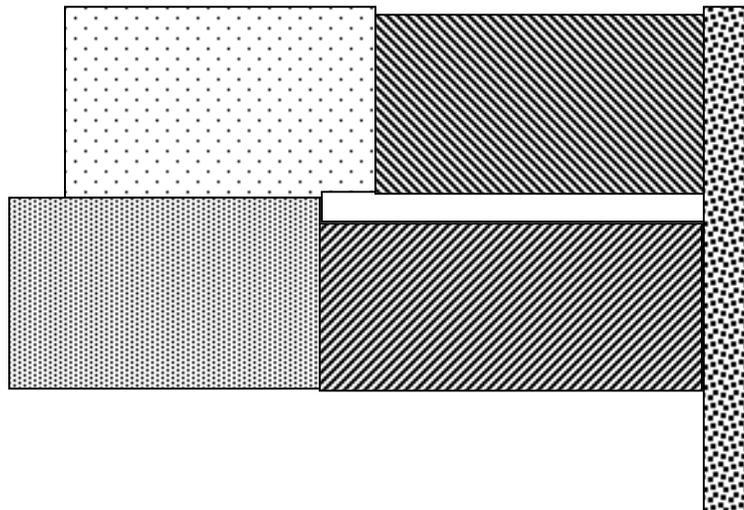


NATURE OF THE DECISION

Petitioners appeal the city’s imposition of conditions on the city’s tentative approval of petitioners’ partition application.

FACTS

In 2001, petitioners partitioned their property into three parcels. The middle parcel did not have road frontage and was provided access by an easement across the easternmost parcel, which bordered Salal Street. The easternmost parcel, which fronted Salal Street, was subsequently partitioned into two parcels (depicted as parcels A and B on the figure below). The present appeal concerns petitioners’ proposal to partition the middle parcel (Proposed Parcels 1 and 2). The figure below does not show the westernmost of the three parcels that were created by the 2001 partition. The figure below shows petitioners’ proposed partition of the middle parcel and the 20-foot easement across Parcels A and B that petitioners propose to utilize to provide access to proposed parcels 1 and 2. That easement is at the heart of this appeal.



Proposed Parcel 1 Parcel A
Proposed Parcel 2 Parcel B
Access Easement Salal Street (a public road)

1 Petitioners filed their application requesting approval of proposed Parcels 1 and 2 in
2 2002. The city council conducted a public hearing on petitioners’ request on May 14, 2002
3 and, after the hearing closed, voted to deny petitioners’ proposal. That 2002 city decision
4 was appealed to LUBA. In *Martin v. City of Dunes City*, 43 Or LUBA 354 (2002) (*Martin I*),
5 we remanded the city’s 2002 decision to deny petitioners’ partition application because it did
6 not include findings that explained the basis for the city’s conclusion that relevant partition
7 approval criteria were not met. On remand, the city approved petitioners’ application, with
8 seven conditions. Those conditions include requirements that (1) petitioners provide a 50-
9 foot easement to serve the proposed parcels, and (2) the proposed parcels must have at least
10 60 feet of frontage on the 50-foot wide easement.¹ This appeal followed.

¹ The city’s decision states, in relevant part:

“The application for minor partition is approved, subject to the following conditions:

- “1. Prior to approval of the final plat for this partition, the applicant shall provide to the City proof that a 50[-foot] wide roadway easement providing both of the proposed parcels with access to Salal Street has been recorded on the affected properties. * * *
- “2. Prior to approval of the final plat for this partition, the applicant shall provide to the City proof that an easement has been recorded for each of the two proposed parcels that provides for the continuation of the of the 50[-foot] wide roadway easement referred to in condition #1 to provide each proposed parcel with at least 60 [feet] of frontage on that roadway easement. * * *
- “3. Prior to approval of the final plat for this partition, the applicant shall provide to the City proof that the recorded easements referred to in #1 and #2 above also provide for the installation, construction and maintenance thereof and for access for public utilities and facilities. Installation, construction and maintenance shall be carried out only in accordance with the requirements in DCC [Section] 90 regarding permits for private excavation and driveway construction and maintenance. * * *
- “4. Prior to approval of the final plat for this partition, the applicant shall provide to the City proof that the recorded easements referred to in #1 and #2 contain the grantor, grantee, a description of [the] dominant and servient tenements, a description of the intent and purpose of the easement, and a statement of maintenance responsibility. * * *
- “5. Prior to approval of a building permit for residential use of either parcel of this partition site, the applicant shall provide to the City written certification by an Oregon Licensed Engineer that the roadway has been constructed consistent with DCC [Section] 90.13 DRIVEWAYS.

1 **PENDING MOTIONS**

2 **A. Motion to Reconsider the Board’s Order on Record Objections**

3 Respondent asks that we reconsider our determination that a March 17, 2003 letter
4 presented by petitioners to the city council after the city council reached its tentative decision
5 following our remand in *Martin I* is properly included in the record. The city argues that the
6 city’s council’s tentative decision was in fact its final decision, and the actions that the city
7 took after its tentative decision were merely technical duties that the city charter requires to
8 be performed by the city recorder.

9 Those “technical” duties include the charter requirement that the city recorder reduce
10 the city council’s decision to writing. We concluded in our order that the city’s decision was
11 not “final” for purposes of an appeal to LUBA until it was reduced to writing. Here,
12 petitioners submitted their letter to the city before the city’s decision was reduced to writing,
13 and the city did not reject that letter. Accordingly, the letter is properly included in the
14 record.

