BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KNUTSON FAMILY LLC,
*Petitioner*,

vs.

CITY OF EUGENE,
*Respondent*,

and

CAROL BOTHMAN, CHRIS BOTHMAN
and CARLEE INVESTMENTS, LLC,
*Intervenors-Respondent.*

LUBA No. 2004-100

CARL BOTHMAN, CHRIS BOTHMAN
and CARLEE INVESTMENTS, LLC,
*Petitioners*,

vs.

CITY OF EUGENE,
*Respondent*,

and

KNUTSON FAMILY LLC,
*Intervenor-Respondent.*

LUBA No. 2004-106

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review on behalf of petitioner Knutson Family LLC. With him on the brief was the Law Office of Bill Kloos, PC. Daniel A. Terrell argued on behalf of petitioner.

William H. Sherlock, Eugene, filed a petition for review and argued on behalf of petitioners Bothman et al. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

No appearance by City of Eugene.

Daniel A. Terrell, Eugene, filed a response brief and argued on behalf of intervenor-respondent Knutson Family, LLC. With him on the brief was the Law Office of Bill Kloos, PC.

William H. Sherlock, Eugene, filed a response brief and argued on behalf of intervenors-respondent Bothman et al. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision. DAVIES, Board Member, did not participate in the decision.

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|---|---|
| REMANDED (LUBA No. 2004-100) | 01/11/2005 |
| REMANDED (LUBA No. 2004-106) | 01/11/2005 |

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

Opinion by Bassham.

## NATURE OF THE DECISION

Petitioners in LUBA Nos. 2004-100 and 2004-106 appeal a planning commission denial of an application to rezone five parcels.

## MOTIONS TO INTERVENE

Carl Bothman, Chris Bothman and Carlee Investment, LLC (hereafter Carlee) move to intervene on the side of respondent in LUBA No. 2004-100. Knutson Family LLC (hereafter Knutson) moves to intervene on the side of respondent in LUBA No. 2004-106. There is no opposition to either motion, and they are allowed.

## MOTION TO FILE REPLY BRIEF

Petitioner Knutson moves for permission to file a reply brief, to respond to an alleged new matter in the Carlee response brief filed in LUBA No. 2004-100. Carlee objects, arguing that a reply brief is not warranted because the matter replied to is not a "new matter" within the meaning of OAR 661-010-0039.[1] Instead, Carlee argues, the response brief simply responds to one of the assertions in the Knutson petition for review.

The Knutson petition for review assigns error to the city's conclusion that, based on review of the Metro Plan map, the subject property is designated Residential rather than Commercial. The response brief provides additional reasons, not adopted by the city, to support that conclusion. We agree with Knutson that the reply brief addresses a "new matter" within the meaning of OAR 661-010-0039. The reply brief is allowed.

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[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * *"

**MOTION TO TAKE OFFICIAL NOTICE**

Petitioner Knutson moves to take official notice of a document entitled *Eugene-Springfield Metropolitan Area General Plan (1980)*, which is a superseded version of the current Eugene-Springfield Metropolitan Area General Plan (Metro Plan). There is no opposition to the motion, and it is allowed.

**FACTS**

The subject property consists of five parcels totaling approximately 2.92 acres in size, owned or controlled by petitioner Knutson. Tax lots 4000, 4100, 4300 and 4400 front on Coburg Road, a north-south arterial, and are zoned Neighborhood Commercial (C-1). Tax lot 4000 is developed with a medical clinic. Tax lots 4100, 4300 and 4400 are vacant. Tax lot 4900 fronts on Willakenzie Road, an east-west street, and is zoned General Office (GO), a commercial zone. Tax lot 4900 is developed with an office building.

Two properties south and east of the subject parcels, at the intersection of Coburg Road and Willakenzie Road, are zoned Community Commercial (C-2). Carlee owns one of these C-2 zoned properties. Further south across Willakenzie Road are a number of parcels zoned C-1 and C-2. To the east across Coburg Road are a number of properties zoned C-1, C-2 and R-2 (Medium Density Residential) and R-3 (High Density Residential). North of the subject property are three lots zoned GO, and further north a strip of land zoned R-1. A large area west of the subject property is zoned R-2, while an area further to the west is zoned Public Land (PL) and developed with a high school. *See* Figure 1, below.

