

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

3  
4 CHARLES WIPER, III  
5 and REST-HAVEN MEMORIAL PARK,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF EUGENE,  
11 *Respondent,*

12  
13 and

14  
15 THOMAS G. EAGAN, DIANA K. EAGAN,  
16 DAVID BERG, JUDITH BERG, LINDA ROE,  
17 TOM ROE, RICHARD STEERS, SHEILA STEERS,  
18 MIKE CURTIS, FRAN CURTIS,  
19 JOHN C. SIHLER, DENE H. SIHLER,  
20 JOHN BENNINGTON and ALLISON HASSLER,  
21 *Intervenors-Respondent.*

22  
23 LUBA No. 2004-016

24  
25 FINAL OPINION  
26 AND ORDER

27  
28 Appeal from City of Eugene.

29  
30 Dan Terrell and Bill Kloos, Eugene, filed the petition for review. Bill Kloos argued on  
31 behalf of petitioners. With them on the brief was the Law Office of Bill Kloos, PC.

32  
33 Emily N. Jerome, Eugene, filed a response brief on behalf of respondent. With her on the  
34 brief was Harrang Long Gary Rudnick, PC.

35  
36 Douglas M. DuPriest, Eugene, filed a response brief and argued on behalf of intervenors-  
37 respondent. With him on the brief was Hutchinson, Anderson, Cox, Coons, DuPriest, Orr and  
38 Sherlock, PC.

39  
40 BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision.

41  
42 AFFIRMED

05/10/2004

43  
44 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a hearings officer's decision denying petitioners' request to modify an existing conditional use permit.

**MOTION TO INTERVENE**

Thomas G. Eagan, Diana K. Eagan, David Berg, Judith Berg, Linda Roe, Tom Roe, Richard Steers, Sheila Steers, Mike Curtis, Fran Curtis, John C. Sihler, Dene H. Sihler, John Bennington and Allison Hassler (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**MOTION TO FILE REPLY BRIEF**

On April 20, 2004, two days prior to oral argument, petitioners filed an 11-page reply brief, to address alleged "new matters" raised in intervenors' response brief, which was filed April 9, 2004. Intervenors oppose the reply brief, on the grounds that it (1) is not limited to "new matters," (2) exceeds the five page limit authorized by OAR 661-010-0039, and (3) was not filed "as soon as possible" after the response brief was filed, as required by OAR 661-010-0039.<sup>1</sup> Petitioners respond to intervenors' objection, arguing that the reply brief is limited to "new matters," and the inadvertent failure to request permission to file an 11-page reply brief and the timing of filing the brief caused no prejudice and should not warrant denial of the reply brief.

We agree with petitioners that the reply brief is properly limited to "new matters." However, the matters addressed in the reply brief have little bearing on the issues we find to be dispositive in this appeal. Given that, we do not see that resolution of the parties' remaining disputes

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<sup>1</sup> OAR 661-010-0039 provides, in relevant part:

"A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon 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, unless permission for a longer reply brief is given by the Board. \* \* \*"

1 over the reply brief would benefit either Board or bar, and we allow the reply brief without further  
2 discussion.

3 **FACTS**

4 The subject property is a 72-acre parcel zoned Low Density Residential (R-1) and partially  
5 developed with an existing cemetery. Those portions of the property not already developed as a  
6 cemetery are generally wooded. Adjacent properties are generally developed with single family  
7 dwellings.

8 In 1995, petitioners applied for and received a conditional use permit (1995 CUP)  
9 approving a masterplan for future development of the subject property. The 1995 CUP approved  
10 development in two phases. Phase I proposes cemetery uses on the bulk of the property from the  
11 north property line south to the southernmost internal road shown on the masterplan. Phase II  
12 involves the southernmost area, consisting of 15.8 acres between the road and the south property  
13 line, also known as Zone 6. The 1995 CUP conceptually approved cemetery uses in Zone 6,  
14 subject to conditions including a 75-foot buffer along the southern periphery of the CUP site, but  
15 did not approve a specific development plan. Instead, the 1995 CUP required future submission  
16 and approval of a specific development plan for Zone 6.

