BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN FREWING,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

WINDWOOD CONSTRUCTION,
Intervenor-Respondent.

LUBA No. 2003-194

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

John Frewing, Tigard, filed the petition for review and argued on his on behalf.

Gary F. Firestone, Portland, filed a response brief and argued on behalf of the respondent. With him on the brief was Ramis Crew Corrigan & Bachrach LLP.

Christopher P. Koback and Jeffrey J. Schick, Portland, filed a response brief and Christopher P. Koback argued on behalf of intervenor-respondent. With them on the brief was Davis Wright Tremaine, LLP.

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

REMANDED 08/20/2004

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

Petitioner appeals a city decision that grants subdivision and planned development approval for a 29-lot subdivision on 9.3 acres.[1]

FACTS

The subject property is zoned Low Density Residential (R-4.5). The minimum lot size in the R-4.5 zone is 7,500 feet. There are trees, wetlands and steep slopes on the subject property. The applicant sought planned development approval, which allows approval of subdivisions that create smaller lots than the applicable zoning would otherwise require, provided overall density limitations are not violated. The applicant proposes 29 lots, which range from 4,702 square feet to 11,616 square feet in size. Twenty-seven of those lots are grouped along the northern part of the property, with access to those lots to be provided by a new, east-west cul-de-sac street that connects with SW 74th Avenue. SW 74th Avenue runs along the western boundary of the property. A wetland area and a drainage easement occupy most of the southern half of the property. Two lots are located at the southwest corner of the property, with frontage on SW 74th Avenue, and are separated from the other lots by the wetlands and drainage easement.

The city planning commission considered the proposal at a July 7, 2003 public hearing. However, after separate motions to approve and to deny the application resulted in 4-4 votes, the planning commission was unable to take action to approve or deny the applications. Under applicable local law, those tie votes had the legal effect of denying the application. The applicant appealed to the city council. The city council considered the appeal at a public hearing on August

[1] The challenged decision actually grants several approvals. It grants preliminary subdivision plat approval with a large number of conditions. It applies a planned development overlay zone to the property and approves both a planned development concept plan and a detailed development plan. Because the site includes wetlands, a drainageway and steep slopes, sensitive lands review is required. The challenged decision includes sensitive lands review. The proposed cul-de-sac provides access to more houses and is longer than permitted under the Tigard Community Development Code (TCDC). The challenged decision grants adjustments to these cul-de-sac requirements.

12, 2003. Following presentations by planning staff, the applicant and petitioner, the city council continued its public hearing until September 9, 2003. Petitioner was not present at the September 9, 2003 public hearing, but other opponents were.[2] After hearing from opponents of the proposal, the applicant was given an opportunity for rebuttal. The city council then closed the September 9, 2003 public hearing, voted to approve the application, and requested that the applicant submit additional findings to support the city's written decision. On October 28, 2003, the city council adopted its final written decision approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner contends that new evidence was submitted at the September 9, 2003 city council hearing in this matter. For purposes of this opinion, we assume that at least some of the evidence that petitioner identifies constitutes new evidence. Petitioner contends it was error for the city council not to allow a continuance of that hearing, under ORS 197.763(6)(a), so that petitioner could have an opportunity to rebut that new evidence.[3] Petitioner contends his substantial rights were thereby prejudiced, and the city's decision should therefore be remanded so that he can be provided an opportunity to rebut that new evidence.

The city and intervenor contend that petitioner had no right to request a continuance under ORS 197.763(6)(a), because the right to request a continuance under that statute applies only to the *initial* evidentiary hearing. The city and intervenor contend that the initial evidentiary hearing in this case was the planning commission's July 7, 2003 public hearing. We agree with the city and

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[2] As we explain below in our discussion of the first assignment of error, petitioner did send the city a letter in which he requested that he be allowed until September 25, 2003 to submit additional written comments.

[3] ORS 197.763(6)(a) provides:

> "Prior to the conclusion of the *initial* evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection." (Emphasis added.)

intervenor. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292, 300, *rev'd on other grounds* 148 Or App 217, 939 P2d 625 (1997).

Petitioner suggests that the city council's hearing in this matter should be considered the initial public hearing due to the planning commission's tie vote and statements by the mayor and city attorney that the city council was proceeding as though no earlier decision had been made. Petition for Review 16. We reject the suggestion. The record compiled by the planning commission is included in the record of this appeal, just as it would have been if a majority of the planning commission had voted to approve or to deny the application and an appeal had been filed to challenge such a planning commission decision. The planning commission's initial public hearing in this matter on July 7, 2003 was the initial hearing, within the meaning of ORS 197.763(6)(a), no matter how complete or thorough the city council's subsequent consideration of the applicant's appeal.

It may be that petitioner has an independent right to rebut any new evidence that was submitted at the September 9, 2003 hearing under *Fasano v. Washington County Comm.*, 264 Or 574, 581, 507 P2d 23 (1973), irrespective of ORS 197.763(6)(a). Or it may be that the city council's September 9, 2003 public hearing is properly viewed as a continued hearing under ORS 197.763(6)(b), so that petitioner had a right to request that the record be held open for at least seven days after the September 9, 2003 hearing so that he could rebut any new evidence.[4] However, even if petitioner had a *Fasano* right or a right under ORS 197.763(6)(b) to rebut that new evidence, we agree with the city and intervenor that petitioner neither exercised his right to

[4] ORS 197.763(6)(b) provides:

> "If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence."

rebut the new evidence at the September 9, 2003 hearing, nor requested a further continuance to allow an opportunity for him to do so.

Petitioner did not ask for an opportunity to rebut new evidence at the September 9, 2003 hearing, or request that the record be held open to allow time for petitioner to submit additional evidence, because he did not attend that hearing and did not send anyone to make that request on his behalf. Petitioner did send the city council a three-page single-spaced letter on August 29, 2003, 12 days before the September 9, 2003 hearing, in which he raised many concerns with the proposal. Record 181-83. Included in that letter is the following request:

> "a. The applicant stated on 8/12 that he would add to the [(Covenants Conditions & Restrictions (CC&Rs)] a condition that future home owners * * * NOT be allowed to cut any remaining trees * * *. The applicant has not filed anything called [CC&Rs], but has filed a draft charter for a homeowners association, which itself is lacking review by the City Attorney as called for in city rules. I have asked for documentation and exact wording of the new concession regarding tree cutting, but have not received it yet. Similarly, the applicant stated that he would leave 100% of trees in an area earlier marked for 50% cut of trees, but the exact words of his commitment are not in the written record. I would like for you to grant me a period of seven days to review this material when it becomes part of the written record. I will be out of the country 9/4 through 9/25, but will immediately comment to you if you will mail it to me before 9/25. The application should be denied based on lack of review of the homeowners association charter by the City Attorney." Record 181.

It is not clear from the above-quoted text from the letter whether petitioner was asserting that he has a *right* to an opportunity to comment on the information he anticipated the applicant would submit or was simply requesting a courtesy from the city to accommodate his travel plans. Even if we assume the above is sufficient to assert such a right, rather than request a courtesy, we agree with the city and intervenor that petitioner has no right to obligate the city to (1) review any additional documents or testimony the applicant might submit in the future to determine whether it is relevant new evidence that might give rise to a right of rebuttal, (2) determine whether the additional time petitioner requests to comment on that evidence is warranted, and (3) grant that request if warranted. Any right that petitioner may have to rebut new evidence under *Fasano* or ORS

197.763(6)(b) requires that petitioner contemporaneously assert that right of rebuttal at the time the new evidence is submitted, so that the local government can rule on the merits of the request and allow an appropriate opportunity for rebuttal where such an opportunity is warranted. *Moore v. Clackamas County*, 11 Or LUBA 103, 106 (1984). Petitioner's August 29, 2003 request for an opportunity for rebuttal before any new evidence was submitted was premature. At that time the city had no way to know whether the applicant would submit new evidence and whether the length of time petitioner requested to rebut that evidence was reasonable. Petitioner also appeared at the city council's October 28, 2003 meeting where the city council adopted its written decision and requested that the city delay its decision, reopen the evidentiary record, and allow him ten additional days to respond to the applicant's submittals at the city council's August 12, 2003 and September 9, 2003 hearings. That October 28, 2003 request came too late.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city council's decision should be remanded because the city council had undisclosed *ex parte* contacts with the applicant's engineer, Kurahashi. The sole basis for this contention is the following statement, which was made by Kurahashi at the September 9, 2003 city council hearing:

> "* * * Ah, we have two proposed conditions that I mentioned to you last week regarding putting in a buffer, and I've heard today that I might not have been right in giving you * * * that, that, so I can retract that if, if it's a problem. But anyway, two conditions were, and I'll read them for the public[.]" Fourth Supplemental Record, Exhibit 2 at 61.

Petitioner contends that any contact Kurahashi had with city councilors the week before the September 9, 2003 public hearing would have been *after* the August 16, 2003 hearing and *before* the September 9, 2003 public hearing and, therefore, would constitute an *ex parte* contact.

The city takes the position that while Kurahashi was in frequent contact with planning staff, he had no *ex parte* contacts with city councilors. The city speculates that the above statement is either a misstatement, with Kurahashi actually meaning to refer to the last meeting of the city council

on August 16, 2003, or a statement that he had a contact with planning staff the week before. The intervenor contends that it was simply a misstatement on Kurahashi's part and that intended reference was to the last *meeting*, not to the prior week. Intervenor moves for an evidentiary hearing to establish that the intended reference was to the last meeting and attaches an affidavit from Kurahashi in support of that motion.

