BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARTIN MCKEOWN, BARBARA MCKEOWN, MARTIN JONES, GAYLE LANDT, DAVID MOON, JOAN KELLEY, ROYA CUDDEBACK, FLORENCE BARNHART, RALPH ETTEL, JEAN ETTEL, BRIAN BARBER, KATHIE BARBER, BERND CRASEMAN and PAT CRASEMAN,
*Petitioners*,

vs.

CITY OF EUGENE,
*Respondent*,

and

MAX LIEBREICH,
*Intervenor-Respondent*.

LUBA No. 2003-184

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

David C. Moon, Eugene, filed the petition for review and argued on behalf of petitioners.

Kathryn P. Brotherton, Eugene, filed a response brief on behalf of respondent. With her on the brief was Emily N. Jerome and Harrang Long Gary Rudnick PC.

Daniel J. Stotter, Eugene, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED 02/24/2004

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 appeal a city hearings official decision that grants tentative partition plan approval.

**MOTION TO INTERVENE**

Max Liebreich (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

Most of the relevant facts regarding this proposal to divide the existing property into two parcels are set out in the hearings officials' decision:

> "In 2001, [intervenor] received a building permit from the City to construct a duplex on his property * * *. [Intervenor] subsequently commenced construction on the lot. Construction has not been completed, and no occupancy permits have been issued. There has, however, been substantial controversy over whether the dwellings being constructed comply with the issued building permit, and whether they meet the duplex development standards. The two dwellings have separate foundations, are more than 10 feet apart, and are connected by an approximately five foot high, eight inch wide wall. Questions have been raised regarding compliance with numerous duplex development standards, including building height, setbacks, and lot coverage. Because the dwellings have not been completed, however, and no occupancy permits have been applied for, the City has not evaluated the dwellings as constructed for compliance with applicable development standards. Compliance with development standards * * * must be established before final occupancy permits are approved." Record 5-6.

The City Building Official testified before the hearings official that the duplex under construction on the subject property is "neither [a] duplex nor single-family dwellings and that this would not be known until the certificate of occupancy was applied for." Record 42.[1] The approved tentative partition plan divides the subject property into two parcels, leaving the northerly existing dwelling on parcel 1 and the southerly existing dwelling on parcel 2. The property line that

[1] For lack of a better alternative, we refer to the partially completed duplex as the existing dwelling on proposed parcel 1 and the existing dwelling on proposed parcel 2.

divides parcels 1 and 2 passes between the two existing dwellings, a little over five feet from each existing dwelling at the closest point to each of those existing dwellings.

Although the eastern part of the property has continuous road frontage, apparently the topography of the property makes a driveway connection impractical for much of the northeastern part of the property along the entire road frontage for parcel 1. The proposed parcels are to be served by a single driveway that enters parcel 2 at the southeast part of the property. That driveway passes between the existing dwelling on proposed parcel 2 and the southern property line. From the drawings in the record, that driveway will pass within a couple of feet of that southern property line and the existing dwelling on parcel 2. The proposed driveway would pass around the rear of the existing dwelling on proposed parcel 2 and continue north to provide access to the existing dwelling on proposed parcel 1. Record 156. The proposed driveway will be located on a "Joint Use Access Easement." Record 165. It appears that approximately one-half of proposed parcel 2 will be subject to the Joint Use Access Easement, leaving the other approximately one-half of parcel 2 for the duplex unit and small yard area that would be unencumbered by the access easement.

**FIRST ASSIGNMENT OF ERROR**

Eugene Code (EC) 9.8215(1)(a) through (k) set out eleven tentative plan approval criteria. As relevant to the first assignment of error, EC 9.8215 provides:

> "The planning director shall approve, approve with conditions, or deny a partition, with findings and conclusions. Approval, or approval with conditions, shall be based on compliance with the following criteria:
>
> "(1) The proposed partition complies with all of the following:
>
> "* * * * *
>
> "(j) All other applicable development standards for *features explicitly included in the application*.
>
> "* * * * *." (Emphasis added).