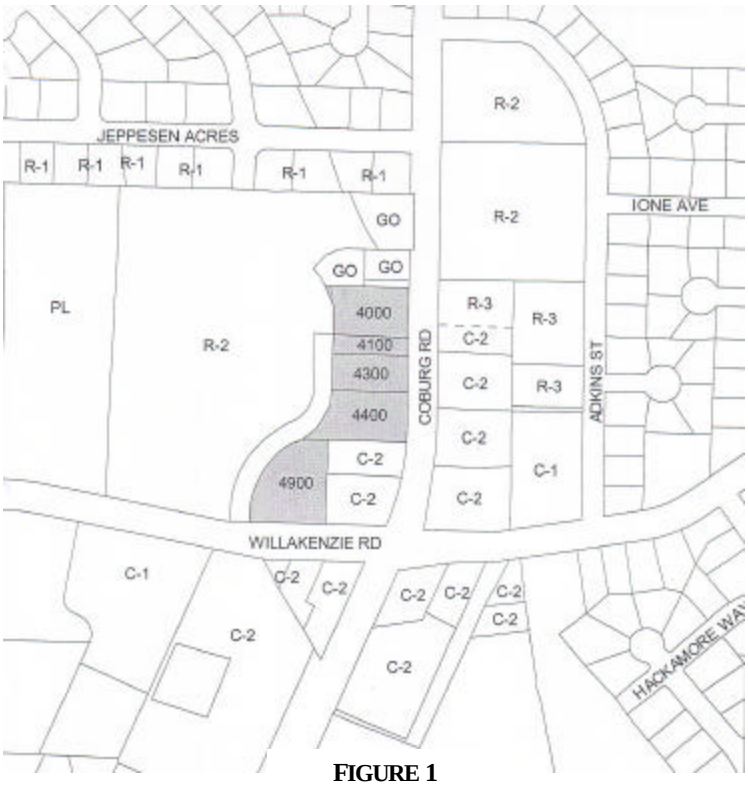


**FIGURE 1**

A key issue in these appeals is the plan designation of the subject property. The subject parcels are within an area that is subject to an acknowledged refinement plan known as the Willakenzie Area Plan (WAP), adopted in 1992. The WAP includes a property-specific map of plan designations. The WAP plan map depicts the C-1 zoned subject property and the GO-zoned lots north of the subject property along Coburg Road as Commercial. The WAP also includes a large-scale map for the Sheldon Sub-area, which includes the subject property. The Sheldon Sub-area map depicts the subject property and the adjoining GO-zoned parcels with a Commercial plan designation.

The Metro Plan diagram, adopted in 1987, is a map that depicts the plan designations for the Eugene-Springfield Metropolitan Area at a scale of one inch equals 8,000 feet. The Metro Plan diagram does not depict property boundaries, and shows only the more significant streets. For example, in the area of the subject property the Metro Plan diagram depicts Coburg Road, but not Willakenzie Road. In the approximate area of the subject property, the diagram shows a half-moon

shaped blob of red color, indicating a Commercial plan designation, on the west side of Coburg Road. The red blob extends north from Cal Young Road, a road south of and roughly parallel to Willakenzie Road, to an indeterminate point on Coburg Road. To the west of the red blob is an orange blob indicating a Medium Density Residential plan designation. Further west is a blue blob indicating a Government and Education plan designation. East of Coburg Road the plan diagram depicts another half-moon shaped blob of red color that starts somewhere north of the intersection of Cal Young Road and Coburg Road, and curves north to end at an indeterminate point along Coburg Road.

The Metro Plan diagram states, in relevant part:

> "The Plan diagram is a graphic depiction of: (1) the broad allocation of projected land use needs in the metropolitan area: and (2) goals, objectives and policies embodied in the text of the plan. One cannot determine the exact designation of a particular parcel of land without consulting with the appropriate local jurisdiction. Local jurisdictions make more specific interpretations of the general diagram through refinement plans and zoning. The relationship of the diagram to text, goals, objectives and policies, and to the refinement plans and zoning, is explained on page I-5 [of the Metro Plan]. * * *"

In November 2003, Knutson applied to rezone all five parcels to C-2, which allows more intensive commercial uses than the C-1 or GO zones. The city hearings official held a public hearing on February 25, 2004, and accepted evidence with respect to whether the proposed rezoning complied with zone change criteria at Eugene Code (EC) 9.8865(1)-(3).[2] Following the public

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[2] EC 9.8865 provides, in pertinent part:

> "Approval of a zone change application, including the designation of an overlay zone, shall not be approved unless it meets all of the following criteria:
>
> "(1) The proposed change is consistent with applicable provisions of the Metro Plan. The written text of the Metro Plan shall take precedence over the Metro Plan diagram where apparent conflicts or inconsistencies exist.
>
> "(2) The proposed zone change is consistent with applicable adopted refinement plans. In the event of inconsistencies between these plans and the Metro Plan, the Metro Plan controls.