17 In 1998, the city and petitioners entered into a conditional use agreement (1998 CUP  
18 agreement), a contract between the parties as to how the 1995 CUP would be implemented. The  
19 site plans approved in the 1998 agreement include the notations “Future Cemetery Lawns” and  
20 “Proposed Irrigation” in Zone 6, and also depict a vegetative buffer along the southern periphery.

21 In April 2002, petitioners applied to the city for a conditional use permit to develop a  
22 Controlled Income and Rental Housing project (CIR-CUP) in the 15.8-acre Zone 6 area. The city  
23 refused to process the application, because the city perceived conflicts between the 1995 CUP and  
24 the CIR-CUP application that the city believed prevented approval of the CIR-CUP application.  
25 The city’s refusal to process the CIR-CUP application was appealed to this Board, which  
26 remanded the decision to the city to process the application and render a decision. *Wiper v. City*

1 *of Eugene*, 44 Or LUBA 127 (2003). On remand, the city requested that petitioners first modify  
2 the 1995 CUP, to remove the 15.8-acre Zone 6 area from the footprint of the CUP masterplan,  
3 before proceeding with the CIR-CUP application. The petitioners requested that the city suspend  
4 consideration of the CIR-CUP application, and subsequently filed the instant application to modify  
5 the 1995 CUP to excise the Zone 6 area from the footprint of the CUP masterplan.

6 Staff accepted the modification application as complete, but recommended that the scope of  
7 the application be expanded to include modifications necessary to allow new uses in Zone 6 to  
8 access roads and utilities in other parts of the property that would remain subject to the 1995 CUP.  
9 Petitioners revised the application in accordance with the staff recommendation. The city planning  
10 director approved the modification application on October 31, 2003.

11 Intervenors, among others, appealed the planning director's decision to the city hearings  
12 officer, who held a public hearing on December 17, 2003. Two days prior to the public hearing, on  
13 December 15, 2003, petitioners requested in writing that the hearings officer include in her decision  
14 a determination as to whether Zone 6 could be developed with uses otherwise allowed in the R-1  
15 zone, such as residential uses, without modifying the 1995 CUP. On January 16, 2004, the  
16 hearings officer issued a decision that (1) determined that modification of the 1995 CUP is  
17 necessary, but (2) denied the requested modification to excise Zone 6 from the CUP masterplan  
18 footprint and the related request to allow uses in Zone 6 to access roads and utilities in other CUP  
19 areas under the masterplan.

20 This appeal followed.

## 21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioners contend that the hearings officer failed to adequately address or resolve  
23 petitioners' request for a determination as to whether Zone 6 could be developed with uses allowed  
24 in the R-1 zone without a modification of the 1995 CUP. To the extent the hearings officer  
25 adequately resolved that issue, petitioners argue, the hearings officer incorrectly concluded that  
26 modification of the 1995 CUP was necessary.

1           Petitioners took the position before the hearings officer that because the 1995 CUP did not  
2 approve any particular development in Zone 6, no modification of the 1995 CUP to excise Zone 6  
3 from the masterplan was necessary in order to develop Zone 6 with uses otherwise allowed under  
4 the R-1 zone. The hearings officer considered that argument and, after quoting and reviewing  
5 portions of the 1995 CUP, concluded as follows:

6           “[N]otwithstanding the applicant’s present position, the 1995 CUP clearly included  
7 the Zone 6 area as part of the CUP, and the [1995] Hearings Official relied upon  
8 the applicant’s proposed use of that property, *i.e.*, the buffer proposed for that  
9 zone, in his description of the site and his evaluation of the use as applied to the  
10 approval criteria. The applicant also relied on that zone as part of the CUP in order  
11 to comply with Condition 17, which required a 75-foot buffer zone on the site’s  
12 southern periphery. To argue now that the Zone 6 portion of the use was not a part  
13 of the 1995 CUP approval is inconsistent with the applicant’s previous  
14 representations and proposals regarding the use of that site, the 1995 CUP  
15 approval and the applicant’s final approved master plan. \* \* \*