Petitioner opposes the motion for evidentiary hearing. However, petitioner argues, in the event LUBA allows an evidentiary hearing, petitioner should be given an opportunity to depose

> "Kurahashi and Windwood Construction owner Dale Richards, all of the City Council members as well as City Manager Bill Monahan, City Recorder Cathy Wheatly, Director of Community Development Jim Hendryx, Director, Current Planning Dick Bewersdorff, Associate Planner Morgan Tracy and City Arborist Matt Stine regarding their actions and whereabouts during the 14 days prior to September 9." Response to Motion to Take Evidence not in the Record 2.

We find it unnecessary to grant intervenor's motion for evidentiary hearing. Petitioner is the one who contends that the above quoted statement by Kurahashi "unambiguously" establishes that there were improper *ex parte* contacts. Petition for Review 17. We do not agree. The statement is exceedingly unclear and ambiguous. The statement is not sufficient, in and of itself, to support a conclusion that the city council engaged in undisclosed *ex parte* contacts with Kurahashi. It is conceivable that the statement *might* be sufficient to justify a timely motion to consider extra-record evidence under OAR 661-010-0045, to determine whether the reference was to an *ex parte* contact with one or more city councilors the prior week.[5] However, petitioner has not filed such a motion. Petitioner simply states in its response to intervenor's motion that "[i]f LUBA determines it necessary to have an evidentiary hearing on this matter," petitioner wants to depose a number of people. Response to Motion to Take Evidence not in the Record 2. That response is not sufficient to constitute a motion to consider extra-record evidence under OAR 661-010-0045, and we do not treat it as such.

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[5] We need not and do not decide that question here.

Because we do not agree with petitioner that the above-quoted statement is sufficient to support a conclusion that the city council engaged in undisclosed *ex parte* contacts with Kurahashi, the second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

A. TCDC 18.380.030(B) (Standards for Quasi-Judicial Zoning Map Amendments)

As we indicated earlier, the challenged decision amends the city's zoning map to add a planned development overlay to the subject property. Under TCDC 18.380.030(B), quasi-judicial zoning map amendments are subject to three standards.[6] Petitioner contends the city inadequately addressed two of those standards.

1. TCDC 18.380.030(B)(1)

The first of those standards, TCDC 18.380.030(B)(1), requires that the amendment comply with "all applicable comprehensive plan policies and map designations." Petitioner challenges the city finding that specifically addresses this criterion as impermissibly conclusory. That finding states:

> "The Development Code implements the goals and policies of the Comprehensive Plan and planned developments are permitted in all districts when they meet the code criteria of the [TCDC]. This criterion is satisfied." Record 73.

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[6] TCDC 18.380.030(B) provides as follows:

> "Standards for making quasi-judicial decisions. A recommendation or a decision to approve, approve with conditions or to deny an application for a quasi-judicial amendment shall be based on all of the following standards:
>
> "1. Demonstration of compliance with all applicable comprehensive plan policies and map designations;
>
> "2. Demonstration of compliance with all applicable standards of any provision of [the TCDC] or other applicable implementing ordinance; and
>
> "3. Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application."

The primary problem with the above finding is that it effectively reads TCDC 18.380.030(B)(1) out of the TCDC. TCDC 18.380.030(B)(2) separately requires that any other applicable TCDC requirements must be met. *See* n 6. TCDC 18.380.030(B)(1) leaves open the possibility that particular comprehensive plan policies or map designations might impose additional requirements. We agree with petitioner that the above-quoted finding erroneously suggests that there could be no such policies or plan designations because the TCDC fully implements the comprehensive plan. However, because petitioner identifies no such applicable comprehensive plan policies or map designations under this subassignment of error, this subassignment of error provides no basis for reversal or remand.

2. TCDC 18.380.030(B)(3)

Petitioner also cites the "change or mistake" rule at TCDC 18.380.030(B)(3), *see* n 6, and argues:

> "No evidence in the record supports such requirement, no evaluation is made by [the] City or Applicant and no findings are made regarding compliance with this mandatory requirement for zone change." Petition for Review 20.

A change in the base zone that applies to a property can dramatically change the allowed uses and the allowable density of uses. Application of a planned development overlay simply implements a decision that the city makes under other standards in the TCDC to approve a planned development application. It is easier to imagine why the city would subject a decision to change the base zoning to a standard like TCDC 18.380.030(B)(3) than it is to imagine why applying a planned development overlay should be subject to TCDC 18.380.030(B)(3), when the overlay is being applied simply to implement the planned development approval decision that presumably has already addressed the criteria that govern planned development approval. The appealed decision includes the following finding:

> "There is no change in circumstances or inconsistencies to [sic] the Comprehensive Plan or Zoning Map that warrants a zone change from the underlying zone. However, a zone change is necessary to place the [planned development] overlay designation on the property. This criterion is inapplicable." Record 73.

We understand the above-quoted finding to interpret TCDC 18.380.030(B)(3) not to apply where the zoning map is amended to apply a planned development overlay, without amending the underlying base zone. Because petitioner does not assign error to that interpretation of TCDC 18.380.030(B)(3), we deny this subassignment of error.[7]

B. TCDC 18.430 (Preliminary Subdivision Approval Process and Criteria))

1. TCDC 18.430.040(A)(2) (Non-Duplicative Plat Name)

Among the preliminary plat "[a]pproval criteria" set out in TCDC 18.430.040(A) is TCDC 18.430.040(A)(2), which requires "[t]he proposed plat name is not duplicative or otherwise satisfies the provisions of ORS Chapter 92[.]" The city adopted the following finding to address this criterion: "[t]he applicant has not provided documentation of a plat name reservation; therefore, the applicant will need to provide an approved plat name reservation prior to final plat approval." Record 73.

Petitioner contends that the city has not found that the application complies with TCDC 18.430.040(A)(2) and has not granted a variance or adjustment to that requirement. Instead, petitioner argues, it has deferred compliance with this approval criterion to a future date where he will not be entitled to notice and an opportunity to participate "and challenge any plat name reservation." Petition for Review 21.

Allegations that the city has improperly deferred decision making to a later stage where petitioner may not have an opportunity to participate are a recurring theme in petitioner's petition for review. Our consideration of such challenges follows our longstanding recognition of the different approaches a local government may take in applying approval criteria in a multi-stage land use approval process.

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[7] We express no view on whether the city's interpretation would survive under the somewhat deferential standard of review that we are required to apply to that interpretation under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003). However, the city would be wise to amend TCDC 18.380.030(B)(3) to exempt planned development overlay zoning map amendments explicitly, if the finding accurately expresses the city's view of TCDC 18.380.030(B)(3).

> "By statute, adjoining property owners within specified distances of property for which discretionary development approval is requested are entitled to notice of the local proceedings and an opportunity for a public hearing. ORS 197.763(2); 215.416; 227.175; *see Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227, *rev den* 308 Or 592 (1989). When conducting a multi-stage approval process for discretionary permits, such as that provided by the county for PD approval, the county is required to assure that discretionary determinations concerning compliance with approval criteria occur during a stage where the statutory notice and public hearing requirements noted above are observed. *Meyer v. City of Portland*, 67 Or App 274, 280 n 3, 678 P2d 741, *rev den* 297 Or 82 (1984); *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991); *Bartles v. City of Portland*, 20 Or LUBA 303, 310 (1990); *Margulis v. City of Portland*, 4 Or LUBA 89, 98 (1981). Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. *See Meyer v. City of Portland*, *supra*; *Bartles v. City of Portland*, *supra*. In such circumstances, neither notice to adjoining property owners nor additional pubic hearings are statutorily required during the second stage. These principles are relatively simple and straightforward in the abstract, but, as this case demonstrates, may prove more complex in the context of specific permit approval requests." *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (footnotes omitted).

Applying the *Rhyne* formulation here, the city has conditioned preliminary plat approval on the applicant's subsequent submittal of a plat name reservation. Record 51. Petitioner is correct that the city did not find that it is feasible for the applicant to submit a non-duplicative plat name to the city prior to final plat approval. However, petitioner does not question the feasibility of complying with that condition, and we cannot imagine how any plausible argument to that effect could be made. The lack of a feasibility finding concerning a criterion that requires a non-duplicative plat name is, at most, harmless error. The condition is sufficient by itself. This subassignment of error provides no basis for reversal or remand.

This subassignment of error is denied.

2. TCDC 18.430.020(J) (Base Flood Elevation)

TCDC 18.430.020 sets out "General Provisions" that apply to subdivision approval. Petitioner contends the city failed to require that the applicant comply with TCDC 18.430.020(J), which requires that the applicant determine base flood elevation. Without that determination, petitioner alleges, it cannot be determined if the subdivision will minimize flood damage and dedicate floodplain areas in accordance with TCDC 18.430.020(F) and TCDC 18.430.020(G).[8]

There are no findings that specifically address TCDC 18.430.020(J). However, respondents point out that TCDC 18.110.030(A)(71) includes a number of "Flood-related definitions," including a definition of "Base Flood."[9] Findings that the city adopted to address the floodplain dedication requirement of TCDC 18.430.020(G) explain there is no 100-year floodplain

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[8] As relevant to this subassignment of error, TCDC 18.430.020 provides:

> "18.430.020 General Provisions
>
> "* * * * *
>
> "F. Minimize flood damage. All subdivision proposals shall be consistent with the need to minimize flood damage.
>
> "G. Floodplain dedications. Where land filling and/or development is allowed within and adjacent to the 100-year floodplain outside the zero-foot rise floodway, the City shall require consideration of the dedication of sufficient open land area for a greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian bicycle pathway plan.
>
> "* * * * *
>
> "J. Determination of base flood elevation. Where base flood elevation has not been provided or is not available from another authoritative source, it shall be generated for subdivision proposals and other proposed developments which contain at least 50 lots or five acres (whichever is less)."