hearing, Knutson submitted a traffic impact analysis to address concerns raised at the hearing regarding road capacity and compliance with EC 9.8865(3). On April 13, 2004, the hearings official denied the application for failure to comply with EC 9.8865(1)–(3). In particular, the hearings official concluded based on the Metro Plan diagram that the subject property is designated Medium Density Residential and that the proposed C-2 zoning is inconsistent with that plan designation and with applicable Metro Plan and WAP policies, under EC 9.8865(1) and (2). In addition, the hearings official denied the application under EC 9.8865(3), after concluding that the applicant failed to demonstrate that the transportation facilities in the area can adequately serve uses allowed in the C-2 zone.

Petitioner Knutson appealed the hearings official decision to the planning commission. The planning commission affirmed the hearings official's conclusion under EC 9.8865(1) and (2) that the Metro Plan designation for the subject property is Medium Density Residential, not Commercial, and that rezoning the property to C-2 would be inconsistent with applicable Metro Plan and WAP policies. However, the planning commission disagreed with the hearings official that the applicant had failed to demonstrate compliance with EC 9.8865(3) and modified the hearings official's decision to remove that basis for denial.

These appeals followed.

**INTRODUCTION**

In LUBA No. 2004-100, petitioner Knutson seeks to overturn the planning commission decision with respect to EC 9.8865(1) and (2), while in LUBA No. 2004-106 petitioner Carlee seeks to overturn the planning commission decision with respect to EC 9.8865(3). Carlee's petition for review argues in relevant part that the hearings official correctly denied the application based on deficiencies in local transportation facilities, and that the planning commission erred in reversing the

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> "(3) The uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban facilities and services."

hearings official on that point. Knutson's response brief first argues that Carlee's petition for review does not state a claim for relief, because in fact transportation facilities are not among the "key urban facilities" subject to review under EC 9.8865(3). In addition, the Knutson response brief advances a cross-assignment of error, alleging that the hearing official erred in rejecting petitioner's request to treat each tax lot separately, for purposes of analyzing transportation impacts under EC 9.8865(3).

Carlee moves to strike Knutson's first argument in the response brief, that transportation facilities are not "key urban facilities," on the grounds that Knutson either waived that issue by failing to raise it below, or affirmatively waived it by conceding below that "key urban facilities" include transportation facilities. Carlee also moves to strike the Knutson cross-assignment of error, arguing that the cross-assignment of error is not appropriate because (1) Knutson does not seek to reverse the planning commission decision and (2) it is directed at the hearings official's decision, not the challenged planning commission decision. Carlee also argues that the issue raised under the cross-assignment was waived, because Knutson failed to raise that issue before the planning commission. We now address these motions.

**A. Waiver**

Knutson responds that it argued to the hearings official that no traffic impact analysis was necessary to establish compliance with EC 9.8865(3), and it submitted a traffic impact analysis only after it became clear that the hearings official would deny the application without one. According to Knutson, the argument that no traffic impact analysis is necessary under EC 9.8865(3) is sufficient to raise an issue regarding whether transportation facilities are "key urban facilities" subject to that provision. Knutson also argues that it never conceded that point, and therefore did not affirmatively waive that issue.

We agree with Knutson that it did not concede or affirmatively waive the issue of whether transportation facilities are "key urban facilities" by submitting a traffic impact analysis. However, we disagree that the issue of whether transportation facilities are "key urban facilities" was raised

below. ORS 197.835(3) provides that issues before LUBA "shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable." ORS 197.763(1) in turn provides that issues that may be the basis for an appeal to LUBA "shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings official, and the parties an adequate opportunity to respond to each issue." The issue petitioner raised below—whether a traffic impact analysis is necessary to demonstrate compliance with EC 9.8865(3)—is a different issue than the issue raised in Knutson's response brief: whether transportation facilities are regulated as "key urban facilities" under that code provision. The latter issue was waived, and we address it no further.

**B. Knutson Cross-Assignment of Error**

According to Carlee, a cross-assignment of error is appropriate only where the respondent does not seek to reverse or modify the judgment on appeal, but rather seeks only to reverse or modify an intermediate ruling that, if reversed, would support the judgment on a different ground than that relied upon. Motion to Strike 3 (citing Oregon Rules of Appellate Procedure (ORAP) 5.57(2)).[3] Carlee argues that, because Knutson seeks, in its *petition for review* in LUBA No. 2004-100, reversal or remand of the planning commission denial under EC 9.8865(1) and (2), Knutson cannot cross-assign error in its *response brief* in LUBA No. 2004-106 to any aspect of the city's alleged error under EC 9.8865(3).