15 **B. Motion to Strike Appendices to Petitioners’ Brief**

16 The city moves to strike appendix items E, H, I, L and M from petitioners’ brief,
17 arguing that those items are not in the record of this appeal, and are not subject to official
18 notice pursuant to Oregon Evidence Code (OEC) 202.

19 **1. Appendix E**

20 Appendix E is a figure that depicts the 50-foot access easement, which is required by
21 the challenged decision, and a drainage easement. Petitioners concede that Exhibit E is a map

“6. Prior to approval of a building permit for residential use of either parcel of this partition site, the applicant shall provide to the City written certification from the Siuslaw Valley Fire and Rescue that the proposed access to the parcels is sufficient for purposes of fire protection. * * *

“7. The Minor Partition approval will expire on March 14, 2004, if the Final Plat Map is not submitted to Dunes City for approval with all conditions fulfilled on or before March 13, 2004.” Record 19.

1 that they created to illustrate an argument included under the second assignment of error, and
2 that the map is not included in the record. Petitioners respond that Appendix E is merely “a
3 visual aid to clarify the layout of the easements * * *.” Response to Motion to Strike 1.

4 We decline to consider maps that have been altered to illustrate a disputed point.
5 *Carver v. City of Salem*, 42 Or LUBA 305, 309, *aff’d* 184 Or App 503, 57 P3d 602 (2002).
6 Appendix E is not in the record. The city’s motion to strike Appendix E is granted.

7 **2. Appendix H**

8 Appendix H is an excerpt from the Uniform Fire Code, Chapter 9, Fire Department
9 Access and Water Supply (1997)(UFC). Petitioners argue that the UFC is a state regulation,
10 adopted by reference by OAR 837-040-0001 and 837-040-0010. Petitioners request that we
11 take official notice of this regulation.

12 We may take official notice of “[r]egulations * * * and similar legislative enactments
13 issued by or under the authority of * * * any state * * *.” OEC 202(4). The UFC has been
14 adopted by the State Fire Marshall as the Oregon Fire Code. Accordingly, we take official
15 notice of Appendix H.²

16 **3. Appendix I**

17 Appendix I is an excerpt from a “Model Development Code and User’s Guide for
18 Small Cities.” Response to Motion to Strike 2. We agree with the city that the Model Code is
19 not part of the city’s record, nor is it subject to official notice. The city’s motion to strike
20 Appendix I is granted.

21 **4. Appendix L**

22 Appendix L is a blank copy of the city’s Road Access/Driveway Permit application.
23 Petitioners assert that Appendix L is the equivalent of an administrative rule, because it was

² While we may take official notice of documents at the request of the parties, official notice does not mean that the documents are necessarily relevant to our disposition of particular assignments of error.

1 seven of the eight arguments, contending that those seven arguments are not responses to
2 “new matters” raised in the response brief and, therefore, are not properly included in a reply
3 brief.

4 We agree with the city that the seven arguments are not properly included in a reply
5 brief, and we therefore do not consider those arguments. The eighth argument is a response
6 to the city’s contention that the third and fourth assignments of error are, in essence,
7 collateral attacks on certain subdivision ordinance provisions that were adopted by
8 ordinances that are not before LUBA in this appeal. That is a new matter, and petitioners’
9 eighth argument in their reply brief may be considered in addressing the city’s collateral
10 attack argument.

11 Petitioners’ reply brief is allowed in part.

12 **INTRODUCTION**

13 The petition for review includes five assignments of error and 13 subassignments of
14 error challenging the city’s imposition of the seven conditions of approval. Rather than
15 address each assignment of error individually, we first address petitioners’ procedural
16 arguments before turning to petitioners’ remaining arguments. Where appropriate, we
17 combine our discussion of the assignments and subassignments of error in addressing
18 particular arguments.

19 **ALLEGATIONS OF PROCEDURAL ERROR**

20 The challenged conditions of approval were adopted to ensure that the proposed
21 partition complies with access requirements set out in Dunes City Code (DCC) 155.089(C).⁴

as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. A reply brief shall not exceed five pages, exclusive of appendices[.]”

⁴ DCC 155.089(C) provides, in relevant part:

“(1) Lots or parcels shall have verifiable access by way of a street, either county, local access-public or an easement. Verifiable access shall meet the following criteria:

1 Petitioners argue that if the standards in DCC 155.089(C) apply to the challenged partition,
2 petitioners' procedural rights were substantially prejudiced because the city did not provide
3 petitioners an adequate opportunity to prepare testimony and present evidence addressing
4 those standards. Petitioners argue that, until the May 14, 2002 city council hearing that
5 preceded the city's first decision, none of the city's notices or staff reports identified DCC
6 155.089(C) as being potentially applicable. According to petitioners, they were not aware
7 that the city believed that the requirements of DCC 155.089(C) applied to their proposed
8 partition until staff identified DCC 155.089(C) as an applicable standard during city council
9 discussions regarding the application during the May 14, 2002 hearing.⁵ At that point,

“(a) *Each lot or parcel abuts on the roadway for a distance of at least 60 feet.*

“(b) There is a legal right appurtenant to the lots or parcels to use the road for ingress and egress. A legal right to use an easement may be evidenced by:

“* * * * *

“(4) An express easement set forth in an approved and recorded subdivision or partition.

“* * * * *

“* * * * *

“(3) Easements used as access to lots or parcels shall meet the following criteria:

“* * * * *

“(c) *The minimum width of roadway easements shall be 50 feet.*

“(d) *All approved documents creating a roadway easement shall provide for the installation, construction, and maintenance thereof and provide access for all public utilities and facilities which are now or may in the future be needed for the area abutting the roadway easement and the surrounding area.*” (Emphasis added.)