We understand petitioners to contend that the two existing dwellings on proposed parcels 1 and 2 and the proposed driveway that will serve those dwellings are "features explicitly included in the application," within the meaning of EC 9.8215(1)(j). We also understand petitioners to contend that those dwellings violate applicable development standards because: (1) both dwellings are more than 35 feet high; (2) the dwelling on parcel 2 intrudes into the required ten-foot front yard setback; (3) the deck on the house on parcel 1 intrudes into the required interior yard five-foot setback; and (4) the driveway intrudes into the interior yard five-foot setback for parcel 2. Record 9-10.

The hearings official adopted the following findings in rejecting petitioners' arguments below:

> "[Petitioners] fault the Planning Director for failing to require that the applicant comply with development standards applicable to the duplex building permit. However, the only application at issue in this challenged decision is an application for a partition. Accordingly, only development standards related to features included in the partition application itself may be evaluated under EC 9.8215(1)(j). This does not in any way absolve the applicant from complying with all other development standards related to any current or subsequent building application the applicant may request. However, a partition application is not a development permit and does not consider or evaluate any development of the parcels created by the partition. A partition, by definition, includes only 'the division of a tract of land.' It does not address or authorize any development of that land. Thus, the only development standards that could be related to the partition application itself are those that relate to the division of the land. In this case, because there are structures on each of the two parcels to be created, the development standard related to the minimum setback requirements from the newly created property boundary is applicable. Other development standards that do not relate to the division of the land itself but rather to how that divided land is developed, now or in the future, continue to be applicable, but their applicability relates to the development and not the land division.
>
> "The Planning Director's finding that the applicant's partition request satisfies EC 9.8215(1)(j) correctly determines that, in addition to compliance with other applicable partitioning criteria, the one development standard related to a specific feature of this proposed division of the property into two parcels has been satisfied. * * *" Record 8-9.

The threshold legal question under this assignment of error is whether the existing dwellings and proposed driveway are "features explicitly included in the application," within the meaning of

EC 9.8215(1)(j). If they are, the planning director and hearings official were obligated to find that those dwellings and the proposed driveway comply with applicable development standards.

Turning first to the threshold question, the existing dwellings are shown on the proposed tentative plan. Record 196 (Oversize Exhibit E). The proposed tentative plan expressly indicates that the existing dwellings are "To Remain." The proposed single driveway to serve both dwellings is shown on a supplemental drawing that intervenor submitted in support of his application.[2] Record 156. The challenged decision makes no attempt to explain why a tentative plan that identifies and proposes to retain existing dwellings and proposes a single driveway over a private easement to serve the proposed parcels does not result in making the dwellings and driveway "features explicitly included in the [partition] application within the meaning of EC 9.8215(1)(j)." Absent such an explanation, we agree with petitioners that including those features on the proposed tentative plan and the supplemental drawing at Record 156 is sufficient to make them explicitly included features.[3]

Having concluded that the existing dwellings and proposed driveway are explicitly included features, the next question is whether the county found that applicable development standards for the dwellings and driveway are met. Because the city did not consider that question, the first assignment of error must be sustained.[4]

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[2] According to the partition tentative plan application form, the applicant is required to "[s]how the location of all existing structures and indicate whether they will remain or be removed" and to "[s]how the width and location of all existing and proposed public and private easements." Record 198.

[3] The findings quoted above in the text attempt to justify a more limited view of relevant legal issues in reviewing a tentative partition plan, but never really address the language of EC 9.8215(1)(j) or the fact that the proposed tentative plan proposes to keep the existing dwellings and construct the single driveway. The issue under the first assignment of error is not whether in the abstract it is wise to consider at the tentative partition plan stage whether existing features violate applicable development standards or whether proposed features can be constructed in the areas proposed without violating applicable setbacks or other development standards. The issue is whether EC 9.8215(1)(j) mandates consideration of those applicable development standards if the tentative partition plan includes development features that will be constructed or retained after the partition is approved.