[9] As defined by TCDC 18.110.030(A)(71)(a) the base flood is what is commonly referred to as the 100-year flood.

> "'Base flood' - The flood having a one percent chance of being equaled or exceeded in any given year. Also referred to as the 'one-hundred-year flood.'"

on the subject property.[10] Given that unchallenged finding, there was no base flood elevation on the property to determine, and it follows that it was not error for the city not to require that the base flood elevation be determined.

This subassignment of error is denied.

C. TCDC 18.795 (Visual Clearance)

TCDC 18.795 requires visual clearance areas to assure adequate site distances at intersections and reduce hazards from vehicle turning movements.[11] The applicant submitted plans that show how the required visual clearance area will be provided at the intersection of proposed Street A and SW 74th Avenue. Record 704. The applicant also provided a traffic analysis that explains that required sight distance is provided at the intersection of proposed Street A and SW 74th Avenue, with one exception. Record 745. The exception is a retaining wall that has been constructed in the right-of-way by an adjoining lot owner. The applicant proposes to obtain an easement from that adjoining lot owner and relocate that retaining wall out of the right-of-way and onto the adjoining lot at no cost to the adjoining lot owner. Petitioner apparently reads TCDC 18.795 to require that the applicant seek and obtain that easement, or demonstrate now that it is feasible to do so in the future, before the city is in any position to find that the applicant's plan for satisfying the TCDC 18.795 visual clearance requirement for that intersection is adequate.

The city adopted the following finding addressing TCDC 18.795:

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[10] That finding explains:

> "No areas within the 100-year floodplain exist on the site. The applicant's narrative erroneously refers to areas of '100-year floodplain' but this is in fact areas of 25-year floodplain used to identify the extent of the drainageway. Since there are no 100-year floodplains on the property, this criterion is not applicable." Record 71.

[11] TCDC 18.795.030(B) provides:

> "Obstructions prohibited. A clear vision area shall contain no vehicle, hedge, planting, fence, wall structure or temporary or permanent obstruction (except for an occasional utility pole or tree), exceeding three feet in height, measured from the top of the curb, or where no curb exists, from the street center line grade, except that trees exceeding this height may be located in this area, provided all branches below eight feet are removed."

> "The applicant has illustrated clear vision areas at the street intersections and has indicated that no obstructions will be placed in those areas. Compliance with vision clearance requirements will be confirmed through the building process for all homes to be constructed within the development. This standard has been met." Record 42.

The city adopted the following additional finding addressing the site distance requirements of TCDC 18.705:[12]

> "The applicant indicates that sight distance will be met * * * condition #45 requires post-construction sight distance certification prior to issuance of building permits.[13] The applicant has proposed relocating a portion of a neighboring retaining wall which is presently in the public right of way.
>
> "[Petitioner] is concerned that the applicant cannot meet sight distance except by constructing a wall on a neighboring property. What [petitioner] may not know is that the applicant has been coordinating with this neighbor concerning the wall and is confident that they will obtain the necessary easement for the wall. Regardless, the applicant will not be able to build the wall until they show proof of easement. If for whatever reason, the applicant cannot obtain the easement they must find another solution for meeting sight distance criteria." Record 164.

Petitioner does not challenge the plan for meeting visual clearance requirements at the intersection of SW 74th Avenue and A Street. The above-quoted findings are adequate to express a city position that the required visual clearance and site distance requirements will be met by the applicant's proposal and that it is feasible for the applicant to secure the required easement to relocate the retaining wall.

This subassignment of error is denied.[14]

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[12] TCDC 18.705.030(H)(1) provides:

> "An access report shall be submitted with all new development proposals which verifies design of driveways and streets are safe by meeting adequate stacking needs, sight distance and deceleration standards as set by ODOT, Washington County, the City and AASHTO (depending on jurisdiction of facility)."

[13] Condition 45 appears at Record 61.

[14] Petitioner cross-references his arguments under subassignment of error 4(A) that the city improperly deferred compliance with TCDC 18.795 to a technical review where petitioner will not have a right to participate. We do not agree that the deferral in condition 45 is improper. The applicant has already shown that the required visual clearance and sight distance requirements will be met, provided an easement is obtained from the

D. TCDC 18.350.110(A)(2)(b) (Common Open Space)

TCDC 18.350.110(A) imposes certain requirements when common open space is proposed as part of a planned development.[15] The city's findings addressing TCDC 18.350.110(A) are as follows:

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adjoining lot owner and the retaining wall is relocated onto that lot. The city has imposed an added requirement that compliance with those requirements again be verified after construction of the intersection with SW 74th Avenue. Because the city found that the applicant's proposal satisfies visual clearance and sight distance requirements, there is nothing improper under *Rhyne* in imposing a condition to require that the applicant's engineer confirm that those standards are met after construction of the intersection. *Rhyne* at 447. That technical confirmation of compliance does not require public hearings or an opportunity for public participation. *Id*.

[15] 18.350.110(A) provides as follows:

"Requirements for shared open space. Where the open space is designated on the plan as common open space the following applies:

"1. The open space area shall be shown on the final plan and recorded with the Director; and

"2. The open space shall be conveyed in accordance with one of the following methods:

"a. By dedication to the City as publicly-owned and maintained as open space. Open space proposed for dedication to the City must be acceptable to it with regard to the size, shape, location, improvement and budgetary and maintenance limitations;

"b. By leasing or conveying title (including beneficial ownership) to a corporation, home association or other legal entity, with the City retaining the development rights to the property. The terms of such lease or other instrument of conveyance must include provisions suitable to the City Attorney for guaranteeing the following:

"(1) The continued use of such land for the intended purposes;

"(2) Continuity of property maintenance;

"(3) When appropriate, the availability of funds required for such maintenance;

"(4) Adequate insurance protection; and

"(5) Recovery for loss sustained by casualty and condemnation or otherwise.

"c. By any method which achieves the objectives set forth in Subsection 2 above of this section."

> "As a condition of approval, the applicant will be required to convey title of the proposed open space as a separate tract to a Homeowner's Association in accordance with the requirements of the [TCDC] and Clean Water Services requirements for buffers." Record 30a.[16]

Condition 27 requires that the applicant convey title to the proposed open space to a homeowners' association prior to final plat approval. Record 52.

Petitioner contends that the city's preliminary plat decision improperly defers a city finding of compliance with TCDC 18.350.110(A) to a stage at which the public will have no right to participate.

As respondents correctly note, petitioner's contention that TCDC 18.350.110(A) mandates creation of a homeowners' association is incorrect. Conveyance of common open space to a homeowner's association is merely one of the ways an applicant can comply with TCDC 18.350.110(A). What TCDC 18.350.110(A) requires is that (1) common open space be shown on the final plat and (2) ownership of that common open space be conveyed to an entity other than the applicant under terms that are acceptable to the city attorney, considering certain specified factors. *See* n 15. The short answer to petitioner's concern that he apparently will not be allowed to participate in development and city attorney approval of the documents that will effect that transfer is that TCDC 18.350.110(A) provides no right for petitioner to participate in that process. We see nothing in TCDC 18.350.110(A) that mandates that the conveyance occur before planned development plan approval is granted or that the city find that such a conveyance is feasible. TCDC 18.350.110(A) is not a planned development approval criterion in the usual sense; it is a city requirement for transfer of ownership under terms that are acceptable to the city attorney. That the homeowners' association that will receive title to the common open space does not yet exist provides no basis for reversal or remand.

[16] Record 30a is the unnumbered page that appears in the record following Record 30.

This subassignment of error is denied.[17]

E. TCDC 18.350.090 (Planned Development Submission Requirements)

TCDC 18.350.090 sets forth several "[g]eneral submission requirements" for planned developments.[18] The application separately lists each of the requirements in TCDC 18.350.090(A) and addresses each of them. Record 674. Petitioner argues "[t]he Applicant Finding for TCDC 18.350 fails to identify and evaluate the requirement of TCDC 18.350.090." Petition for Review 22.

Petitioner makes no attempt to explain why failure to comply with the submittal requirements of TCDC 18.350.090(A) necessarily requires remand. As we explained in *McConnell v. City of West Linn*, 17 Or LUBA 502 (1989), an applicant's failure to include information that a local ordinance requires to be submitted as part of a land use permit application does not necessarily constitute a basis for remand. That failure must result in an evidentiary shortcoming that prevents a required demonstration of compliance with one or more mandatory applicable approval criteria:

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[17] Petitioner raises a similar argument under subassignment of error 4(B), emphasizing his view that the city improperly deferred the required conveyance to a future date where he will not have a right to participate. We reject that subassignment of error for the same reasons we rejected subassignment of error 3(D).

[18] TCDC 18.350.090(A) provides:

> "General submission requirements. The applicant shall submit * * * the following:
>
> "1. A statement of planning objectives to be achieved by the planned development through the particular approach proposed by the applicant. This statement should include a description of the character of the proposed development and the rationale behind the assumptions and choices made by the applicant.
>
> "2. A development schedule indicating the approximate dates when construction of the planned development and its various phases are expected to be initiated and completed.
>
> "3. A statement of the applicant's intentions with regard to the future selling or leasing of all or portions of the planned development.
>
> "4. A narrative statement presenting information, a detailed description of which is available from the Director."

> "We have held that omission of required information from an application is harmless procedural error if the required information is located elsewhere in the record. *Dougherty v. Tillamook County*, 12 Or LUBA 20, 24 (1984); *Families for Responsible Govt. v. Marion County*, 6 Or LUBA 254, 277, *rev'd on other grounds* 65 Or App 8, 670 P2d 615 (1983). However, if the required information is not available elsewhere in the record, and is necessary for a determination of compliance with applicable approval standards, such an error is not harmless and warrants reversal or remand of the challenged decision. *Hopper v. Clackamas County*, 15 Or LUBA 413, 418 (1987); *Hershberger v. Clackamas County*, 15 Or LUBA 401, 408-409 (1987)." 17 Or LUBA at 525.