⁵ Petitioners also assert that we may not consider the minutes of the May 14, 2002 city council hearing found at Record 70 through 84 because they are draft minutes. The city responds that the minutes accurately reflect the actions of the city council and the parties during the May 14, 2002 meeting. The city also states that the same information can be gleaned from the city's audiotapes, which are indisputably part of the record. Petitioners did not object to the inclusion of the draft minutes in the record. We agree with the city that we may consider the draft minutes.

1 petitioners contend, they were not prepared to address DCC 155.089(C). Petitioners further
2 argue that they were prevented from presenting testimony and evidence regarding DCC
3 155.089(C) on remand, because the city adopted its remand decision without a hearing.

4 The city responds that the city’s application form clearly states that DCC 155.089(C)
5 applies to minor partition applications. Record 152-154. The city also argues that petitioners
6 had an opportunity to respond to the city council’s concerns with respect to compliance with
7 DCC 155.089(C) during the city council’s May 14, 2002 hearing and, in fact, petitioners’
8 attorney did comment in response to the city council’s discussion regarding the need for a
9 50-foot wide access easement. Record 76-78.

10 As an initial matter, we agree with petitioners that the city’s written notices of
11 hearing before the planning commission and the city council were inadequate to identify
12 DCC 155.089(C) as an approval criterion. Those notices merely refer to DCC 155.031(B) as
13 providing relevant approval criteria, and do not set out the other criteria that the city used to
14 evaluate the proposed partition.⁶ Record 95, 96, 131, 132.

15 However, we agree with the city that petitioners were given an opportunity to testify
16 regarding DCC 155.089(C) during the proceedings that led to the city’s first decision. The
17 minutes of the May 14, 2002 city council meeting show that the city council discussed
18 whether DCC 155.089(C) applies to the subject application, and that petitioners’ attorney
19 testified that he did not believe the provisions applied.⁷ Therefore, petitioners were not
20 prejudiced by the city’s application of DCC 155.089(C) to their partition request.⁸

⁶ DCC 155.031(B) is set out in n 15.

⁷ The minutes relate the following:

“Mayor Ward called for staff response and council questions.

Mayor Ward stated he was concerned that the recorded driveway easement is 20 [feet wide]
but Dunes City Code requires it to be 50 [feet wide].” Record 72-73.

1 We also conclude that petitioners were not prejudiced by the city’s denial of their
2 request for a new evidentiary hearing on remand. In *Martin I*, we remanded the city’s initial
3 decision to deny the proposed partition because the city failed to adopt a written decision that
4 explained the basis for its conclusion that the proposed partition did not meet applicable
5 approval criteria. We also indicated that the city’s proceedings on remand could include an
6 opportunity to address the assignments of error included in the petition for review. *Martin I*,

“[City Councilor:] I have a question for [staff]. You refer in your staff report about verifiable access. Can you reference a code section or something? * * *

“[City Staff:] It is [DCC] 155.089. Access, the requirements of access, it is a list, and I will read it: Shall have verifiable access by way [of a], street, county, local, public or an easement[,] and it shall meet the following: * * * [I]t has to abut a roadway for 60 feet * * *. * * * [T]he minimum width of the easement shall be 50 feet * * *. * * * [The ordinance also] states[] that public roads and easements used to access lots or parcels shall be developed according to the standards of this chapter. * * * This automatically, by that statement throws you into road and driveway requirements. * * * All approved documents shall provide for installation, construction, maintenance, access to public utilities, etc. * * *. In addition, the city may require such improvements that are reasonably necessary to provide safe and adequate access to the lot or parcel.” Record 73-74.

Later in the hearing, the city council allowed the applicants an opportunity to respond to questions by the city council and to issues that had been raised during the city council’s discussion. Record 77. Petitioners’ attorney responded, in part:

“At the present time, there is a 20-foot easement access across [Parcels A and B to] Salal [Street]. If there are concerns about the drainage and the riparian interest [on Parcels A and B], then forcing the applicant to dedicate 50-feet for a driveway purpose, then potentially have to put safeguards in to access across that 50-feet seems a bit counter productive. We are well aware that the city has substantial numbers of properties that have * * * 20-foot driveway easements. * * *

“* * * I don’t understand why [the 20-foot easement over Parcels A and B were approved.] I wasn’t here, I didn’t do it. I am presuming that it passed [muster] both though the Planning Commission because I understand that it went through the Planning Commission with the [2001 partition] and I understood that it went through [the city council] for your deliberations. * * * I don’t think that the volume of traffic on this right of way is the issue. It’s two homes. The issue I think is how do we minimize the impact, if any, by culverting all of [the access easement] and putting in a two-lane, three-lane, four-lane * * * roadway[?]”

“* * * [W]e would suggest to you that the previous approval * * * has set the standard for access. I already acknowledged * * * [that] the access is recorded and is on the property.” Record 77.

⁸ If petitioners believed that they needed additional time to submit testimony regarding the applicability of DCC 155.089, then petitioners should have requested additional time to submit the evidence. *Schellenberg v. Polk County*, 21 Or LUBA 425, 444 (1991). They did not do so.

1 43 Or LUBA at 360. However, in explaining its earlier decision to deny petitioners’
2 application, the decision challenged in this appeal relies on the record of proceedings in
3 *Martin I* to approve the partition with conditions. Petitioners do not provide a reason why the
4 initial evidentiary hearings were inadequate to address petitioners’ application. Neither do
5 petitioners argue that petitioners’ assignments of error in their petition for review in *Martin I*
6 required the city to consider new evidence on remand.