[4] However, in doing so we express no view concerning the merits of petitioners' arguments that certain development standards are applicable and are violated. For example, the height limit for the existing dwellings apparently is measured from *finished* grade. In a number of places in the record city staff takes the position that while the existing dwellings may be more than 35 feet tall, if height is measured from existing grade, the finished grade may be higher and thus result in buildings that satisfy the 35-foot height limit. It may be that the height

The first assignment of error is sustained.

**SECOND AND THIRD ASSIGNMENTS OF ERROR**

**A. Duplex Division Standards**

The city has special provisions for dividing lots that have been developed with a duplex. EC 9.2777. Petitioners argued below that the city should apply its duplex division standards rather than the generally applicable partition provisions at EC 9.8200 through 9.8245. The planning director rejected this argument.[5] Record 93. In their second assignment of error, petitioners contend the city erred by not applying the duplex division provisions at EC 9.2777. In their third assignment of error, petitioners contend the hearings official erred by failing to acknowledge or address the issue of the potentially applicability of EC 9.2777 in her findings.

**B. Waiver**

Intervenor contends that petitioners waived the issues they raise in the second and third assignments of error. Petitioners clearly raised the issue presented in these assignments of error in a July 3, 2003 letter to planning staff. Record 121. Just as clearly, the issue presented in these assignments of error is not included in the issues set out in the written local appeal that petitioners filed on August 4, 2003 to appeal the planning director's decision to the hearings official. Record 73-82. However, petitioners provided a copy of EC 9.2777 to the hearings official on September 26, 2003. Record 32. September 26, 2003 was the day the record closed following the September 17, 2003 hearing before the city hearings official. Prior to the Court of Appeals' decision in *Miles v. City of Florence*, 190 Or App 500, ___ P3d ___ (2003), the July 3, 2003

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standard is either inapplicable at this point or, if applicable, the height limit may be the kind of standard that will require to city to find that it is feasible for the existing dwellings to meet the height standard and impose a condition of approval to ensure such compliance. Petitioners also claim the house on parcel 2 is less than 10 feet from the street and thus violates the front yard setback. We have no way of knowing whether petitioners are correctly measuring that setback. Similarly petitioners' contentions regarding the alleged setback violations regarding the driveway appear to depend on petitioners' particular interpretation of how those setbacks should be interpreted and applied. Record 9-10. We do not know if the city agrees with those interpretations.

[5] Although we are not certain, the planning director appears to have rejected the argument based on a conclusion that the existing dwellings are not properly viewed as duplexes because they are ten feet apart.

letter likely would have sufficed to raise the disputed issue under these assignments of error to preserve the issue for our review under ORS 197.763(1) and 197.835(3).[6] The September 26, 2003 letter that was submitted on the last day the record remained open at the conclusion of the final evidentiary hearing might also have preserved the issue for our review under those statutes. However, as we explain below, under the holding in *Miles*, petitioners waived the issue presented in the second and third assignments of error because they did not include that issue as one of their bases for appeal in the appeal form and attached documents that they filed on August 4, 2003 to appeal the planning director's decision to the hearings official. Record 73-82.

In *Miles*, the Court of Appeals construed ORS 197.763(1) and 197.835(3) with the statutory requirement in ORS 197.825(2) that petitioners must first exhaust local administrative remedies before appealing to LUBA.[7] In *Miles*, an issue was raised during the local proceedings concerning the proper interpretation and application of a lot width requirement. LUBA concluded the issue was adequately raised before the planning commission to preserve the issue for review at LUBA.[8] *Miles v. City of Florence*, 44 Or LUBA 411, 417-18 (2003). However, the Court of Appeals construed ORS 197.763(1) and 197.835(3) with the exhaustion requirement of ORS 197.825(2) to conclude that the critical step in *Miles* was when the petitioners filed their local appeal of the planning commission's decision. The City of Florence Code required that the local

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[6] ORS 197.835(3) limits LUBA's scope of review as follows:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

ORS 197.195(3)(c)(B) requires that the notice of opportunity to comment on a limited land use decision must state that issues that may later be raised at LUBA must "be raised in writing prior to the expiration of the comment period." ORS 197.763(1) provides that any issue that is raised at LUBA "shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government."