16           “Further, the fact that additional review was required prior to further development  
17 beyond the conceptual plan provided for Zone 6 in the 1995 application does not  
18 exempt that portion of the site from the CUP. Rather, as the Hearings Official  
19 explained, the applicant had conceptually proposed tombs and fencing in addition to  
20 a proposed vegetative buffer [in Zone 6]. The Hearings Official found that, since  
21 further development of this portion of the site—beyond its approved use as a  
22 buffer—was proposed for a future phase, conceptual approval at that time was  
23 adequate, provided that additional review was completed prior to development ‘in  
24 that regard.’ This does not exempt [Zone 6] from the CUP, or allow the applicant  
25 to remove that portion of the property without a modification to the CUP.

26           “Condition 16 of the 1995 CUP decision states that ‘if the timing, location or size of  
27 any of the proposed improvements included in the master development plan are  
28 changed, a minor modification to this CUP shall be required. If there are substantial  
29 changes to the timing, location or size of these improvements, a major modification  
30 of this CUP may be required.’ The request to remove Zone 6 from the CUP  
31 changes the location and size of improvements included in the master development  
32 plan within the meaning of Condition 16.

33           “\* \* \* [In addition], all modifications to approved CUPs must be evaluated for  
34 compliance with the criteria at EC [Eugene Code] 9.8110. As the Planning  
35 Director’s decision correctly determined, ‘as clearly established on the approved  
36 site plans, and within the CUP performance agreement, the subject area was  
37 conceptually approved for cemetery use with several requirements such as a 75-  
38 foot wide buffer zone along its periphery. As such, the applicant’s request to

1 remove the subject area from the cemetery master plan is correctly submitted as an  
2 application for CUP modification.’

3 “The applicant’s request for a determination that no modification is required to  
4 remove the Zone 6 property from the Rest Haven CUP is denied.” Record 8-9  
5 (quoting from portions of the planning director’s decision at Record 308-09).

6 Petitioners argue first that the hearings officer mischaracterized the issue as whether (1)  
7 Zone 6 *is* part of the 1995 CUP or (2) a proposal to *remove Zone 6* from the 1995 CUP required  
8 a modification of the 1995 CUP. According to petitioners, the actual issue petitioners presented  
9 was whether a proposal to *develop Zone 6* with uses otherwise allowed in the R-1 zone required  
10 modification of the 1995 CUP to remove Zone 6. Petitioners contend that the hearings officer  
11 never resolved the actual question presented.

12 Although portions of the hearings officer’s decision appear to mischaracterize the issue in  
13 the manner petitioners contend, we believe that the hearings officer understood the question  
14 presented and that the adopted findings adequately resolve that issue. Fairly read in the context of  
15 other findings in the decision, the hearings officer essentially concluded that the 1995 CUP  
16 approved conceptual uses and imposed conditions such that modification of the 1995 CUP is  
17 necessary in order to approve development that is different from that conceptually approved (*i.e.*,  
18 cemetery uses) or that affects compliance with conditions imposed on development of Zone 6, such  
19 as the requirement for a 75-foot buffer along the southern periphery. The hearings officer’s conclusion  
20 to that effect is adequate for review.