Petitioner makes no attempt to identify the significance of the alleged missing information. That failure aside, the applicant in this case did include a specific response to each requirement. Assuming petitioner is referring to Record 674 in contending that the applicant's response is inadequate, petitioner makes no attempt to explain why he believes that response is inadequate. Petitioner must do more than that to state a basis for reversal or remand.

This subassignment of error is denied.

F. Condition 51 (Improper Delegation of Authority)

TCDC 18.725.020(C) imposes a continuing obligation on property owners and operators to comply with state, federal and local environmental regulations.[19] The city imposed condition 51, which provides:

> "The applicant and future owners of lots within the development shall ensure that the requirements of CDC 18.725 (Environmental Performance Standards) are complied with at all times." Record 54.

Petitioner argues that the above condition "improperly gives authority to Applicant to enforce the requirements of TCDC 18.725 for some indeterminate time into the future." Petition for Review 23.

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[19] TCDC 18.725.020(C) provides:

> "Continuing obligation. Compliance with state, federal and local environmental regulations is the continuing obligation of the property owner and operator."

Intervenor and respondent contend that petitioner's improper delegation argument misreads condition 51. According to intervenor and respondent, the condition merely repeats the obligation that TCDC 18.725.020(C) separately imposes. We agree with intervenor and respondent.

Petitioner's arguments under this subassignment of error provide no basis for reversal or remand.[20]

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Under this assignment of error, petitioner contends that the city has deferred decision making and improperly deferred requiring that the applicant submit certain TCDC-required information until a time in the future when petitioner will have no right to participate or challenge the adequacy of that decision or the adequacy of the TCDC-required information. We address those arguments separately below.

A. TCDC 18.795 (Visual Clearance)

We have already rejected petitioner's argument concerning visual clearance in our discussion of subassignment of error 3(C). *See* n 14.

This subassignment of error is denied.

B. TCDC 18.350.110(A)(2)(b) (Common Open Space)

We have already rejected petitioner's argument concerning common open space in our discussion of subassignment of error 3(D). *See* n 17.

C. TCDC 18.775 (Sensitive Lands)

TCDC 18.775 regulates sensitive lands. TCDC 18.775.020(D) imposes requirements for development or alteration of jurisdictional wetlands.[21] The city's findings addressing TCDC 18.775.020(D) are as follows:

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[20] Petitioner makes additional arguments under this assignment of error that are beyond the scope of the assignment of error, which asserts an improper delegation of authority. Intervenor and respondent do not respond to those additional arguments, and we do not consider them either.

> "The wetlands within this site do not appear as significant wetlands on the City's map, but are regulated by CWS and state agencies. A condition of approval will be imposed requiring the necessary permits from Army Corps, Division of State Lands, and CWS be obtained." Record 80.[22]

Petitioner contends that TCDC 18.775.020(D) applies to the disputed application as an approval criterion and requires that the city find that the proposal meets the criteria that the "US Army Corps of Engineers, Division of State Lands, [Clean Water Services (CWS)], and/or other federal, state, or regional agencies" will apply in issuing those permits. Because the challenged decision does not include such findings, petitioner contends that condition 4 improperly defers this responsibility to a later staff determination where there is no opportunity for public participation.[23]

The city responds that petitioner misreads TCDC 18.775.020(D). The city contends that because the city council found that the wetlands on the site do not appear as significant wetlands on the city's "Wetland and Streams Corridor Map," alteration and development of the wetlands *will not* require a sensitive land permit from city and *will* require permits from other agencies. The city

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[21] TCDC 18.775.020(D) provides:

> "Jurisdictional wetlands. Landform alterations or developments which are only within wetland areas that meet the jurisdictional requirements and permit criteria of the U.S. Army Corps of Engineers, Division of State Lands, CWS, and/or other federal, state, or regional agencies, and are not designated as significant wetlands on the City of Tigard 'Wetland and Streams Corridors Map,' do not require a sensitive lands permit. *The City shall require that all necessary permits from other agencies are obtained*. All other applicable City requirements must be satisfied, including sensitive land permits for areas within the 100-year floodplain, slopes of 25% or greater or unstable ground, drainageways, and wetlands which are not under state or federal jurisdiction." (Emphasis added.)

[22] The challenged decision imposes the following conditions:

> "4. Prior to site work, the applicant shall provide evidence of all necessary approvals for work within the wetlands from US Army Crops of Engineers and the Division of State Lands." Record 49.
>
> "43. Prior to the issuance of building permits on any lot, the applicant must provide city staff with a letter from Clean Water Services that indicates compliance with the approved service provider letter (#2819)." Record 54.

[23] Petitioner also includes arguments concerning tree protection that do not appear to have any bearing on the assignment of error. We consider petitioners tree-related arguments later in this opinion.

contends that TCDC 18.775.020(D) only requires "that all necessary permits from other agencies [be] obtained." The conditions simply reflect that requirement. The city contends that TCDC 18.775.020(D) does not require that "the City must decide before the permit is issued whether the permit will be issued [by those other agencies]." Respondent's Brief 12.

We agree with the city's explanation of the meaning of TCDC 18.775.020(D). Specifically, we agree with the city that TCDC 18.775.020(D) requires that applicable permits be obtained from other agencies, but does not require that the applicant prove in this city proceeding that such permits will be issued or that the city find that the applicant will be able to secure those permits.[24]

D. 18.350.090(B)(6) (CC&Rs))

TCDC 18.350.090(A) sets out a number of "[g]eneral submission requirements" for planned development conceptual plans. TCDC 18.350.090(B) sets out a number of "[a]dditional information" requirements for such conceptual plans. TCDC 18.350.090(B)(6) requires that a conceptual development plan application include "[a] copy of all existing or proposed restrictions or covenants." The record includes draft CC&Rs. Record 550-60. The challenged decision includes a condition requiring that CC&Rs be submitted prior to final plat approval and be recorded with the final plat.[25]

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[24] In support of his argument here, petitioner cites *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 115 (1995), which concerned a decision that approved comprehensive plan and zoning map amendments, a site development approval and a minor partition. In that decision we concluded that the city improperly deferred consideration of whether the proposal complied with a Tigard Comprehensive Plan policy that required that development "shall comply with applicable federal, state and regional water quality standards" to a non public decision making process. Our decisions considering the nature of local governments' duty to consider whether state and federal permit standards are met or can be met in various contexts are not a model of clarity. Without reaching the question of whether our decision in *Marcott Holdings, Inc.* was correctly decided, it has little bearing on this case. Resolution of this subassignment of error turns on the meaning of TCDC 18.775.020(D), it does not turn on the meaning of the comprehensive plan policy that was at issue in *Marcott Holdings, Inc.*

[25] That condition provides:

> "31. Prior to approval of the final plat, the applicant shall prepare Conditions, Covenants and Restrictions (CC&Rs) for this project, to be recorded with the final plat, that clearly [lay] out a maintenance plan and agreement for the proposed private street(s). The CC&Rs shall obligate the private property owners within the subdivision to create a homeowner's association to ensure regulation of maintenance for the street(s). The CC&Rs shall additionally establish restrictions regarding the removal

Petitioner argues that the city must find that the application complies with the TCDC 18.350.090(B)(6) requirement for proposed CC&Rs. Petitioner contends the city has improperly deferred that finding to a nonpublic proceeding in the future.

The city responds:

> "By providing a set of draft CC&Rs * * * Applicant complied with TCDC 18.350.090(B)(6), which requires submission of 'a copy of all existing or proposed restrictions or covenants.' This is a submittal requirement, not an approval standard. This provision does not require review of the CC&Rs for the property, but merely requires that any that do exist be submitted. Because Applicant did provide a set of draft CC&Rs, Applicant complied with the submittal standard.
>
> "Again, this is not a situation in which the City deferred a decision on compliance with an approval standard. There was only a submittal requirement, and that requirement was complied with." Respondent's Brief 13.

We agree with the city. This subassignment of error provides no basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

A. Compliance with Comprehensive Plan

As noted in our discussion of subassignment of error 3(A), TCDC 18.380.030(B)(1) requires that quasi-judicial zoning map amendments must comply with "all applicable comprehensive plan policies and map designations[.]" The Tigard Comprehensive Plan (TCP) includes natural areas policies. TCP Natural Areas Policy 3.4.2 provides that the city will require cluster type development where properties have "important wildlife habitat value as delineated on the 'Fish and Wildlife Habitat Map' on file at the city."[26]

> of trees greater than 12 inches in diameter from any of the lots or tracts following completion of the subdivision improvements. Trees may only be allowed to be removed subject to a certified arborist's finding that the trees are dead, or in severe decline. The applicant shall submit a copy of the CC&Rs to the Engineering Department (Kim McMillan) and the planning Department (Morgan Tracy) prior to approval of the final plat." Record 52.

[26] As relevant, TCP Natural Areas Policy 3.4.2 provides:

The critical question under TCP Natural Areas Policy 3.4.2(c) is whether the subject property is included on the city's Fish and Wildlife Habitat Map. If the property is not included on the map, TCP Natural Areas Policy 3.4.2(c) does not apply. We do not understand petitioner to argue that the subject property is included on the Fish and Wildlife Habitat Map. Rather, petitioner argues the property was included in the Washington County Metzger-Progress Community Plan before it was annexed by the city, and its treatment in that county plan was such that it *should* be included on the city's Fish and Wildlife Habitat Map. Whatever the merits of that argument, the fact that the subject property has not been included on the city's Fish and Wildlife Habitat Map means that TCP Natural Areas Policy 3.4.2(c) does not apply and, therefore, does not require that the challenged development be clustered.[27]

B. Vertical Sag Curve

SW 74th Avenue along the western border of the property is currently unimproved. To improve SW 74th Avenue along the western border of the property a creek and wetlands near the southwestern corner of the property must be crossed, which will create a vertical sag curve.[28] With increased speed, the vertical sag curve needs to be more level or gentle to allow traffic traveling at the road's design speed to travel across the vertical sag curve safely. With decreased speed, the

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"The city shall:

"* * * * *

"c. Require cluster type development in areas having important wildlife habitat value as delineated on the 'Fish and Wildlife Habitat Map' on file at the city."