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[3] ORAP 5.57(2) provides:

"A cross-assignment of error is appropriate:

"(a) If, by challenging the trial court ruling, the respondent does not seek to reverse or modify the judgment on appeal; and

"(b) If the relief sought by the appellant were to be granted, respondent would desire reversal or modification of an intermediate ruling of the trial court."

In any case, Carlee argues, Knutson cross-assignment is directed at the wrong decision-maker. According to Carlee, the cross-assignment challenges the hearings official's alleged error in applying EC 9.8865(3), not any determination made by the planning commission.

Knutson responds, and we agree, that neither objection to the cross-assignment of error has merit. In *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, *aff'd* 193 Or App 82, 94 P3d 913 (2004), we held that it is consistent with LUBA's rules to advance in a response brief what corresponds to a cross-assignment of error under ORAP 5.57(2), and that such cross-assignments need not be presented in a cross-petition for review. We explained that, as illustrated by ORAP 5.57(2), a cross-assignment of error does not seek to reverse or modify the judgment on appeal, but rather seeks reversal or modification of an intermediate ruling, if the relief sought by the appellant is granted. *Id.* at 664. We provided the following pertinent example of an appropriate cross-assignment of error:

> "For example, an applicant intervenor-respondent could assert a contingent cross-assignment of error arguing that, if the decision is remanded for any reason under the petition for review, LUBA should also order the decision maker to address or correct an erroneous intermediate order or determination." *Id.* at 666.

In the present case, the Knutson cross-assignment of error requests that, if LUBA remands the planning commission decision with respect to EC 9.8865(3) pursuant to Carlee's petition for review, LUBA should order the planning commission to correct its alleged error in failing to apply EC 9.8865(3) to each lot individually, rather than to all five lots as a whole. That argument falls squarely into the above-quoted example from *Copeland Sand & Gravel, Inc.*, and is an appropriate cross-assignment of error.

It is true that Knutson seeks to reverse or remand other aspects of the planning commission decision, in a separate appeal consolidated with Carlee's appeal. However, we see no reason why an intervenor-respondent in one appeal should be precluded from presenting an otherwise appropriate cross-assignment of error, simply because that party is also a petitioner in a separate appeal of the same decision, or even a cross-petitioner in the same appeal, for that matter. Land

use decisions often have multiple aspects or components, and a party on appeal may well seek to overturn one aspect while preserving another. ORAP 5.57(2)(a) states that a cross assignment of error is appropriate "[i]f, *by challenging the trial court ruling*, a party does not seek to reverse or modify the judgment on appeal." (Emphasis added). In other words, a cross-assignment of error is inappropriate if in the course of challenging an intermediate ruling the party seeks to reverse or modify the judgment on appeal. Here, Knutson's cross-assignment of error properly challenges an intermediate ruling regarding EC 9.8865(3) and does not seek to reverse or modify the ultimate planning commission decision with respect to EC 9.8865(3).

We also disagree with Carlee that the cross-assignment is directed at the wrong decision maker. The planning commission affirmed the hearings official's decision, except as modified. Record 7. While the planning commission modified the hearings official's decision with respect to EC 9.8865(3), that modification did not involve the question of whether to apply that code provision to each individual lot or to the whole. The planning commission either followed the hearings official in applying EC 9.8865(3) to the whole, or failed to resolve that issue. If the planning commission decision is remanded under Carlee's assignment of error, then the issue of whether to apply EC 9.8865(3) to each tax lot or the whole will be squarely before the planning commission.

Finally, Carlee argues that Knutson waived the issue raised by the cross-assignment of error, by failing to raise that issue before the planning commission. However, Knutson's appeal statement to the planning commission clearly raised that issue. Record 81.

For the foregoing reasons, Carlee's motion to strike the cross-assignment of error is denied.

**FIRST ASSIGNMENT OF ERROR (KNUTSON)**

Petitioner Knutson argues that the planning commission erred in affirming the hearings official's finding that the plan designation of the subject property is Medium Density Residential rather than Commercial.