21 Turning to petitioners’ challenge to that conclusion, petitioners argue that the hearings  
22 officer’s misconstrued the 1995 CUP. According to petitioners, the 1995 CUP simply required  
23 that *if* petitioners want to develop Zone 6 with cemetery uses, petitioners must submit a more  
24 detailed development plan for approval and that plan must require a 75-foot buffer between  
25 cemetery uses and the residences adjoining the southern property line. Petitioners contend that  
26 nothing in the 1995 CUP prohibits a non-cemetery use in Zone 6. Further, petitioners argue that the  
27 sole purpose of the condition requiring the 75-foot buffer is to separate cemetery uses in Zone 6

1 from the residential uses adjoining the southern property boundary. That buffer becomes  
2 unnecessary if Zone 6 is developed with non-cemetery uses, petitioners argue, and to the extent  
3 some kind of buffer is still desirable to protect residences adjoining the southern property line the  
4 entirety of Zone 6 will act as a buffer between cemetery uses elsewhere on the property and those  
5 residential uses.

6 We disagree with petitioners that the hearings officer misconstrued the 1995 CUP. The  
7 1995 CUP applicant proposed, and the city conceptually approved, cemetery uses in Zone 6. The  
8 conditions and uses approved under the 1995 CUP were predicated on an assumption that Zone 6  
9 would be developed with cemetery uses. For whatever reason, the 1995 hearings official was  
10 clearly concerned with buffering residential uses and cemetery uses, and petitioners offer no reason  
11 to believe the hearings official's concern was limited to the specific residences adjoining the southern  
12 property boundary. Had the city known in 1995 that petitioners would change their mind and  
13 propose non-cemetery development in Zone 6, such as the residential development proposed in the  
14 pending CIR-CUP application, the city might well have imposed different or additional conditions to  
15 buffer those uses from cemetery uses elsewhere on the subject property, in deciding to approve or  
16 deny the 1995 CUP. In short, the hearings officer correctly concluded that development of Zone 6  
17 with uses other than those uses contemplated by the 1995 CUP requires modification of or  
18 amendment to the 1995 CUP.

19 The first assignment of error is denied.

20 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

21 As discussed, the particular modification petitioners proposed was to remove Zone 6 from  
22 the footprint of the 1995 CUP. Modifications to an existing CUP are governed by the standards at  
23 EC 9.8110, which require a finding that the proposed modification is not “materially inconsistent  
24 with the conditions of the original approval,” and that it will “result in insignificant changes” in

1 physical development, use of the site, and impacts on surrounding properties.<sup>2</sup> The hearings officer  
2 concluded that the proposed removal of Zone 6 from the 1995 CUP satisfied neither criterion. In  
3 addition, the hearings officer concluded that the additional modification suggested by city staff—to  
4 allow development in Zone 6 to use roads and utilities within the remaining CUP area—was  
5 inconsistent with EC 9.8110(2).

6 **A. EC 9.8110(1)**

7 Petitioners first challenge the hearings officer’s conclusion that removal of Zone 6 from the  
8 1995 CUP footprint is “materially inconsistent with the conditions of the original approval.” The  
9 hearings officer determined that the proposed modification was inconsistent with Condition 17,  
10 which the hearings officer understood to require a 75-foot vegetative buffer along the southern  
11 periphery of the CUP site.<sup>3</sup>

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<sup>2</sup> EC 9.8110 provides:

“After the effective date of the approval of the conditional use permit, modifications to the approved conditional use permit may be considered in accordance with the Type II application procedures contained in EC 9.7200 through 9.7230, Type II Application Procedures. The planning director shall approve the request only if it complies with the following criteria:

- “(1) The proposed modification is not materially inconsistent with the conditions of the original approval; and
- “(2) The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties.

“If the requested modification does not meet the criteria for approval, the application will be denied. The applicant may submit the requested modification as a new conditional use permit application based on Type III procedural requirements. Nothing in this land use code shall preclude the applicant from initially submitting the requested modification as a new conditional use permit application.”