[27] It is not clear to us what it means under TCP Natural Areas Policy 3.4.2(c) to be "cluster type development." The disputed development is cluster type development in the sense that nearly half of the subject property is included in the wetland and drainage area in the middle of the site that will not be developed, and all but 2 of the 29 proposed lots are clustered along the northern part of the property. It is no doubt true that the area included in lots could be further reduced as petitioner argues, which would arguably result in more intense clustering, but it is not accurate to say there is no clustering.

[28] According to respondent, a vertical sag curve is the opposite of the type of curve that must be negotiated to climb and crest a hill and descend the other side of the hillcrest. In traversing a vertical sag curve, one descends to the bottom of the curve and then climbs up the other side of the curve.

vertical sag curve can be steeper, or more severe, and still be safely traveled. The issue presented in this subassignment of error is whether the city approved construction of SW 74th with a vertical sag curve that is too steep.

TCDC 18.810.020(B) provides that the city engineer is to establish street construction standards.[29] The parties apparently agree that the city engineer has done so. Attached to the petition for review, as Appendix B, are two figures that petitioner and the city apparently agree are street construction standards that have been adopted by the city engineer. The first figure shows a typical road pavement section, which indicates that the design speed for local roads is 25 miles per hour. The second figure shows vertical sag curve "K" values for roads with different design speeds. We do not fully understand that table, but the vertical sag curve "K" values clearly increase with design speed. For example a road with a design speed of 25 miles per hour must have a K value of at least 13.4. For a road with a design speed of 55 miles per hour, a K value of at least 65.1 is required. It appears that the smaller the "K" value the steeper the vertical sag curve. Conversely, the larger the "K" value the more gentle the curve.

Rather than place fill in the area of the creek to decrease the severity of the vertical sag curve to a "K" value of at least 13.4, the county approved a steeper vertical sag curve with a "K" value of 5.4.[30] To allow the steeper vertical sag curve and maintain safety, the county reduced the speed limit that would otherwise apply to this part of SW 74th Avenue to 15 miles per hour. The county explained its decision as follows:

> "The applicant also requested that the speed limit be reduced to 15 miles per hour in the section where the 74th Avenue crossing will occur. This speed limit was accepted by the City of Tigard Engineer. The city of Tigard standards are met by a

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[29] TCDC 18.810.020(B) provides:

> "Standard specifications. The City Engineer shall establish [street and utility] standard specifications consistent with the application of engineering principles."

[30] The findings explain that to achieve a "K" value of 13.4 a great deal of fill would be required in the wetland and that fill would have to be placed on top of an existing water line. The city wished to avoid placing this amount of fill on the water line. Record 84.

> 15 mile per hour vertical curve design, to a 'K value' of greater than 5 (AASHTO)." Record 43.

It may well be that a road with speed limited to 15 miles per hour with a vertical sag curve with a "K" value of greater than 5 is just as safe as roads with the design speeds shown on the table with vertical sag curves with the "K" value that corresponds to the different design speeds. However, the city's street standards seem to call for roads with a design speed of at least 25 miles per hour. Roads with a design speed of 25 miles per hour may have vertical sag curves with a "K" value of no less than 13.4. While avoiding the fill that will be necessary to achieve a vertical sag curve in this section of SW 74th Avenue might make sense from both environmental impact and traffic engineering perspectives, and might result in no compromise in safety if the posted speed limit is reduced to 15 miles per hour, the city's findings identify no authority for simply deviating from the lowest "K" value that is specified in the city's standards, and reducing the speed on the street to maintain safety.[31] If the city engineer has retained discretion under the TCDC and any other related city regulations to simply deviate from the table and allow construction of a road with a lower "K" value and impose a speed limit to preserve safety, no party identifies such authority.

The findings simply say the city engineer has accepted the proposal. Neither the city's findings nor the response brief identify any place in the record that explains the city engineer's reasoning in support of the lower "K" value or the city's engineer's authority to approve deviations from the adopted "K" values. Without that explanation, we must sustain this subassignment of error.

Petitioner's remaining argument under this subassignment of error is as follows:

> "Additionally, there is no finding in the record that TCDC 18.810.030(A)(1) or (2) are met."[32]

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[31] Taken to an extreme, if the speed limit were reduced to a crawl, we assume almost any "K" value could be accommodated.

[32] In a document submitted after oral argument in this appeal, petitioner requested that the reference to TCDC 18.810.030(A)(1) or (2) be revised to read TCDC 18.810.030(A)(2), (3) or (4). Petitioner characterizes the

The above argument does not appear to be directed at the subject of this subassignment of error, *i.e*. the vertical sag curve approved for SW 74th Avenue. For that reason alone, the above argument is rejected. In addition, the county cites findings that appear at Record 84 as sufficient to establish that the application complies with TCDC 18.810.030(A)(1).[33] Those findings explain that the proposal has access to SW 74th Avenue, which is a public street. We agree with the city that those findings are adequate to address TCDC 18.810.030(A)(1).

TCDC 18.810.030(A)(2) requires that "[n]o development shall occur unless streets *within the development* meet the standards of this chapter." The city did adopt findings addressing streets within the development. Petitioner identifies no streets within the development that he believes violate applicable standards. Without more of an attempt to develop this argument, the argument would have to be rejected for that reason as well, even if it were properly presented under subassignment of error 5(B).

Subassignment of error 5(B) is sustained with regard to the arguments directed at the vertical sag curve with a "K" value of 5.2. Otherwise, subassignment of error 5(B) is denied.

C. Stormwater Management Plans

TCDC 18.810.100 sets out storm drainage requirements.[34] Petitioner contends that the applicant did not show surface water drainage directions on the site plans, as required by TCDC

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requested revision as correcting a typographical error. We reject the characterization and consider petitioner's argument as it was presented in the petition for review.

[33] TCDC 18.810.030(A)(1) requires that "[n]o development shall occur unless the development has frontage or approved access to a public street."

[34] TCDC 18.810.100 provides in relevant part:

> "A. General provisions. The Director and City Engineer shall issue a development permit only where adequate provisions for storm water and flood water runoff have been made, and:
>
> "* * * * *
>
> "3. Surface water drainage patterns shall be shown on every development proposal plan.

18.810.100(A)(3). Petitioner also contends that the applicant failed to consider flow from upslope adjoining property, which petitioner contends is required by TCDC 18.810.100(C). Finally, petitioner contends that the applicant presented conflicting statements concerning possible effects on downstream drainage.

We set out below the city's response to this subassignment of error:

> "Petitioner argues that the Applicant did not show 'surface water drainage directions' on site plans as required by TCDC 18.810.100(A)(3). That provision requires that the application show 'surface water drainage patterns.' The site plans show surface water drainage patterns by the plans that show topography and that show surface water drainage facilities, exiting and planned. Furthermore, TCDC 18.810.100(A)(3) is a submittal standard not an approval standard, and Petitioner has not argued that the materials are insufficient to demonstrate compliance with approval standards.
>
> "Petitioner next argues that Applicant did not consider runoff from offsite lands upslope from the development. TCDC 18.810.100(C) does require accommodation of upstream drainage that flows into any culvert or other drainage facility, and provides that the 'City Engineer shall approve the necessary size of the facility.' TCDC 18.810.100(C)(1). This is not a discretionary decision for the Planning Commission or the City Council to make, but a non-discretionary decision to be made by the City Engineer in approving final plans. The City imposed a condition requiring submission of final design plans and calculations for the proposed water quality detention facility. Because the code only requires that the

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> "* * * * *
>
> "C. Accommodation of upstream drainage. A culvert or other drainage facility shall be large enough to accommodate potential runoff from its entire upstream drainage area, whether inside or outside the development, and:
>
> "1. The City Engineer shall approve the necessary size of the facility, based on the provisions of Design and Construction Standards for Sanitary and Surface Water Management (as adopted by the Unified Sewerage Agency in 1996 and including any future revisions or amendments).
>
> "D. Effect on downstream drainage. Where it is anticipated by the City Engineer that the additional runoff resulting from the development will overload an existing drainage facility, the Director and Engineer shall withhold approval of the development until provisions have been made for improvement of the potential condition or until provisions have been made for storage of additional runoff caused by the development in accordance with the Design and Construction Standards for Sanitary and Surface Water Management (as adopted by the Unified Sewerage Agency in 1996 and including any future revisions or amendments)."

> City Engineer approve, not that the land use decision-maker approve, the condition to submit the plans for review and approval is all that is required of the land use decision-maker.
>
> "Petitioner further argues that Mr. Kurahashi's testimony is inconsistent in that Mr. Kurahashi stated that the surface runoff does not run off the land but also stated that footing drains will go to the back of the lots. The testimony is not inconsistent. Footing drains are subsurface and do not carry surface runoff. All surface water, including roof and driveway drainage, will be required to be directed to the on-site stormwater detention facilities. Again, compliance with the standards is a decision that under the code is made by the City Engineer based on actual engineered drawings, not by the land use decision-maker. TCDC 18.810.100. The land use decision-maker assured compliance by requiring the plans to be submitted to the Engineering Department." Respondent's Brief 15-16.