7 The second and third subassignments of error of the second assignment of error are
8 denied. The first subassignment of error of the third assignment of error is denied. The first
9 subassignment of error of the fifth assignment of error is denied, in part.

10 **APPLICABILITY OF DCC CHAPTER 155 TO MINOR PARTITIONS**

11 The city’s land division ordinance is codified at DCC Chapter 155 (Chapter 155). The
12 challenged decision involves approval of a minor partition.⁹ According to petitioners, where
13 Chapter 155 refers to partitions generally, those general references should be read to concern
14 major partitions, and not to minor partitions. In their first assignment of error, petitioners
15 argue only those provisions of Chapter 155 that refer specifically to minor partitions apply to
16 minor partition applications. Petitioners argue that their position is supported by Chapter
17 155’s purpose statement, which provides:

18 “The City Council * * * hereby finds and deems that it is reasonably
19 necessary, in order to accomplish the orderly development of land within the
20 city, and in order to promote the public health, safety, and general welfare of
21 the city, to enact this chapter, *to be hereinafter known as the Subdivision*
22 *Ordinance of the city, in order to provide procedures, regulations, and*
23 *standards to govern the approval of plats for subdivisions, and also the*
24 *partitioning of land by creation of a street or way; to carry out the*
25 *development pattern and plan of the city and to promote the public health,*
26 *safety, and general welfare thereof; and in order to minimize congestion of*
27 *streets, secure safety from fire, flood, pollution, geological hazards and other*
28 *detrimental effects on the environment; to provide adequate light and air; to*

⁹ A minor partition is defined in DCC 155.004 as a “partition that does not include the creation of a street.” That same section defines “major partition” as “a partition [that] includes the creation of a street.”

1 prevent overcrowding of land; to facilitate adequate provision for
2 transportation, water supply, sewage disposal, drainage, education, recreation,
3 and other needs of the people of the city; and to provide and protect solar
4 access.” DCC 155.002 (Emphasis added.)

5 The city responds that Chapter 155 deals with all land divisions, and that the
6 challenged decision clearly interprets provisions in Chapter 155 that include references to
7 partitions to apply to minor partitions as well as major partitions.

8 The portion of DCC 155.002 that petitioners rely upon to argue that Chapter 155 has
9 limited applicability to minor partitions must be read in context with the remainder of the
10 purpose statement and the chapter as a whole. *PGE v. Bureau of Labor and Industries*, 317
11 Or 606, 610-611, 859 P2d 1143 (1993). DCC 155.002 provides that Chapter 155 is adopted
12 to “carry out the development pattern and plan of the city;” “to minimize congestion” and “to
13 facilitate adequate provision of transportation.” DCC 155.031(B)(1) requires “affirmative
14 findings” demonstrating that minor partitions “compl[y] in all respects to the partitioning
15 requirements and purpose of [Chapter 155], the Comprehensive Plan, and the laws of the
16 state.” In addition, DCC 155.080, setting out the general provisions for design and
17 development standards, including the access standards set out at DCC 155.089, provides that
18 “[a]ll partitions and subdivisions shall conform to the [city’s] design and development
19 standards * * *.” Read together, it is clear that applications for minor partitions must comply
20 with more than the Chapter 155 provisions that pertain to minor partitions only. Therefore,
21 the city did not err in applying sections of Chapter 155 that are not specifically limited to
22 minor partitions in their consideration of petitioners’ minor partition application.

23 The first assignment of error is denied.

24 **APPLICABILITY OF DCC 155.089 TO PETITIONERS’ PARTITION**
25 **APPLICATION**

26 **A. DCC 155.089(C)(1)(a)**

27 DCC 155.089(C)(1) requires that

1 “Lots or parcels shall have verifiable access by way of a street, either county,
2 local access-public or an easement. Verifiable access shall meet the following
3 criteria:

4 “(a) Each lot or parcel abuts on the roadway for a distance of at least 60
5 feet.”

6 Petitioners argue that DCC 155.089(C)(1)(a) does not apply to the proposed minor
7 partition. In petitioners’ view, DCC 155.089(C)(1)(a) comes into play only when a lot or
8 parcel abuts a *public* roadway.¹⁰ In this case, petitioners argue, the proposed parcels will
9 access the nearest public roadway, Salal Street, via an easement. Therefore, petitioners
10 contend, the requirement that the proposed lots abut on a roadway for at least 60 feet does
11 not apply, and petitioners are not obliged to ensure that each of the proposed parcels have 60
12 feet of frontage on the proposed easement.

13 The city disagrees. The city argues that DCC 155.089(C)(1) clearly requires that all
14 lots or parcels have “verifiable access.” According to the city, “verifiable access” is achieved
15 by satisfying DCC 155.089(C)(1)(a) through (c). The city concedes that “roadway,” as that
16 term is used in DCC 155.089(C)(1)(a) is not defined in the city’s code. However, the city
17 argues that petitioners’ proposed access is clearly a “roadway easement” as that term is
18 defined in DCC 155.004, and that the word “roadway” in DCC 155.089(C)(1)(a) includes
19 roadway easements.¹¹

20 While DCC 155.089(C)(1) and (C)(1)(a) could be written more clearly, the city’s
21 interpretation that the 60-foot frontage standard set out in DCC 155.089(C)(1)(a) applies to
22 frontage on a private easement as well as frontage on a public road is not inconsistent with
23 the language of DCC 155.089(C)(1). ORS 197.829(1). Nothing in DCC 155.089(C)(1)(a)

¹⁰ Petitioners assume in this context that “street” and “roadway” are synonymous. Petition for Review 19, n 11.