<sup>3</sup> The hearings officer’s decision state, in relevant part:

“[T]he question that must be addressed here is what impact the removal of this property from the CUP will have on compliance with Condition 17. That condition requires that the buffer along the southern periphery of the CUP be at least 75 feet wide. The applicant proposed that buffer, using the property it now proposes to remove from the CUP, in order to ensure compatibility, as required by former EC 9.702(a). Removal of that property will remove the existing 75-foot buffer. Removal of that buffer, however, does not remove the condition, which was found necessary, in Conditions 7 and 17, to establish compatibility and thus compliance

1           Petitioners repeat their argument that the only purpose of the 75-foot buffer requirement is  
2 to ensure compatibility between cemetery uses in Zone 6 and *existing* residential uses adjoining the  
3 southern property line. The proposed modification is consistent with that purpose, petitioners argue,  
4 because all of Zone 6 would buffer residential uses along the southern property line from cemetery  
5 uses elsewhere on the subject property. Petitioners also dispute the hearings officer’s conclusion  
6 that the required buffer must be “vegetative.” Finally, petitioners argue that the hearings officer  
7 erred in finding that petitioners had already removed most of the vegetation along what would  
8 become the southern periphery of the CUP site, if the proposed modification were approved.  
9 According to petitioners, although petitioners did obtain tree cutting permits for that area, the  
10 permits expired, and no tree-cutting in that area has in fact occurred. *See Rest Haven Memorial*  
11 *Park v. City of Eugene*, 44 Or LUBA 231, *aff’d* 189 Or App 90, 74 P3d 1107 (2003)  
12 (dismissing petitioners’ appeal of tree-cutting permits as moot).

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with EC 9.702(a). In order to be compatible, Condition 17 requires that the buffer along the southern periphery must be at least 75 feet wide. The applicant has not established how it will continue to comply with that condition after the Zone 6 property is removed from the CUP. In fact, in reliance on the approved Master Plan, the applicant has removed most of the vegetative buffer along what it now proposes to be the southern periphery of the CUP site.

“The applicant argues that there is no requirement that the 75-foot buffer between the cemetery and adjacent properties be vegetative. However, [Condition 7 of the 1995 CUP] approval, quoted above, clearly establishes that the compatibility was dependent upon a vegetative buffer. Moreover, regardless of whether it is vegetative, in this modification application, applicant has not established how it proposes to provide a 75 foot buffer of any kind along the CUP’s southern periphery. The applicant argues that the land it proposes to remove from the CUP will be a buffer between the cemetery and the existing adjacent residential neighborhood. However, if the Zone 6 property is removed from the CUP, it cannot be relied upon as the buffer required by the CUP. Condition 17 requires that the buffer along the cemetery’s southern boundary be 75 feet. That condition cannot be satisfied by a ‘buffer’ outside the property subject to the CUP.

“\* \* \* \* \*

“The applicant has not established how removal of the Zone 6 property can be achieved while continuing to comply with Condition 17 of the 1995 CUP approval. Removal of that property without compensating with a comparable buffer along the CUP’s southern periphery results in a CUP that is materially inconsistent with Condition 17 of the original approval.” Record 11-12.

1                   **1.     Vegetative Buffer**

2                   With respect to whether the required buffer must be vegetative, we agree with intervenors  
3 and the hearings officer that the site plan and other conditions imposed in the 1995 CUP and the  
4 1998 CUP agreement make it reasonably clear that the buffer was intended to be vegetative in  
5 character.

6                   **2.     Consistency with Condition 17**

7                   With respect to whether removal of Zone 6 from the CUP footprint, and hence elimination  
8 of the requirement for a vegetative buffer in Zone 6, would be consistent with condition 17, the  
9 hearings officer’s decision implicitly rejects petitioners’ argument that the sole purpose of condition  
10 17 is to buffer *existing* residential uses south of the property line. Instead, the hearings officer  
11 appears to view condition 17 more broadly as intended to ensure compatibility between cemetery  
12 uses within the CUP footprint and adjoining non-cemetery uses outside the CUP footprint.  
13 According to the hearings officer, condition 17 does so by requiring a buffer along the southern  
14 periphery of the CUP area, which as proposed and approved in 1995 was in Zone 6. Therefore,  
15 the hearings officer concluded, consistency with condition 17 requires a similar buffer within the  
16 southern periphery of the CUP area, once Zone 6 is removed from the CUP footprint. Because  
17 petitioners did not propose *any* buffer within the southern periphery of the CUP area after Zone 6 is  
18 removed, the hearings officer rejected the proposed modification as inconsistent with condition 17  
19 and therefore not compliant with EC 9.8110(1).