We agree with the city's response to petitioner's subassignment of error 5(C). This subassignment of error is denied.

D. Tree Retention to the Greatest Degree Possible

As previously noted, the applicant proposes to construct 29 single-family detached dwellings on 29 lots. A new road is to be constructed to serve those lots. The lots and road are located in the northern part of the property. The applicant's tree preservation plan essentially proposed to remove all trees from the proposed lots and new right-of-way and to save all trees in the designated open space area where the wetlands and drainage area are located. Record 640.[35] The city council imposed conditions of approval that will require that some of the trees on the proposed lots be preserved. Record 48-49.

The approval criteria for conceptual planned development approval are located at TCDC 18.350.100. One of those criteria is TCDC 18.350.100(B)(3)(a)(1), which requires preservation of "the existing trees, topography and natural drainage to the *greatest degree possible*."(Emphasis added.)[36] Under TCDC 18.120.010, where a word is not defined in the TCDC, the "commonly

[35] Other plans showing proposed grading and construction appear at Record 627-39.

[36] The complete text of TCDC 18.350.100(B)(3)(a)(1) is as follows:

accepted, dictionary meaning" is to be used. The first definition of "possible" provided in *Webster's Third New Int'l Dictionary*, 1771 (unabridged ed 1981) is as follows:

> "[F]alling or lying within the powers (as of performance, attainment, or conception) of an agent or activity expressed or implied: being within or up to the limits of one's ability or capacity as determined by nature, authority, circumstances, or other controlling factor[.]"[37]

Petitioner argues, and we agree, that the code's adoption of a "greatest degree possible" standard is far more exacting than a "cost effective for the developer" standard. Petition for Review 35. It imposes a heavy obligation to preserve "trees, topography and natural drainage." However, the only alternative to the applicant's plans that petitioner identifies appears at Record 293. That plan does not propose 29 single-family dwellings on individual lots; it proposes 1,500 square foot units "stacked two or three high" located in the northeastern part of the property and the location of the cul-de-sac is revised.

The city offers the following response to petitioner's arguments under this subassignment of error:

> "* * * The [applicant's] proposed plan groups the development away from the most sensitive areas, protects large numbers of trees, both within the sensitive lands area and outside the sensitive lands area, and minimizes grading.
>
> "[TCDC 18.350.100(B)(3)(a)(1)] can only be applied when comparing otherwise similar developments – those that have the same number, size and type of units. A smaller development (fewer units, small units, stacked units) will always provide more preservation. The plan that provides the greatest preservation will be a plan for no development. In the absence of a plan for an equivalent development that protects more trees (or has less impact on topography or drainage), the City approved the proposed plans which provide substantial protection for trees, topography and natural drainage." Respondent's Brief 16-17.

"The streets, buildings and other site elements shall be designed and located to preserve the existing trees, topography and natural drainage to the greatest degree possible[.]"

[37] Petitioner cites a similar definition from the Oxford English Dictionary. Petition for Review 35 n 46.

We agree with the city. Although TCDC 18.350.100(B)(3)(a)(1) is a demanding standard, it does not require that the applicant abandon its proposal to build 29 detached single-family dwellings on individual lots and adopt the suggested development proposal for smaller stacked dwellings. Under TCDC 18.350.100(B)(3)(a)(1), the applicant likely could be required to configure those 29 lots and site the houses and necessary roadways so as to avoid cutting trees if that is possible. But petitioner identifies no such suggestions that were ignored. The suggestion that appears at Record 293 proposes a fundamentally different development. It is clear that the city does not interpret TCDC 18.350.100(B)(3)(a)(1) to mandate that an applicant fundamentally change the nature of a proposed development, even if that would preserve more existing trees or avoid changes in existing topography and drainage. Rather, the city interprets TCDC 18.350.100(B)(3)(a)(1) to require that execution of the proposed development be implemented in a way that preserves existing trees, topography and drainage if possible.

This subassignment of error is denied.

E. Site Access on SW 74th Avenue

TCDC 18.705 establishes city standards for "Access, Egress and Circulation." TCDC 18.705.030(D) requires access to a public or private street.[38] TCDC 18.810.030(A)(4) requires that new streets and improvements to existing streets serving new development meet city standards.[39] Petitioner argues the city violated TCDC 18.705.030(D) and TCDC

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[38] The text of TCDC 18.705.030(D) is as follows:

> "Public street access. All vehicular access and egress as required in Sections 18.705.030H and 18.705.030I shall connect directly with a public or private street approved by the City for public use and shall be maintained at the required standards on a continuous basis."

[39] The text of TCDC 18.810.030(A)(4) is as follows:

> "Any new street or additional street width planned as a portion of an existing street shall meet the standards of this chapter[.]

Although petitioner sets out the text of TCDC 18.810.030(A)(4) in his brief, he mistakenly cites to TCDC 18.810.030(A)(2). After oral argument, petitioner moved to correct that mistake. Because petitioner set out the text of TCDC 18.810.030(A)(4), we will overlook the mistaken citation to TCDC 18.810.030(A)(2).

18.810.030(A)(4) by not requiring that SW 74th Avenue be fully improved to city standards between the intersection of Street A north to SW Barbara Lane.

The city responds that the proposed development will have access to SW 74th Avenue and the applicant will be required to improve SW 74th to the south to provide access. The city contends that neither TCDC 18.705.030(D) nor TCDC 18.810.030(A)(4) require that the applicant also fully improve SW 74th Avenue to the north. We agree with the city.

This subassignment of error is denied.

F. Lock-Block Walls on Street Fill

As we explained in our discussion of subassignment of error 5(B), pursuant to TCDC TCDC 18.810.020(B), the city engineer has adopted road construction standards. Included in those standards is "Figure D-1" which shows a "Typical Road Pavement Section." Figure D-1 indicates that the maximum allowed slope outside the eight-foot public utility easement that must be provided next to the street right-of-way is 2:1. Petitioner contends that the applicant's proposal to construct a "lock-block" wall along a part of SW 74th Avenue violates the slope requirement.

Petitioner misreads Figure D-1. The 2:1 slope requirement in the figure applies to the slope of the land adjoining the public utility easement; it does not apply to construction of retaining walls. If the city has standards that govern construction of retaining walls along rights of way, petitioner does not identify them or explain why the "lock-block" wall violates any such standards.

This subassignment of error is denied.

G. Impact Study Deficiencies

For applications that are subject to the city's Type III procedure, such as the application at issue in this appeal, TCDC 18.390.050(B)(2)(e) requires preparation of an impact study.[40]

[40] TCDC 18.390.050(B)(2)(e) provides:

> "[Type III applications shall i]nclude an impact study. The impact study shall quantify the effect of the development on public facilities and services. The study shall address, at a minimum, the transportation system, including bikeways, the drainage system, the parks system, the water system, the sewer system, and the noise impacts of the development. For

Petitioner challenges the adequacy of the studies the applicant submitted to comply with this requirement.[41] As we have already explained, informational requirements like TCDC 18.390.050(B)(2)(e) are generally not approval criteria themselves. *McConnell v. City of West Linn*, 17 Or LUBA at 525. The impact studies that TCDC 18.390.050(B)(2)(e) calls for are to provide information that may be necessary to address the many substantive standards that exist elsewhere in the TCDC. In the words of TCDC 18.390.050(B)(2)(e), these impact studies are to form the basis by which the applicant will "propose improvements necessary to meet City standards and to minimize the impact of the development on the public at large, public facilities systems, and affected private property users." Although there may be such "City standards" elsewhere in the TCDC that make the alleged deficiencies in the impact studies that petitioner identifies important, petitioner does not cite or discuss them in this subassignment of error. Neither does petitioner explain how the impact studies submitted by the applicant are inadequate to show impacts have been "minimized."

This subassignment of error is denied.

H. Minimum Buffer Requirements

TCDC 18.775 governs "Sensitive Lands." TCDC 18.775.030 sets out "Administrative Provisions." One of those administrative provisions is TCDC 18.775.030(A), which requires

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> each public facility system and type of impact, the study shall propose improvements necessary to meet City standards and to minimize the impact of the development on the public at large, public facilities systems, and affected private property users. In situations where the Community Development Code requires the dedication of real property interests, the applicant shall either specifically concur with the dedication requirements, or provide evidence which supports the conclusion that the real property dedication requirement is not roughly proportional to the projected impacts of the development."

[41] Petitioner challenges the applicant's contention that the residents of the development would "make a measurable impact on the City's park system." Record 581. Petitioner also contends that the impacts on the water, sewer and transportation systems are inadequately identified and that noise impacts are ignored. Without an adequate assessment of impacts, petitioner contends the appropriateness of the mitigation measures that TCDC 18.390.050(B)(2)(e) calls for cannot be assessed.

interagency coordination.[42] Petitioner contends that the applicant's geotechnical report is inadequate to demonstrate compliance with a CWS vegetative setback requirement.

As the city correctly notes, TCDC 18.775.030(A)(1) does not require that the city independently determine if all requirements imposed by CWS are satisfied, it requires that the applicant secure a "CWS Service Provider Letter," which the applicant has done. Record 623-26.

This subassignment of error is denied.

I. Completeness and Adequacy of the Applicant's Tree Plan

One section of the TCDC is entitled "Tree Removal." TCDC 18.790. We recently discussed this section of the TCDC at some length in *Miller v. City of Tigard*, 46 Or LUBA 536, 539-43 (2004). There are several sections of TCDC 18.790 that are relevant under this assignment of error.