[7] ORS 197.825 limits LUBA's jurisdiction. One of those limitations is ORS 197.825(2), which limits our jurisdiction "to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

[8] The Court of Appeals assumed the issue was adequately raised before the planning commission to allow it to respond to the issue, as ORS 197.763(1) requires. 190 Or App at 508.

appeal document include a statement of "[t]he specific errors, if any, made in the decision of the [planning commission] and the grounds therefore." 190 Or App at 503. There was no dispute in *Miles* that the document that the petitioners filed to perfect their appeal of the planning commission decision specified four errors and that the petitioners' argument concerning the disputed lot width requirement was *not* one of those four alleged errors. The Court of Appeals rejected the petitioners' contention that a letter they later sent to the city council during its deliberations sufficed to raise the issue, because it was sent after the local appeal was filed. 190 Or App 508 n 6 ("that letter did not satisfy the city's requirement that the issues presented for the appeal be specified in their written petition for appeal").

Except as discussed in section C below, the present case is indistinguishable from *Miles*. EC 9.7605(3) is similar to the local code in *Miles*, in that it requires specification of the issues in the local appeal.[9] As was the case in *Miles*, petitioners raised the disputed issue before the initial decision maker, but failed to identify the disputed issue in the documents they filed to perfect their local appeal to the local appellate body. As was the case in *Miles*, the issue arguably was raised before the ultimate appellate body, after the local appeal was filed. Under *Miles*, when the relevant local legislation requires that the notice of local appeal specify the issues that form the basis for the local appeal, it does not matter if an issue was raised during the proceedings that came before or come after that notice of local appeal is filed. Failure to raise the issue *in the notice of local appeal document itself* results in waiver of that issue under ORS 197.763(1), 197.835(3) and ORS 197.825(2). In this case, petitioners' failure to raise the issue that forms the basis for their second and third assignments of error when they filed their notice of local appeal on August 4, 2003 means the issue was waived.

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[9] EC 9.7605(3) requires:

> "The appeal shall include a statement of issues on appeal and be limited to the issues raised in the appeal. The appeal statement shall explain specifically how the planning director's decision is inconsistent with applicable criteria."

### C. ORS 227.175(10)(a)(E)(ii)

Although neither party raises the potential applicability of ORS 227.175(10)(a)(E)(ii) to the waiver question under these assignments of error, we raise that question on our own. ORS 227.175(10)(a)(E)(ii) applies to *de novo* appeal hearings that are required where a city renders a permit decision without a hearing pursuant to ORS 227.175(10)(a).[10] The city must provide a right to file a local appeal following a permit decision that is rendered without a hearing, and that right to a local appeal includes a right to a "*de novo* hearing." ORS 227.175(10)(a)(D). ORS 227.175(10)(a)(E)(ii) specifically prohibits cities from limiting the issues in such a *de novo* hearing to the issues raised in the notice of local appeal.[11] If ORS 227.175(10)(a)(E)(ii) applies, petitioners did not waive their right to raise the issue presented in the second and third assignments of error.

ORS 227.175(10)(a)(E)(ii) was adopted in response to the Court of Appeals' decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997). Or Laws 2001, ch 397, sec 2. *Johns* concerned a permit decision that had been rendered initially without a hearing under ORS 227.175(10)(a). Lincoln City Code provisions required that persons attempting to appeal such permit decision specify "the basis for the appeal." 146 Or App 596. Based on that code requirement, the Court of Appeals held that the issues the local appellant raised before the local appellate body were limited to the issues he specified in his notice of local appeal. 146 Or App

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[10] ORS 227.175(10)(a)(A) provides:

> "The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal."