20                  The hearings officer’s understanding of the purpose of condition 17, and hence what  
21 consistency with condition 17 means for purposes of EC 9.8110(1), is plausible and supported by  
22 the record. Petitioners’ different view of the purpose of condition 17 is also plausible and has  
23 support in the record. However, petitioners’ disagreement with the hearings officer on this point  
24 does not establish that the hearings officer misconstrued condition 17 or committed reversible error  
25 in concluding that the proposed modification was inconsistent with condition 17.

1           **B.     EC 9.8110(2)**

2           The hearings officer also concluded that the proposed modification failed to comply with  
3 EC 9.8110(2), which requires in relevant part a finding that the modification will have insignificant  
4 impacts on the surrounding properties. *See* n 2. The hearings officer relied on testimony from  
5 adjoining landowners that the preservation of the existing vegetative buffer in Zone 6 was necessary  
6 to prevent adverse impacts to their properties, specifically to prevent “windthrow” of downed trees  
7 and increased runoff onto their properties.<sup>4</sup>

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<sup>4</sup> The hearings officer’s decision states, in relevant part:

“\* \* \* [W]hile the modification will not change the use of the remaining property as a cemetery, the use of the Zone 6 portion of the cemetery as a buffer necessary to ensure compatibility for purposes of drainage and windthrow, and the impact to the surrounding properties when that buffer is removed from the CUP protections, must be evaluated. While the applicant states that the removal of the Zone 6 area from the CUP in itself will not alter the appearance of that property, it will remove the condition that the Zone 6 area remain as a buffer. As one concerned neighbor with a Forestry degree explained:

““Anyone who has ever viewed a clear cut in a west-side Cascade Douglas Fir forest knows that for the first few years after the clear cut Douglas Fir trees will blow down around the edge \* \* \* Doug fir trees are very shallow rooted and prone to blow down when suddenly exposed to wind by the removal of trees around them.

““Most of the properties surrounding Rest Haven have large Doug fir trees in the back yards. I have two; one about 20 inches in diameter and one about 24 inches in diameter. Both are uphill from my house, close to the property line. If these trees blew down, they would land downhill and are tall enough to hit my house. Cutting trees in the buffer would directly impact my property. If trees were cut in the buffer next to my property, I would have the choice between taking a chance of these trees blowing down and doing serious damage to my house or removing the trees. The buffer contemplated by the original conditional use permit protects my property from harm.’

“Other nearby residents testified regarding the increased run-off that could occur without the protection of the buffer provided by the 1995 CUP and the impacts of that run-off on their properties.

“The applicant is correct that removal of the Zone 6 property from the CUP does not guarantee that the trees will be removed. However, removal of that property from the CUP will remove the protections afforded by that CUP, and the removal of those protections could have a significant adverse impact on the surrounding properties. Accordingly, before a conclusion can be made that the modification will have no impact on the surrounding properties or the use of the site, the effect of the removal of the protections of the CUP Master Plan condition requiring a 75-foot buffer must be considered. The applicant has not sustained its burden to establish that there will be an insignificant change in the use or surrounding area as a result of this proposed modification.” Record 13 (ellipses in the internal quote in original).