1. Tree Removal Permits

TCDC.790.050 identifies circumstances where a permit is required from the city to remove a tree and identifies circumstances where a permit is not required to remove a tree.[43] Under TCDC

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[42] TCDC 18.775.030(A) provides:

> "Interagency Coordination. The appropriate approval authority shall review all sensitive lands permit applications to determine that all necessary permits shall be obtained from those federal, state, or local governmental agencies from which prior approval is also required.
>
> "1. As governed by CWS 'Design and Construction Standards', the necessary permits for all 'development', as defined in Section 18.775.020.A above, shall include a CWS Service Provider Letter, which specifies the conditions and requirements necessary, if any, for an applicant to comply with CWS water quality protection standards and for the Agency to issue a Stormwater Connection Permit."

[43] As relevant, TCDC 790.050 provides:

> "A. Removal permit required. Tree removal permits shall be required only for the removal of any tree which is located on or in a sensitive land area as defined by Chapter 18.775.
>
> "* * * * *
>
> "D. Removal permit not required. A tree removal permit shall not be required for the removal of a tree which:

18.790.050(A), a city permit is required to remove any trees growing on sensitive lands. But under TCDC 18.790.050(A), no permit would be required from the city to remove the trees from the part of the subject property that falls outside the sensitive land area along the southern part of the property. TCDC 18.790.050(D)(4) appears to have been intended as a further qualification of the TCDC 18.790.050(A) requirement for a permit to remove trees on sensitive lands. But if TCDC 18.790.050(D) was intended to qualify TCDC 18.790.050(A), the final clause of TCDC 18.790.050(D)(4) renders the exemption inapplicable in the only circumstance it could apply, *i.e.*, where land in Christmas tree or forest tax deferral is on sensitive lands. The TCDC 18.790.050(D)(4) exemption is unnecessary for trees that are not located on sensitive lands, because TCDC 18.790.050(A) does not require a permit to remove such trees in the first place.

In summary, as far as we can tell, the applicant could remove all of the trees from the portion of the property that the applicant proposes to develop, without violating TCDC 18.790.050(A). That is because those trees are not located on sensitive lands, and TCDC 18.790.050(A) does not require a permit to remove trees unless those trees are located on sensitive lands.

2. The Tree Plan Requirement

TCDC 18.790.030 requires that a tree plan be provided when property is developed.[44] The precise nature of the obligation to protect trees through a tree plan is somewhat ambiguous.

"* * * * *

"4. Is used for Christmas tree production, or [stands on] land registered with the Washington County Assessor's office as tax-deferred tree farm or small woodlands, but does not stand on sensitive lands."

[44] TCDC 18.790.030 provides:

"A. Tree plan required. A tree plan for the planting, removal and protection of trees prepared by a certified arborist shall be provided for any lot, parcel or combination of lots or parcels for which a development application for a subdivision, partition, site development review, planned development or conditional use is filed. Protection is preferred over removal wherever possible.

TCDC18.790.030(A) states "[p]rotection is preferred over removal wherever possible." *See* n 44. But TCDC 18.790.010(C) expressly recognizes that trees may need to be removed to develop property,[45] and TCDC 18.790.030(B)(2) anticipates that more than 75% of the trees on a site may be removed to accommodate development, subject to mitigation requirements. *See* n 44. In addition to the somewhat ambiguous preference for preserving trees, the city also relies on a series of incentives for tree preservation, which are set out in TCDC 18.790.040.

"B. Plan requirements. The tree plan shall include the following:

"1. Identification of the location, size and species of all existing trees including trees designated as significant by the city;

"2. Identification of a program to save existing trees or mitigate tree removal over 12 inches in caliper. Mitigation must follow the replacement guidelines of Section 18.790.060D, in accordance with the following standards and shall be exclusive of trees required by other development code provisions for landscaping, streets and parking lots:

"a. Retention of less than 25% of existing trees over 12 inches in caliper requires a mitigation program in accordance with Section 18.790.060D of no net loss of trees;

"b. Retention of from 25% to 50% of existing trees over 12 inches in caliper requires that two-thirds of the trees to be removed be mitigated in accordance with Section 18.790.060D;

"c. Retention of from 50% to 75% of existing trees over 12 inches in caliper requires that 50 percent of the trees to be removed be mitigated in accordance with Section 18.790.060D;

"d. Retention of 75% or greater of existing trees over 12 inches in caliper requires no mitigation.

"3. Identification of all trees which are proposed to be removed;

"4. A protection program defining standards and methods that will be used by the applicant to protect trees during and after construction. * * *.

[45] TCDC 18.790.010(C) provides:

"Recognize need for exceptions. The City recognizes that, * * * at the time of development it may be necessary to remove certain trees in order to accommodate structures, streets utilities, and other needed or required improvements within the development."

3. Petitioner's Arguments

Petitioner challenges the adequacy of the applicant's tree protection plan. The focus of petitioner's challenge is on the part of the subject property that is to be developed, where most of the trees will be removed. It is not clear to what degree petitioner's arguments challenge the adequacy part of the plan that applies to the sensitive lands, where almost all of the trees are to be preserved. But petitioner's argument includes an overriding complaint that the applicant's tree protection plan evolved significantly over the course of the local proceedings and that it is difficult or impossible to determine with any degree of certainty precisely what the tree protection plan is.

The city and intervenor do not really respond to petitioner's arguments that the tree protection plan that the applicant submitted and the city ultimately approved is inadequate to comply with a number of particular requirements of TCDC 18.390.030. Instead they rely on city council findings that no tree protection plan is required at all for the part of the property that lies outside the sensitive lands part of the property and that the plan to protect nearly all the trees on the sensitive lands is sufficient to comply with TCDC 18.390.030. We turn to those findings.

4. The City's Findings

Simply stated the city council found that a tree protection plan is not required for the part of the subject property where the applicant proposes to develop houses, notwithstanding the express requirement in TCDC 18.390.030 that a tree plan must be provided "for any lot, parcel or combination of lots or parcels for which a development application for a subdivision * * * [or] planned development * * * is filed." The city council reached this conclusion based in large part on the TCDC 18.390.050(D)(4) exemption for tree removal permits discussed above. The city council recognized that if TCDC 18.390.050 is read by itself, the TCDC 18.390.050(D)(4) exception serves no purpose, for the reasons we have already explained. To give TCDC 18.390.050(D)(4) some effect, the city council concluded it should be read to exempt proposals to develop lands that are not sensitive lands from the TCDC 18.390.030 requirements for a tree plan and for mitigation in certain circumstances. The fatal problem with that interpretation is that TCDC

18.390.050(D)(4) does not say anything about tree plans or mitigation; it is an unnecessary exception to the TCDC 18.390.050(A) requirement for a tree permit. We review a local governing body's interpretation of its land use regulations under the standard set out at ORS 197.829(1) and the Court of Appeals' decision in *Church v. Grant County*.[46] Even if interpreting TCDC 18.390.050(D)(4) in the way the city did here might have survived the more deferential standard of review that was required before *Church*, it cannot be affirmed under *Church*. Contrary to the city's argument, the city's interpretation does not merely clarify "the scope of the exemption" provided by TCDC 18.390.050(D)(4), it applies it to a tree plan requirement that it clearly does not apply to. The city council's interpretation is inconsistent with the express language of TCDC 18.390.050(D)(4).

The city council's policy reason for the interpretation it applied here presents only a slightly closer question. The city council concluded that no permit is necessary from the city to harvest trees outside sensitive lands. If the city is right about that, the applicant in this case could remove all of the trees in the area proposed for development and then submit the application, thereby avoiding any requirement to produce a tree plan for that area of the property. If that is true, there may be a loophole in the city's tree removal ordinance that in some circumstances may effectively eviscerate the TCDC 18.390.030 requirement for a tree plan and mitigation. Even if the applicant could take

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[46] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

advantage of that loophole, as far as we know it has not done so, and the trees remain on the area of the property to be developed.

It is also important to note that the possibility that the applicant in this case could utilize the loophole to remove the trees before submitting an application does not render the requirement for a tree plan nonsensical. If the portions of a proposed development site that are not sensitive lands are not completely logged before development even though they could be logged, as will frequently be the case for a variety of reasons, there is nothing nonsensical about requiring a tree plan to protect those trees on lands to be developed, during and after the construction phase, and requiring mitigation for the trees that will be removed.

It may be that the tree plan that the applicant has proposed comes far closer to a tree plan for the entire property that complies with TCDC 18.390.030 than petitioner argues. However, without some assistance from the city and intervenor, we cannot conclude that the approved tree plan is consistent with TCDC 18.390.030. We reject the city's attempt to interpret TCDC 18.390.030 with TCDC 18.390.050(D)(4) to conclude that no tree plan is required for the part of the site that does not qualify as sensitive lands.

This subassignment of error is sustained.

J. Special Adjustments

The challenged decision grants an adjustment to street improvement sidewalk construction standards to allow a curb-tight sidewalk where SW 74th Avenue crosses the drainageway. The challenged decision also grants two adjustments to allow construction of the proposed cul-de-sac. Those adjustments allow the cul-de-sac to exceed 200 feet in length and to serve 23 houses.[47]

[47] Under the TCDC, cul-de-sac streets may provide access to no more than 20 houses. The adjustment allows the cul-de-sac to serve 23 houses. Apparently the first 200 feet of the cul-de-sac will provide access to lots 1 and 2 and lots 20-23. The adjustment to the 200-foot length limitation is necessary to provide access to lots 3 through 19. Otherwise a loop road would be required and it would appear that such a loop road would almost certainly have to encroach on the wetland and drainage area that is protected under the proposed plan.