Permit decisions issued without a hearing can and often are issued with the city and the applicant as the only participants. The referenced paragraph (c) requires that notice of a permit decision that is adopted without a hearing be provided the persons who would have been entitled to notice of a hearing on the permit under ORS 197.763(2), had a hearing been held.

[11] ORS 227.175(10)(a)(E)(ii) provides:

> "The presentation of testimony, arguments and evidence [at a de novo hearing required by ORS 227.175(10)(a)(D)] shall not be limited to issues raised in a notice of appeal[.]"

602-03. ORS 227.175(10)(a)(E)(ii) has the effect of legislatively overruling the Court of Appeals' holding in *Johns*.

The first question is whether ORS 227.175(10)(a)(E)(ii) directly applies to the decision challenged in this appeal. The answer to that question is simple; it does not. As we have already mentioned, ORS 227.175(10)(a)(E)(ii) applies to "permit" decisions that are rendered without a hearing.[12] The challenged decision is not a permit decision; it is a "limited land use decision," as that term is defined in ORS 197.015(12).[13]

A second potential question is whether the legislature's adoption of ORS 227.175(10)(a)(E)(ii) might justify extending the rule that is set out in that statute to a limited land use decision, such as the decision at issue in this appeal, rather than extending the rule the Court of Appeals adopted in *Miles* for permit decisions that are initially approved without a hearing to the limited land use decision at issue in this case. We conclude that the rationale in *Miles* represents the more natural extension. Although the limited land use decision in this case was rendered initially without a public hearing, unlike the initial permit decision in *Johns*, it was rendered following a public process that included notice and an opportunity to comment. Prior to the planning director's decision in this case the planning director provided notice of the proposal and allowed an

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[12] As relevant, ORS 227.160(2) provides:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
>
> "(a) A limited land use decision as defined in ORS 197.015[.]"

[13] As relevant, ORS 197.015(12) provides:

> "'Limited land use decision' is a final decision or determination made by a local government pertaining to a site within an urban growth boundary which concerns:
>
> "(a) The approval or denial of a subdivision or partition, as described in ORS chapter 92.
>
> "* * * * *"

The challenged partition is within the city's urban growth boundary.

opportunity to comment.[14] Record 150. The planning director's written decision addresses comments that were received. Record 90-101. The notice and comment procedure the city followed appears to follow the notice and comment procedure that is required under ORS 197.195(3)(c). Simply stated, the notice and opportunity to comment process that is required for limited land use decisions is sufficiently similar to the initial public hearing that was provided before the planning commission in *Miles*, that we believe a similar exhaustion requirement applies. Petitioners were obligated by EC 9.7605(3) to include the issue they raise under the second and third assignment of error in their appeal to the hearings official to preserve that issue for our review. Because they did not do so, petitioners waived that issue.[15]

The second and third assignments of error are denied.

**FOURTH ASSIGNMENT OF ERROR**

Under the fourth assignment of error, petitioners argue the city erred by applying the EC 9.0500 definition of "lot width" to conclude that proposed parcel 1 is 52.26 feet wide and thus satisfies the minimum 50-foot width required by the EC.[16]

It is fair to say that the EC 9.0500 definition of "lot width" seems to have been written with regular shaped lots in mind. The example figure included in the code, which the definition of "lot width" cross references, shows square and rectangular lots. When the city applied the EC 9.0500 "lot width" definition to irregularly shaped parcel 1, portions of the lines connecting the front and

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[14] That notice also stated "that issues which may provide the basis for an appeal to the State Land Use Board of Appeals must be raised in writing with sufficient specificity to enable the decision maker to respond to the issue." Record 150.

[15] Given that the Court of Appeals' decision in *Miles* is based entirely or in large part on ORS 197.825(2), which limits our "jurisdiction" "to cases in which the petitioner has exhausted all remedies available by right," it may be more accurate to say LUBA lacks jurisdiction over those issues than to say petitioner waived those issues.