¹¹ DCC 155.004 defines “roadway easement” as:

“An easement granted for the purpose of providing vehicular ingress and egress across a particular parcel of land, serving another separate and specified parcel of land.”

1 distinguishes between the requirements for a public access and a private access. Even if we
2 agree with petitioners that “roadway,” as that term is used in DCC 155.089(C)(1)(a) is
3 synonymous with “street,” petitioners’ distinction between the requirements for frontage on
4 streets/roadways and the lack of requirements for frontage on private roadway easements is
5 not borne out in the code. DCC 155.004 defines “street” as:

6 “[a] public or *private* way that is created to provide ingress or egress for
7 persons to one or more lots, parcels, areas, or tracts of land and [includes] the
8 term[s] ‘road,’ ‘highway,’ ‘lane,’ ‘avenue,’ ‘alley,’ or similar designation.”

9 The definition of “street” includes a “private way that is created to provide ingress and egress
10 for persons to one or more * * * parcels.” Under the DCC, a roadway easement is a type of
11 street, because it provides “ingress and egress across a particular parcel of land, serving
12 another separate and specified parcel of land.”

13 More fundamentally, the purpose of DCC 155.089(C)(1) is to ensure that “verifiable
14 access” is provided to all lots and parcels. Such a purpose is defeated if the provisions of
15 DCC 155.089(C)(1)(a) are limited to requiring 60 feet of frontage on public rights-of-way
16 only. The city did not err in applying DCC 155.089(C)(1) to petitioners’ partition
17 application. Accordingly, the second subassignment of the third assignment of error is
18 denied.

19 **B. DCC 155.089(C)(3)(c)**

20 **1. “Waiver”**

21 DCC 155.089(C)(1)(c) provides that “the minimum width of [a] roadway easement[]
22 shall be 50 feet.” Petitioners contend that, as a matter of law, the city may not apply DCC
23 155.089(C)(3)(c) to the proposed partition of Parcel Two, because it was not applied in
24 approving the earlier 2001 and 2002 partitions. Petitioners contend that as a result the city
25 “waived” the right to apply DCC 155.089(C) to the current partition proposal.

26 The city responds that while the city may have mistakenly approved prior partitions
27 that included a 20-foot access easement for the middle parcel that is the subject of the current

1 partition proposal, those approvals do not mean that the city is bound to approve a partition
2 that will create an additional parcel that will rely on that easement for access. According to
3 the city, DCC 155.089(C)(3)(c) clearly requires that easement access be 50 feet wide, and
4 that requirement is not waived simply because the city mistakenly allowed use of a 20-foot
5 easement in prior partitions.¹² See n 4.

6 We agree with the city that there is nothing in the city’s code or in the prior partition
7 decisions that bars the city from requiring a 50-foot wide easement to access the two
8 proposed parcels. DCC 155.089(C)(3)(c) clearly requires that roadway easements be 50 feet
9 wide, and any mistakes that the city may have made in allowing access for one parcel via a
10 20-foot wide easement does not bind the city to approve a partition of that parcel that will
11 rely on that same 20-foot wide easement for access.

12 The first subassignment of the second assignment of error is denied.

13 **2. Contract “Breach”**

14 Petitioners argue that they granted a drainage easement to the city in 2001 as
15 consideration for the approval of the first partition of the property. According to petitioners,
16 that “consideration” bound both petitioners and the city to the conditions of approval
17 included in the 2001 partition. As a result, petitioners argue, any attempt by the city to
18 require additional access to the parcels created from the middle parcel is a “breach” of the
19 contract that resulted in that partition.

20 Petitioners misunderstand the process used by the city to approve partitions. It is not a
21 contract; it is a land division that includes conditions of approval that are related to that
22 particular proposal. The 2001 partition created three new parcels, and the city’s approval of
23 that partition was conditioned on the provision of a drainage easement over Parcels A and B.
24 The current proposal, even though it pertains to a portion of the property that was the subject

¹² We address petitioners’ contentions that they are entitled to a modification of DCC 155.089 requirements later in this opinion.

1 of the 2001 partition, creates new parcels, and includes conditions of approval to address the
2 impacts of two new one-acre parcels. The drainage easement granted by petitioners in the
3 2001 partition does not restrict the city’s review of the proposed partition, and does not
4 preclude the city from requiring a wider access to serve the proposed parcels.

5 The fourth subassignment of error of the second assignment of error is denied.

6 **CONSISTENCY WITH COMPREHENSIVE PLAN POLICIES**

7 **A. Dunes City Comprehensive Plan (DCCP) Policies A10, B2 and L1**

8 According to petitioners, by requiring that petitioners provide a 50-foot wide access
9 easement to the proposed parcels, the city failed to comply with DCCP policies that promote
10 the continuation of the forested character of the area.¹³ Petitioners contend that the city has
11 the obligation to limit access requirements to the width and length of access that is necessary
12 to provide legal and safe access to properties so that they may be developed in accordance
13 with their zoning designation. Petitioners argue that the 50-foot width and 60-foot frontage
14 standards are not necessary to ensure that safe access is maintained for the two dwellings that
15 will eventually be sited on the two proposed parcels. Petitioners argue that if the entire length
16 and width of the easement must be developed with a roadway to serve the two proposed
17 parcels, significant grading and the removal of many trees will be required. Petitioners argue:

¹³ Petitioners specifically cite to DCCP Policies A10, B2, and L1 to support their contention that the city’s imposition of the 50-foot wide easement requirement is inconsistent with DCCP conservation policies. DCCP Policy A10 provides:

“Dunes City shall create an environment which is visually attractive and which preserves the basically rural, low-density residential character of the city.”