1           Petitioners argued to the city that any development within Zone 6 that might involve removal  
2 of trees within the 75-foot vegetative buffer would be subject to city regulations governing tree-  
3 cutting, and therefore will be consistent with city code. Record 216, 349.<sup>5</sup> According to  
4 petitioners, the city’s tree-cutting and stormwater regulations require evaluation of any adverse  
5 impacts on adjoining properties, including windthrow and drainage impacts. Petitioners contend that  
6 the existence and potential applicability of such regulations is highly relevant to whether the  
7 proposed modification, which effectively voids the 1995 CUP conditions requiring a vegetative  
8 buffer in Zone 6, will impact adjoining properties. Citing *Norvell v. Portland Area LGBC*, 43 Or  
9 App 849, 852-53, 604 P2d 896 (1979) for the proposition that the decision maker must address  
10 focused evidence and concerns raised below regarding compliance with applicable standards,  
11 petitioners contend that the hearings officer failed to consider petitioners’ arguments on this point,  
12 and remand is necessary to adopt findings addressing the issue of whether the city’s tree cutting and  
13 stormwater regulations suffice to ensure that the proposed modification will not result in significant  
14 impacts to surrounding properties, for purposes of EC 9.8110(2).

15           Intervenors respond that mere citation to the city’s tree cutting ordinances is insufficient to  
16 obligate the hearings officer to address whether those ordinances (1) provide equivalent protection

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<sup>5</sup> Petitioners cite to the following portions of the application and written argument to the hearings officer, respectively:

“\* \* \* [A]ny tree removal that will take place on the excised Zone 6 area will continue to be subject to the tree removal provisions of the Eugene Code (EC) either under EC Chapter 6, if tree removal is done without a related land use approval, or under EC Chapter 9, if tree removal is done as part of an associated land use approval. Consequently, any tree removal done in the excised Zone 6 following approval of this modification application will be done subject to the criteria in the Eugene Code, which is what [1995 CUP condition of approval no. 8] requires. Therefore the proposed modification is not materially inconsistent with the conditions of the original approval.” Record 349.

“[Opponents’] fourth objection \* \* \* is directed towards the ‘buffer’ that they argue will be removed by the decision. The buffer between the cemetery and existing residential uses will remain as a result of this decision. Cemetery uses will not extend south of the proposed roads. Likewise, the on site vegetation will remain. This decision does not authorize any tree removal from the subject property. Any future tree removal will have to be consistent with the provisions of the Eugene Code. That is what was required by the CUP, and that is what continues to be required by the current code.” Record 216.

1 as the 1995 CUP, or (2) provide a basis to conclude under EC 9.8110(2) that the proposed  
2 modification will result in insignificant impacts on adjoining properties. Intervenor contend that  
3 petitioners bear the burden of demonstrating compliance with EC 9.8110(2), and that petitioners  
4 failed to submit any evidence or even focused argument that the city’s tree cutting ordinances  
5 provide the same protections as the 75-foot vegetative buffer required by the 1995 CUP.

6 We agree with intervenors that petitioners did not adequately raise the issue that they fault  
7 the hearings officer for failing to address. The testimony petitioners cite to is not directed at  
8 EC 9.8110(2) and at best presents an argument that the city’s tree cutting ordinance will ensure that  
9 any tree removal that occurs will be consistent with the city’s tree cutting ordinance. *See* n 5. That  
10 argument falls far short of alerting the hearings officer that petitioners believe the city’s tree cutting  
11 ordinance requires evaluation of impacts to adjoining properties, and further offers protection  
12 equivalent to the vegetative buffer imposed by the 1995 CUP, for purposes of complying with  
13 EC 9.8110(2). Petitioners do not argue they raised any issue below regarding whether the city’s  
14 stormwater regulations are sufficient to protect adjoining properties against increased runoff that  
15 might result from loss of the vegetative buffer, for purposes of EC 9.8110(2). Having failed to raise  
16 these issues below, petitioners’ argument that the hearings officer erred in failing to address them  
17 does not provide a basis for reversal or remand.