The city council's decision does not apply the special adjustment criteria set out at TCDC 18.370.020(C)(11), even though the adjustments all appear to be directed at street improvement requirements.[48] Instead, the city council applied the special adjustment criteria at TCDC 18.370.020(C)(1).[49] No party questions that choice by the city, and we therefore do not question it either. The city's findings addressing the TCDC 18.370.020(C)(1)(a) requirement that there be special circumstances are set out below:

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[48] TCDC 18.370.020(C)(11) provides:

> "Adjustments for street improvement requirements (Chapter 18.810). By means of a Type II procedure, as governed by Section 18.390.040, the Director shall approve, approve with conditions, or deny a request for an adjustment to the street improvement requirements, based on findings that the following criterion is satisfied: Strict application of the standards will result in an unacceptably adverse impact on existing development, on the proposed development, or on natural features such as wetlands, steep slopes or existing mature trees. In approving an adjustment to the standards, the Director shall determine that the potential adverse impacts exceed the public benefits of strict application of the standards."

[49] TCDC 18.370.020(C)(1) provides:

> "Adjustments to development standards within subdivisions (Chapter 18.430). The Director shall consider the application for adjustment at the same time he/she considers the preliminary plat. An adjustment may be approved, approved with conditions, or denied provided the Director finds:
>
> "a. There are special circumstances or conditions affecting the property which are unusual and peculiar to the land as compared to other lands similarly situated;
>
> "b. The adjustment is necessary for the proper design or function of the subdivision;
>
> "c. The granting of the adjustment will not be detrimental to the public health, safety, and welfare or injurious to the rights of other owners of property; and
>
> "d. The adjustment is necessary for the preservation and enjoyment of a substantial property right because of an extraordinary hardship which would result from strict compliance with the regulations of this title."

The adjustment criteria at TCDC 18.370.020(C)(1) in some respects resemble traditional variance criteria, which are exceedingly difficult to satisfy. *Lovell v. Independence Planning Comm.*, 37 Or App 3, 586 P2d 99 (1978); *Wentland v. City of Portland*, 22 Or LUBA 15, 24-26 (1991); *Patzkowski v. Klamath County*, 8 Or LUBA 64, 70 (1983). However as the Court of Appeals made clear in *deBardelaben v. Tillamook County*, 142 Or App 319, 325-26, 922 P2d 683 (1996), LUBA is to extend appropriate deference to the city's interpretations of its own adjustment criteria. Under *Church v. Grant County*, the city is not entitled to the highly deferential standard of review that was required at the time *deBardelaben* was decided, but it still is entitled to appropriate deference under ORS 197.829(1) and *Church*.

"* * * The applicant is requesting an adjustment to the 5-foot planter strip along 74th Avenue to reduce 1,100 additional square feet of impact to the drainageway and wetland area. The applicant proposes this curb tight sidewalk for the special circumstance where the development is required to cross the stream. Outside the resource area, the sidewalk will meet the required public street standards.

"Due to the presence of the sensitive lands, the development width of the property makes a looped street unfeasible. Also, because of existing development patterns adjacent to the site, the cul-de-sac could not be extended to the site's east property line. The applicant was able to extend a new public street to the north property line for future connectivity. The length of the cul-de-sac is the primary reason to exceed the 20 home maximum standard on this private street. Because of the special circumstances affecting this property, this criterion has been satisfied." Record 30a.

The city council's findings explaining why the adjustments are necessary for proper design and functioning of the subdivision under TCDC 18.370.020(C)(1)(b) are as follows:

"The adjustment request for the curb tight sidewalk is necessary to reduce impacts to the drainageway and wetlands. The adjustment for the cul-de-sac length is necessary to provide access to Lots 3-19 and to allow a turn around for emergency equipment and garbage trucks. The adjustment to allow more than 20 units to access the cul-de-sac is a result of both the length of the resulting cul-de-sac, and the desire to eliminate the need for a second redundant access serving three lots. Providing this second access would have reduced the amount of area available for buildings, with the result of eliminating the lots being served by it. Therefore, this criterion is satisfied." Record 30a-31.

The city council's finding regarding the TCDC 18.370.020(C)(1)(c) public health safety and welfare criterion is as follows:

"The Fire District has reviewed the proposed street design and has provided no objections to these adjustments. There is no evidence that these adjustments will be detrimental to the health safety or welfare to other property owners surrounding the site." Record 31.

Finally, the city council's finding regarding the TCDC 18.370.020(C)(1)(d) extraordinary hardship standard is as follows:

"Due to existing development patterns, the natural resources, and the shape of the site, the adjustment is necessary for the applicant to make use of substantial property rights. The applicant is proposing to build within the density prescribed for this site. The criteria for granting these adjustments to the street design, cul-de-sac length, and sidewalk standards have been satisfied." *Id.*

Petitioner assigns error to the city's findings concerning the TCDC 18.370.020(C)(1)(c) public health safety and welfare criterion and the TCDC 18.370.020(C)(1)(d) extraordinary hardship standard. We have set out the other city findings, on the first two criteria, because they have some bearing on the last two criteria.

Petitioner first contends that, contrary to the city's finding that there is no evidence that these adjustments will be "detrimental to the health safety or welfare to other property owners surrounding the site," there is a great deal of evidence to that effect. The city appears to be correct that some of the evidence cited by petitioner relates more to the development itself rather than the three adjustments that are at issue under this subassignment of error. However, some of the evidence cited by petitioner clearly does address this criterion, and the city's finding that there is no such evidence is in error. This part of subassignment of error 5(J) is sustained.

Petitioner also argues the city's finding that the adjustments are needed to preserve a substantial property right due to extraordinary hardship that would result from strict compliance with the adjusted standards are inadequate and are not supported by the evidentiary record.

Reading the city's findings concerning TCDC 18.370.020(C)(1)(a) and (d) together, we reject petitioners challenge to the findings regarding the cul-de-sac adjustments under TCDC 18.370.020(C)(1)(d). It is reasonably clear from those findings that if the applicant were forced to provide access to the proposed lots without the adjustments, much more of the property would have to be developed with roads, at a significant additional expense and with the potential loss of lots that would otherwise be approvable. It is reasonably clear that the city considers those impacts to constitute a hardship. We cannot say the city misinterpreted TCDC 18.370.020(C)(1)(d) or that its findings are inadequate to demonstrate that the cul-de-sac adjustments comply with that criterion.

The city's findings concerning TCDC 18.370.020(C)(1)(d) and the curb tight sidewalk are a different story. Although it appears that granting the adjustment would serve the desirable

purpose of minimizing fill in the wetland and drainage area, the city does not explain why it would be a hardship on the applicant to construct a conforming sidewalk.[50]

To summarize, the city's findings concerning TCDC 18.370.020(C)(1)(c) are inadequate for all three adjustments. The city's findings concerning TCDC 18.370.020(C)(1)(a) and (d) are sufficient to demonstrate that the cul-de-sac adjustments comply with TCDC 18.370.020(C)(1)(d). The city's findings concerning TCDC 18.370.020(C)(1)(d) are inadequate to demonstrate that the curb tight sidewalk adjustment satisfied that criterion.

K. Landscaping

One of the specific planned development criteria is TCDC 18.350.100(B)(3)(g)(1).[51] Petitioner contends that the city erred in counting the 44 percent of the site that will be included in the open space and drainage tract on the site, which will be left in its current undeveloped state, in applying the TCDC 18.350.100(B)(3)(g)(1) landscaping requirement. Petitioner contends that TCDC 18.350.100(B)(3)(g)(1) requires more proactive landscaping efforts on the part of the applicant.

The city's interpretation of TCDC 18.350.100(B)(3)(g)(1) to allow the open space area that is to be left in its natural state to be counted toward the TCDC 18.350.100(B)(3)(g)(1) 20% landscaping requirement is implicit. Record 29. The city contends that it is a sustainable interpretation under ORS 197.829(1) and *Church*. We agree with the city.

Petitioner also cites TCDC 18.745.030(E) and TCDC 18.350.100(B)(3)(a)(5) and argues that the applicant's landscape plan fails to protect existing vegetation "as much as possible" or

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[50] We note that there is no extraordinary hardship criterion like TCDC 18.370.020(C)(1)(d) in the special adjustment criteria for street improvement standards at TCDC 18.370.020(C)(11). *See* n 48. However, as previously noted, the city applied the special adjustment criteria at TCDC 18.370.020(C)(1) rather than the TCDC 18.370.020(C)(11) criteria.

[51] TCDC 18.350.100(B)(3)(g)(1) imposes the following requirement:

> Residential Development: In addition to the requirements of subparagraphs (4) and (5) of section a of this subsection, a minimum of 20 percent of the site shall be landscaped[.]"

replace trees.[52] The city does not respond to petitioner's contention concerning preservation of vegetation during construction under TCDC 18.745.030(E). Accordingly, we sustain that part of subassignment of error 5(K). Petitioner's contention regarding TCDC 18.350.100(B)(3)(a)(5) is not clear. We have already sustained petitioner's subassignment of error 5(I). Until that deficiency is considered by the city on remand, it is premature to consider whether there is any obligation to replace any trees in the area to be developed, beyond the replacement trees that are already proposed.

This subassignment of error is sustained in part.

CONCLUSION

Subassignment of error 5(I) is sustained. Subassignments of error 5(B), 5(J) and 5(K) are sustained in part and denied in part. The remaining assignments of error and subassignments of error are denied.

The city's decision is remanded.

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[52] TCDC 18.745.030(E) provides:

> "Protection of existing vegetation. Existing vegetation on a site shall be protected as much as possible.
>
> "1. The developer shall provide methods for the protection of existing vegetation to remain during the construction process; and
>
> "2. The plants to be saved shall be noted on the landscape plans (e.g., areas not to be disturbed can be fenced, as in snow fencing which can be placed around individual trees).

TCDC 18.350.100(B)(3)(a)(5) provides:

> "Trees preserved to the extent possible. Replacement of trees is subject to the requirements of Chapter 18.790, Tree Removal."