DCCP Policy B2 provides:

“The city shall protect the waterways and geologic and wooded integrity of the area so that the community may proudly identify itself with trees, lakes, dunes and rivers.”

DCCP Policy L1 provides:

“Dunes City shall strive to maintain the forested character of Dunes City through the enforcement of its ordinances and the Forest Practices Act.”

1 “[DCCP] Policies A10, B2 and L1 clearly state their underlying purpose is to
2 minimize the impact of development in order to retain a rural environment
3 and create a visually attractive city by maintaining wooded and geologic
4 integrity. * * * Conditions #1 and #2 are not consistent with these policies and
5 under ORS 197.829, LUBA should not affirm the[se] conditions.” Petition for
6 Review 24.

7 The city responds that petitioners waived these arguments by not raising the issue of
8 compliance with the DCCP below. The city argues that even if those issues are not waived,
9 they are, in essence, impermissible collateral attacks on the city’s policy determinations
10 regarding minimum road development standards made when those standards were adopted.

11 Petitioners reply that they were not aware that the city would impose the easement
12 width and frontage standards to the proposed partition and, as a result, this is the first
13 opportunity petitioners have to challenge those requirements as they are applied to their
14 partition application. We disagree. The colloquy quoted in part at n 7 demonstrates that the
15 applicability of DCC 155.089(C)(1) and (C)(3)(c) was at issue during the city’s May 14,
16 2002 hearing on the application. Petitioners’ attorney responded to the city council’s
17 discussion of those standards by asserting that he did not believe that requiring a 50-foot
18 wide access easement furthered the city’s endeavors to protect wildlife and riparian resources
19 located on the property, and that the 20-foot wide access easement was sufficient to ensure
20 access. We believe that petitioners had the opportunity to raise issues at the May 14, 2002
21 hearing regarding the applicability of DCCP policies and why petitioners believed those
22 policies required a reduction in roadway width. Petitioners did not do so. Therefore, that
23 issue is waived. The fourth assignment of error is denied.

1 **B. DCCP Policy F4**

2 Petitioners argue that imposing the roadway easement width and frontage
3 requirements is inconsistent with DCCP Policy F4, which specifically permits access to
4 parcels via a deeded easement.¹⁴

5 The city responds that petitioners waived this issue by not raising it below. ORS
6 197.763(1); ORS 197.835(3). Even if petitioners did not waive the issue, the city responds
7 that its decision is consistent with DCCP Policy F4 in that the city approved the form of
8 petitioners’ proposed access—an easement—although it imposed additional requirements
9 regarding the nature and improvements necessary to use that easement for access to the
10 proposed parcels.

11 We agree with the city that (1) the conditions of approval are not inconsistent with
12 DCCP Policy F4, and (2) DCCP Policy F4 does not prohibit the city from imposing
13 conditions of approval that require minimum development standards for private access
14 easements. Accordingly, the third subassignment of error of the third assignment of error is
15 denied. The third assignment of error is denied.

16 **CONDITIONS OF APPROVAL**

17 Petitioners argue that the city erred in imposing the seven conditions of approval to
18 ensure that DCC 155.032, DCC 155.089(C)(3)(c), (d), (g), (h), and DCC 90.13 are
19 satisfied.¹⁵

¹⁴ DCCP Policy F4 provides:

“Every developed property shall have direct access by streets or deeded easements.”

¹⁵ DCC 155.032 sets out the standard the city council uses to evaluate minor partition proposals. It provides, in relevant part:

“Approval of the minor partition must include the affirmative findings as listed in DCC 155.032.”

DCC 155.032 does not include a listing of required affirmative findings. The city contends, and petitioners do not dispute, that the reference to DCC 155.032 is a typographical error, and the proper reference is to DCC 155.031(B). That section provides, in relevant part:

1 **A. Opportunity to Address DCC 155.032 (DCC 155.031(B)),**
2 **155.089(C)(3)(d), (g), (h), and DCC 90.13**

3 Petitioners argue:

4 “[DCC 155.032, 155.089(C)(3)(d), (g), (h), and DCC 90.13] were [not]
5 considered in *Martin I*[,] and cannot now be applied as bases for requiring any
6 conditions of approval. Review of a limited land use decision limits the issues
7 LUBA may consider to the record * * *. As there was no hearing after
8 remand[,] this error prejudiced petitioners’ substantial rights * * *.” Petition
9 for Review 25.

10 The city understands petitioners to argue that the city applied new criteria to petitioners’
11 partition application in making its remand decision. The city disputes this assertion, arguing
12 that in the challenged decision, the city applied only those code criteria that were applicable
13 to the partition application *and* were considered at some point during the initial proceedings
14 below.

“Recommendation for approval must include affirmative findings that:

- “(1) The minor partition complies in all respects to the partitioning requirements and purpose of this chapter, the Comprehensive Plan, and the laws of the state.
- “(2) The minor partition does not impede the future best use of the remainder of the property under the same ownership or adversely affect the safe and healthful development of such remainder or any adjoining land or access thereto.”

DCC 155.089(C)(3)(d) provides:

“All approved documents creating a roadway easement shall provide for the installation construction, and maintenance thereof and provide access for all public utilities and facilities which are now or may be in the future be needed for the area abutting the roadway easement and the surrounding area.”

DCC 155.089(C)(3)(g) provides:

“Any roadway easement approved shall be documented on a form acceptable to the city and shall contain the minimum following information: the grantor and grantee, a description of dominant and servient tenements, a description of the intent or purpose of the easement and a statement of maintenance responsibility.”

DCC 155.089(C)(3)(h) provides:

“All approved roadway easements shall be recorded in the title of the affected properties and recorded with the county.”