18 **C. Modifications to Access and Utilities**

19 Having rejected the proposed modification to remove Zone 6 from the 1995 CUP footprint,  
20 the hearings officer proceeded also to reject the proposed modification to the 1995 CUP to allow  
21 future development in Zone 6 to access and use roads and utilities within the remaining CUP area.<sup>6</sup>

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<sup>6</sup> The hearings officer’s decision states, in relevant part:

“Likewise, the applicant has proposed changes to access and utility installation, yet has not provided any evaluation as to how the change in access or installation could impact the surrounding properties or the use of the site. While any change may be insignificant, without that evaluation, and a statement of the purpose of the changes, that evaluation cannot be made.” Record 14.

1 Although not entirely clear, the hearings officer appeared to conclude that petitioners failed to  
2 present enough information or analysis to conclude that the proposed modification complied with  
3 EC 9.8110(2).

4 Petitioners contend that the findings quoted at n 6 are unacceptably conclusory, in that the  
5 findings fail to explain what evidence or evaluation is missing. Alternatively, petitioners contend that,  
6 pursuant to ORS 197.522, even if the proposed modification is inconsistent with EC 9.8110(2), the  
7 city was obligated to approve petitioners' application under reasonable conditions that make the  
8 proposed modification consistent with applicable regulations.<sup>7</sup>

9 Intervenors cite to testimony that use of roads and utilities within the CUP area by non-  
10 cemetery development in Zone 6, such as residential uses proposed in the pending CIR-CUP  
11 application, could have significantly greater adverse impacts on surrounding properties than the  
12 cemetery uses conceptually approved in Zone 6 under the 1995 CUP. According to intervenors,  
13 petitioners failed to recognize or address those impacts, and instead took the position that any  
14 impacts from use of roads and utilities by future development in Zone 6 are speculative and beyond  
15 the scope of consideration under EC 9.8110(2). Intervenors argue that the hearings officer  
16 disagreed with that position, and rejected the proposed modification because petitioners failed to  
17 present any evidence or evaluation of the impacts of the proposed modification on surrounding  
18 properties or the CUP site. With respect to ORS 197.522, intervenors argue that the city is under  
19 no obligation to present evidence on petitioners' behalf or provide the evaluation necessary to  
20 determine compliance with EC 9.8110(2). Further, intervenors contend that petitioners did not

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<sup>7</sup> ORS 197.522 provides:

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

1 suggest any conditions below that would allow approval of the proposed modification under  
2 EC 9.8110(2).

3 While brief, the hearings officer’s findings adequately explain the basis for denial. The  
4 hearings officer apparently believed that the proposed modification—to allow unspecified future  
5 development in Zone 6 to use roads and utilities within the remaining CUP site—could impact  
6 surrounding uses or the use of the site, and faulted petitioners for failing to present *any* evaluation or  
7 evidence regarding potential impacts. Petitioners took the position below that the proposed  
8 modification itself causes no impacts, and any impacts related to use of roads and utilities by future  
9 development in Zone 6 are too speculative to evaluate. The hearings officer clearly disagreed with  
10 that position, and viewed EC 9.8110(2) as requiring at least some evidence and evaluation  
11 regarding the potential impacts of allowing future development in Zone 6 to use roads and utilities in  
12 the CUP area. Petitioners have not demonstrated that the hearings officer erred in so viewing  
13 EC 9.8110(2) or in rejecting the proposed modification for failure to provide the required evidence  
14 and evaluation.

15 With respect to ORS 197.522, even assuming that statute is applicable in the present  
16 instance, as we explained in *Oien v. City of Beaverton*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 2002-  
17 075/076, December 30, 2003, slip op 16-17), the applicant, and not the local government, has the  
18 obligation under that statute to identify and propose “reasonable conditions” that might allow  
19 approval. Here, petitioners did not identify or propose any conditions that would allow the city to  
20 find that the proposed modification complies with EC 9.8110(2). The hearings officer was under no  
21 obligation to attempt to craft such conditions on her own.

22 The second and third assignments of error are denied.

23 The city’s decision is affirmed.