally been proposed as cul-de-sacs. * * * Balancing the Laurel Hill Plan's directive for east-west movements and the code required internal connectivity against the incremental increase in the amount of impact, in this instance the Plan's policies and the benefits to the neighborhood transportation system indicate a greater need for the through connection. * * *" Record 360.

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streams, and provided the requested buffer adjacent to all intermittent streams. For those wetlands to be preserved, the applicant has included a 20-foot buffer surrounding each as a protection area. * * *

"The staff also suggested that additional conservation areas could better preserve more of the site's vegetation and natural features, and recommended several areas where additional conservation areas would maximize such preservation. The revised site plan incorporates those recommendations to the extent they can be incorporated without violating other, conflicting code requirements and interests, and in those instances, the applicant's rebuttal comments explain why those recommended alternatives cannot be incorporated." Record 391.

We generally agree with intervenor that LHVCA's apparent reading of EC 9.512(6)(f) as requiring that all significant on-site vegetation and natural features be preserved in all cases is not warranted when EC 9.512(6)(f) is viewed in context with other EC provisions. For example, other EC 9.512(6) criteria impose directives in mandatory language such that conflicts that would prevent fully achieving both directives could easily occur.[24] In addition, although EC 9.512(6)(f) does mandate that the PUD "assure preservation of significant on-site vegetation * * * and other unique and worthwhile natural features," other subsections of EC 9.512(6) make it reasonably clear that the mandate to preserve those resources is not as overarching and absolute as petitioner argues.[25]

The balancing approach that was employed by the city to address the relevant approval criteria, while subjective and susceptible to varied results, is not unusual and in some cases is a practical necessity. As the Court of Appeals explained in *Waker Associates, Inc., v. Clackamas County*, 111 Or App 189, 194-95, 826 P2d 20 (1992):

> "[D]ecision-makers will often be confronted with situations * * * where a use is compatible with some of the goals and incompatible with others. It is not possible to approve or disapprove a use in those situations without engaging in a balancing exercise. Although the effect on and consistency of a proposed use with each of the goals must be considered, the weight to be given a goal and the magnitude of the effects that particular proposed uses will have on the values that the different goals protect will inevitably vary from case to case. Some of the goals may be totally irrelevant to some proposed conditional uses. * * *
>
> "In addition to the fact that some goals will be irrelevant to some proposals, it is equally apparent that some proposed * * * uses will have more profound effects on some goals than on others and that some proposed uses will have

[24]EC 9.512(6)(c)(5) directs, in part, that the PUD must "[b]e in compliance with the street connectivity standards of section 9.045." EC 9.512(6)(e) directs that "[d]evelopments must provide for solar access to lots and south-facing building walls * * *." EC 9.512(6)(g) requires that "[t]here will be adequate on-site provision for utility services, emergency vehicle access, and, where appropriate, public transportation facilities."

[25]For example, EC 9.512(6)(c)(2) requires that the PUD "[a]void unnecessary disruption or removal of attractive natural features and vegetation * * *." EC 9.512(6)(c)(4) requires that the PUD "[a]void conversion of natural resource areas designated in the Metropolitan Area General Plan to urban uses when alternative locations on the property are suitable for development as otherwise permitted."

> greater effects on the goals generally than will other proposed uses. * * * In sum, * * * a balancing process that takes account of relative impacts of particular uses on particular goals and of the logical relevancy of particular goals to particular uses is a decisional necessity. *See Union Oil Co. v. Board of Co. Comm. of Clack. Co.*, 81 Or App 1, 724 P2d 341 (1986); *see also Oswego Properties, Inc. v. City of Lake Oswego*, 108 Or App 113, 814 P2d 539 (1991). The way in which the factors are balanced is a question for the local government to answer initially, subject to LUBA's and our review."

LHVCA's argument under this assignment of error is directed at the balancing approach itself rather than the particular balances that were struck or the degree to which one code mandate was sacrificed to achieve another. The hearings official and planning commission adopted extensive findings, some of which are quoted above, explaining the revisions that were made to achieve the mandate in EC 9.512(6)(f) and why in some cases natural areas were sacrificed to achieve other code requirements. We conclude those findings are adequate to explain why the proposal complies with EC 9.512(6)(f).

LHVCA's third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR (LHVCA)

EC 9.045(7) provides:

> "There shall be no cul-de-sac more than 400 feet long from the centerline of the intersecting street to the radius point of the cul-de-sac bulb * * *."

One of the cul-de-sacs in the Regan Heights area of the proposed PUD is approximately 500 feet long.[26] The planning commission imposed the following condition:

> "A separate variance application will be required as part of the subdivision application for the Regan Heights area if a cul de sac length of greater than 400 feet is proposed." Record 31.

LHVCA argues this constitutes an improper deferral of decision making to a later stage where petitioner will not be provided "the full opportunity for public involvement

[26]The hearings official explained that the longer cul-de-sac avoided the need to construct a loop road, which would result in more grading and "more impact on the upper elevations of the site." Record 383.

provided in the initial stage of the process." *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100, 107 (1992); *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988).

Had the city required that the applicant seek and receive a variance before approving the PUD, EC 9.090 provides for notice of a variance decision, with an opportunity for appeal to the hearings official. In that event, the hearings official would conduct a public hearing. As far as we can tell, petitioner's right to participate is not affected by when the variance is granted. If the cul-de-sac variance is sought in the future and denied, the PUD apparently would have to be modified. If that modification were found to be "minor," it could be approved by the planning director subject to notice and an opportunity for appeal. EC 9.516(9)(e)(1). In the event of such an appeal, the hearings official would conduct a public hearing. *Id*. If the modification were found to be "major" it would be referred to the hearings official for a public hearing. EC 9.516(9)(e)(2). Petitioner makes no attempt to explain why these procedures fail to provide substantially the same full opportunity for public involvement that would have been provided had the variance been granted prior to or as part of the proceedings that led to the challenged decision.

LHVCA's fourth assignment of error is denied.

CONCLUSION

Although all petitioners request reversal of the city's decision, we believe remand is the appropriate disposition. For the reasons we have already explained, the city's error was in approving the disputed PUD before it secured a modified March 19, 1999 permit or a new permit that would authorize the disputed PUD to connect to the Glenwood interchange. We are offered no reason to believe that ODOT could not approve such a new or amended permit. In that event, the evidentiary record in this proceeding could be reopened to include evidence of such a new or amended permit and any related evidentiary matters and the city could adopt new findings of compliance with the relevant approval criteria. In such circumstances, remand rather than reversal is appropriate. *See Seitz v. City of Ashland*, 24 Or

LUBA 311, 314 (1992) (where land use decision could be corrected by accepting additional evidence and adopting additional findings, remand rather than reversal is appropriate).

The city's decision is remanded.