1 We understand petitioners to present an additional, related argument: that the city's
2 failure to deny the proposed partition based on the same criteria that now form the basis for
3 its approval means that the city may not consider those criteria in making its decision on
4 remand or impose conditions of approval that ensure those criteria are met. We reject that
5 argument. Our remand in *Martin I* required the city to adopt a written decision explaining the
6 criteria and facts it relied upon to approve or reject the proposed partition. Our remand did
7 not bind the city to apply only the criteria that may have formed the basis for its denial. If the
8 city considered other approval criteria, but did not address those criteria in the prior decision
9 because it concluded that the application could not be approved for other reasons, the city is
10 not barred from applying those criteria to the partition application on remand.

11 With respect to petitioners' assertions that the initial proceedings did not identify all
12 of the code provisions the city now identifies as the basis for imposing conditions of
13 approval, we believe some of the listed criteria were in fact considered during the initial
14 proceedings. The "affirmative findings" standards set out in DCC 155.031(B) were
15 extensively discussed at the planning commission and at the city council levels. *See* Record
16 94, (staff report finding that the proposed minor partition "adversely affects the safe and
17 healthful development of the remainder * * *), 102. DCC 155.089(C)(3)(d) and the road
18 construction standards set out in DCC 90.13 were identified as being standards that must be
19 met. *See* Record 74, 104, audiotapes of the March 20, 2002 planning commission meeting,
20 sides two and three.

21 Regarding DCC 155.089(C)(3)(g) and (h), it does not appear that those code
22 provisions were identified as applicable criteria or were discussed during the proceedings
23 below. However, we do not believe that the failure of the county to identify DCC
24 155.089(C)(3)(g) and (h) as applicable standards is fatal to the city's imposition of conditions
25 of approval addressing those standards. DCC 155.089(C)(3)(g) and (h) are not approval
26 standards. They describe the type of easement that must be submitted to the city to satisfy the

1 city’s standards for verifiable access, and require that easement be recorded. They do not set
2 out approval criteria that must be listed in notices that may be addressed during the
3 proceedings leading to a decision.

4 The first subassignment of the fifth assignment of error is denied.

5 **B. Adequacy of Findings**

6 Petitioners challenge the adequacy of the city’s findings with respect to DCC
7 155.089(C)(3)(d), (g), and (h). *See* n 15 (setting out those provisions). Petitioners argue that
8 the findings are inadequate to demonstrate why the city believes that DCC 155.089(C)(3)(d),
9 (g) and (h) are not satisfied. Petitioners contend that the existing 20-foot easement includes
10 all of the necessary elements to satisfy those provisions, and the city’s findings do not
11 explain why that easement is inadequate to satisfy them.

12 The city found:

13 “The documents creating the proposed roadway easement do not fully comply
14 with [DCC 155.089(C)(3)(d)]. Compliance will be achieved through a
15 condition of approval requiring that the applicant shall provide to the City,
16 prior to approval of the final plat of this partition, proof that the recorded
17 easement [that provides a 50-foot wide access easement that fronts the
18 proposed parcels for at least 60 feet] also provides for the installation,
19 construction and maintenance [of the roadway] and for access for public
20 utilities and facilities. Installation, construction and maintenance shall be
21 carried out only in accordance with the requirement in DCC [Section] 90
22 regarding permits for private excavation and driveway construction and
23 maintenance.” Record 31.

24 “The proposed roadway easement does not comply with [DCC (C)(3)(g)].
25 Compliance will be achieved through a condition of approval requiring that
26 the application provide to the City prior to approval of the final plat for this
27 partition proof that the recorded easement * * * contains the grantor, grantee,
28 a description of dominant and servient tenements, a description of the intent
29 and purpose of the easement, and a statement of maintenance responsibility.

30 “* * * * *

31 “Compliance with [DCC 155.089(C)(3)(h).] will be achieved through a
32 condition of approval requiring that the applicant provide to the City prior to
33 approval of the final plat for this partition, proof that the required roadway

1 easement has been recorded in the titles of [proposed Parcels 1 and 2 and
2 Parcels A and B.]” Record 32.

3 We believe that the findings with respect to DCC 155.089(C)(3)(d), (g) and (h) must
4 be read in conjunction with other findings that conclude that a new easement across Parcels
5 A and B is necessary to provide “verifiable access,” as that term is used in DCC Chapter 155.
6 Therefore, that the existing 20-foot wide easement includes provisions addressing DCC
7 155.089(C)(3)(d), (g) and (h) is not relevant to the city’s determination that the necessary 50-
8 foot wide access easement include those same elements. We conclude that the city’s findings
9 are adequate to explain why DCC 155.089(C)(3)(d), (g) and (h) require the imposition of
10 Conditions 3, 4 and 5 to ensure that those standards are met.

11 The second subassignment of error of the fifth assignment of error is denied.

12 **C. ORS 197.522**

13 ORS 197.522 is one of a series statutes dealing with moratoria. It provides:

14 “A local government shall approve an application for a permit, authorization
15 or other approval necessary for the subdivision or partitioning of, or
16 construction on, any land that is consistent with the comprehensive plan and
17 applicable land use regulations or shall impose reasonable conditions on the
18 application to make the proposed activity consistent with the plan and
19 applicable regulations. A local government may deny an application that is
20 inconsistent with the comprehensive plan and applicable land use regulations
21 and that cannot be made consistent through the imposition of reasonable
22 conditions of approval.”