[16] As relevant, EC 9.0500 provides the following definition of "lot width":

> "The distance between straight lines connecting front and rear lot lines at each side of the lot, measured across the rear of the required front yard setback. * * * **(See Figure 9.0500 Lot Lines, Lot Frontage, Lot Width, Lot Depth.)**" (Bold type in original).

rear lot line corners cross over onto adjoining lots. Record 30. At the point where the lot width is measured between those lines for proposed parcel 1, "the rear of the required front yard setback," a small part of adjoining parcel 2 is included in the measurement and a larger part of parcel 1 is excluded from the measurement. Petitioners offer a number of reasons why they believe that result is so at odds with the "policy" that underlies the lot width requirement, that the city's literal application of the lot width definition as written is wrong.

We disagree. We have no idea what "policy" may underlie the disputed definition. We understand petitioners to argue that the EC 9.0500 definition of "lot width" must be interpreted to produce a lot width that is no wider than the width of the lot at its most narrow point. Whatever merits there might be to a policy choice to measure minimum lot width in that manner, there is simply no support in the city's code to mandate that EC 9.0500 be read in that manner. Assuming that the general purpose of the minimum lot width requirement is to avoid lots that are too narrow, we leave open that possibility that the city's apparent literal application of the EC 9.0500 "lot width" definition could produce a result that is so strange that some deviation from that language is warranted to achieve the purpose of the minimum lot width requirement. However, in this case, the actual lot width that the city's literal interpretation and application of EC 9.0500 to parcel 1 produces is no stranger than the lot width that is produced by petitioners' interpretation of EC 9.0500, and petitioners' interpretation reads in a limitation that is not expressed in the definition. *Compare* Record 30 and Oversized Exhibit A. For all that we know, the city's approach produces a lot width for irregularly shaped parcel 1 that comports exactly with the underlying purpose for measuring lot width in the way EC 9.0500 requires. In this case, petitioners' "odd results" argument provides no basis for reversal or remand.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR**

We discuss one of the eleven tentative partition plan approval criteria set out in EC 9.8215(1)(a) through (k) in our discussion of the first assignment of error. The next subsection of

EC 9.8215, EC 9.8215(2), imposes the following additional criterion for approval of the disputed tentative partition plan: "[t]he proposed partition will not create a new nonconforming situation." We understand petitioners to argue under the fifth assignment of error that the hearings officer erred by not considering their argument that the proposed partition will create new nonconforming situations.

As noted in our discussion of the first assignment of error, petitioners argue that the EC 9.8215(1)(j) criterion that requires that "features explicitly included in the application" comply with "applicable development standards" is violated in four ways: (1) both dwellings are more than 35 feet high; (2) the dwelling on parcel 2 intrudes into the required ten-foot front yard setback; (3) the deck on the house on parcel 1 intrudes into the required interior yard five-foot setback; and (4) the driveway intrudes into the interior yard five-foot setback for parcel 2. Although the precise scope of petitioners' argument under this assignment of error is not entirely clear, we understand petitioners to contend that the proposed partition will create new nonconforming situations because (1) the existing *single* duplex that petitioners believe is taller than 35 feet is to be retained as *two* single family dwellings that are taller than 35 feet tall (item 1 above), and (2) the partition creates interior yard setbacks that would not exist but for the partition and the interior yard setbacks are violated by the deck on the dwelling on proposed parcel 2 (item 3 above) and the proposed driveway that will serve both parcels (item 4 above). Petitioners also allege that the existing dwelling on parcel 2 violates development standards because it intrudes into the 10-foot front yard setback. However, that violation or nonconformity, assuming it is a violation or nonconformity, already exists and is not created by the partition.

The city's resolution of petitioners' arguments under the first assignment of error concerning the height of the existing dwellings, whether the driveway violates approval standards and whether the deck on the dwelling on parcel two violates the interior yard setback will also decide whether the disputed tentative partition approval creates new nonconforming situations. Again, we express no view regarding the answer to petitioners' arguments, but we agree that the city erred in

concluding that it need not address those questions before approving the proposed tentative partition plan.

The fifth assignment of error is sustained.

The city's decision is remanded.