23 Petitioners argue that ORS 197.522 imposes on local governments the obligation to
24 impose only “reasonable” conditions of approval. Petitioners contend that Conditions 1 and
25 2, which impose the 50-foot width and the 60-foot frontage requirements, are not reasonable
26 conditions of approval. According to petitioners, the required width is wider than the existing
27 right-of-way access for Salal Street. Petitioners also argue that (1) the 50-foot width is not
28 necessary to ensure adequate access for two parcels, and (2) the city’s construction standards
29 do not require more than a 20-foot width for shared driveways.

1 Even if ORS 197.522 is applicable to the challenged decision and can be read to limit
2 the types of conditions that may be imposed on approvals to “reasonable conditions,” we
3 disagree with petitioners that ORS 197.522 places a burden on the city to demonstrate that
4 the conditions are reasonably necessary to address the particular circumstances presented in
5 the proposed partition. The city’s development standards clearly provide for minimum right-
6 of-way requirements for new parcels. The city is not obliged to modify its minimum
7 requirements to respond to arguments that the minimum requirements are excessive in a
8 particular case.

9 The fifth subassignment of error of the second assignment of error is denied.

10 **D. Road Construction Standards**

11 Conditions 3 and 5 require that petitioners construct a driveway across the proposed
12 easement that satisfies DCC 90.13.¹⁶ The city concluded that DCC 90.13 is met by
13 certification by an Oregon licensed engineer that the required driveway has been constructed
14 in a manner that complies with DCC 90.13.

15 Petitioners argue that nothing in DCC 155.031(B)(2) requires application of DCC
16 90.13 or requires that a licensed engineer certify the driveway’s construction satisfies DCC
17 90.13.

18 DCC 155.031(B)(2) requires a finding that the proposed minor partition

19 “does not impede the future best use of the remainder of the property under
20 the same ownership or adversely affect the safe and healthful development of
21 such remainder or any adjoining land or access thereto.”

¹⁶ DCC 90.13 provides:

“All driveways in the city shall be constructed or maintained so that they do not form an impediment to natural drainage. They shall have culverts installed to service existing ditches or to provide for future ditches [that] may be installed by the city. A driveway shall not collect, retain, or back up the flow of surface water and create puddles, marshes, swamps, or any other similar collection of undesirable water on, upon, or near city streets and roads. It is the responsibility of the property owners on which the driveway exists to ensure that the driveway complies with the provisions of this section.”

1 Such a broad approval criterion allows the city to consider evidence in the record that the
2 proposed partition, and access to that partition, may adversely affect the “safe and healthful
3 development of [the] remainder.” There is evidence in the record that the driveway
4 construction on the proposed easement may affect drainage on Parcels A and B. We believe
5 there is a reasonable relationship between DCC 155.031(B)(2) and the condition of approval
6 requiring assurance from an engineer that the driveway that is constructed on the proposed
7 easement not cause water to collect on or near the driveway. Therefore, even if DCC 90.13
8 does not apply directly, the city may require compliance with those driveway standards as a
9 means to insure that the proposed partition is consistent with DCC 155.031(B)(2).

10 The third subassignment of error of the fifth assignment of error is denied, in part.

11 **E. Fire Equipment Access Requirements**

12 The city concluded that, in order to find that DCC 155.031(B)(2) is met, petitioners
13 must supply written certification from Siuslaw Valley Fire and Rescue that the driveway, as
14 constructed, is adequate to ensure access for emergency vehicles. Petitioners argue that
15 nothing in DCC 155.031(B)(2) requires such a certification, and such certification is
16 unnecessary, as they assert that at the time the two parcels are developed with dwellings, the
17 driveway access will be improved to fire safety access standards.

18 The city responds, and we agree, that nothing in DCC 155.031(B)(2) or any other
19 standard in Chapter 155 that has been identified to us prevents the city from imposing
20 conditions that it believes are necessary to ensure that the “safe and healthful development”
21 standard of DCC 155.031(B)(2) is satisfied. A condition of approval that requires a
22 demonstration that a local service provider has certified that the access has been improved to
23 accommodate emergency vehicles does not exceed the limits of the “safe and healthful”
24 standard.

25 The fourth subassignment of error of the fifth assignment of error is denied, in part.

1 **F. Compliance with Conditions**

2 As set out in n 1, Condition 7 requires that all conditions of approval must be met
3 within one year of the issuance of the city’s approval, or the approval lapses. Petitioners
4 argue that Condition 7 is inconsistent with Conditions 5 and 6, which require that the access
5 be improved to city standards prior to the issuance of a building permit. Petitioners note that
6 it is likely that dwellings will not be constructed on the proposed parcels for some time, and
7 if Condition 7 is read literally, petitioners will be obliged to improve the access easement far
8 earlier than would be necessary if the time limits imposed by Conditions 5 and 6 were
9 adhered to.

10 The city responds that Condition 7 does not alter the time frame for compliance with
11 non-plat related conditions. The city states that Condition 7 should be read to apply only to
12 Conditions 1 through 4, which specifically apply to the final partition plat. The city explains
13 that Conditions 5 and 6 are in the nature of advisory conditions, in that they are putting
14 petitioners on notice that some improvements will need to be made to the access before
15 building permits will be issued for the two new parcels.

16 We agree with petitioners that Condition 7 could be read to impose an absolute
17 deadline of one year. However, we conclude that the city’s explanation is sufficient to clarify
18 that ambiguity and, therefore, petitioners’ arguments in the third, fourth and fifth
19 subassignments of error of the fifth assignment of error provide no basis for reversal or
20 remand.

21 The third, fourth and fifth subassignments of error of the fifth assignment of error are
22 denied.

23 The second and fifth assignments of error are denied.

24 The city’s decision is affirmed.