The hearings official concluded that the Metro Plan diagram and the WAP plan diagram are in conflict with respect to the plan designation of the subject properties, and therefore that the Metro Plan diagram prevailed. That conclusion was based on findings that (1) it is "clearly evident" from the Metro Plan diagram that the subject properties are located outside the red Commercial "blob" depicted west of Coburg Road, and (2) the C-1 and GO commercial zones implement and are consistent with the Medium Density Residential plan designation, which supports the conclusion that the subject properties, which are zoned C-1 and GO, are designated Medium Density Residential.[4]

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[4] The hearings official's decision states, in relevant part:

> "The Metro Plan diagram currently generally depicts the area of the subject properties as medium-density residential. Both the C-1 and GO zones are consistent with that residential designation. The requested C-2 zone is not. The applicant disputes the conclusion that the Plan diagram depicts the subject location as residential on two bases. First, the applicant asserts that the residential designation is based on the 'blob' map, which is not intended to be site-specific, and which cannot be used to accurately identify the designation of any particular parcel. * * *
>
> "* * * [T]he applicant is correct that the Metro Plan diagram does not and is not intended to be site specific. However, viewing that map, it is clearly evident that, with the exception of the tip of the commercial 'blob' at the location of the intersection of Coburg and Willakenzie Road, the area of the subject properties, along the west side of Coburg Road, north of Willakenzie Road, and along the north side of Willakenzie Road, are depicted by the Residential blob. As discussed further below, this is consistent with the WAP diagrams, which identify the designation on a site-specific basis. The fact that the blobs are not site-specific is not a basis upon which to ignore the general diagram. Nor does it provide a basis to conclude that the diagram, as it is presently drawn, depicts the general area of the subject properties as commercial rather than residential.
>
> "* * * * *
>
> "Moreover, relying on the WAP commercial designations does not determine whether the proposed zone change is consistent with the Metro Plan designation. Both the C-1 and the GO zones are appropriate zones through which to implement both the Residential and Commercial designations. In this case, the Metro Plan currently designates the general area of the subject property as Residential, and the WAP refines the Metro Plan designations on site-specific bases, designating the specific subject parcels as commercial. Both the Metro Plan and the WAP specifically recognize that all Refinement Plan designations must be consistent with the Metro Plan, and where inconsistencies occur, the Metro Plan Prevails. In this instance, because the C-1 and GO zones can implement both the Residential and Commercial designations, the WAP's commercial designation is consistent with the Metro Plan's Residential designation to the extent zones permitted under the WAP's commercial designation at these locations are limited to either GO or C-1. The applicant's argument that the Metro Plan must be interpreted to be consistent with the Refinement plan reverses the

The planning commission agreed with the hearings official's conclusion and reasoning, with the exception of her finding that the GO zone is consistent with the Medium Density Residential designation.[5]

Knutson argues that the planning commission and hearings official erred in finding a conflict between the Metro Plan diagram and the WAP plan diagram with respect to the plan designation of the subject property. According to Knutson, both the Metro Plan diagram and the Metro Plan text make it clear that in many cases the blob diagram cannot be used to determine the plan designation for specific property, which must be done by reference to applicable refinement plans or zoning. Knutson emphasizes language in the Metro Plan indicating that the Metro Plan is a framework plan, made more specific by other, more detailed plans.

Further, Knutson argues that the planning commission's view of the relationship between the Metro Plan diagram and refinement plan diagrams, and how to determine the plan designation of specific property, is inconsistent with the city council's approach in past cases. The correct view, Knutson contends, is shown in *Carlson v. City of Eugene*, 3 Or LUBA 175 (1981). In *Carlson*, the city council rezoned a .75-acre parcel from C-2 to a residential zone. The applicable refinement plan, the Whitaker Refinement Plan, showed property specific plan designations, and designated the parcel for residential use. However, the Metro Plan diagram in effect at the time, like the present one, was a very small scale blob diagram, with the same caveats regarding the inability to determine the plan designation for specific property from the plan diagram, and instructions to refer to

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priority that the City has legislatively established in determining how inconsistencies are resolved." Record 110-12.

[5] The planning commission decision states, in relevant part:

"The Eugene Planning Commission finds that the Hearings Official did not err. The Hearings Official's finding that the proposed zone change is consistent with applicable provisions of the Metro Plan, as required by the approval criterion at EC 9.8865(1) is correct and is based on substantial evidence in the record. The Eugene Planning Commission therefore denies the appellant's first assignment of error for the reasons provided in the Hearings Official's decision, except that the Planning Commission does not rely on the Hearings Official's findings related to the consistency of GO General Office zoning with the Metro Plan residential designation." Record 7.

applicable refinement plans and zoning. The Metro Plan diagram showed an Industrial blob stretching 1/16th of an inch north of Railroad Avenue, a distance representing approximately 500 feet at the 1:8000 scale of the Metro Plan diagram, adjoining a Residential blob to the north. The subject parcel was no more than 300 feet north of Railroad Avenue, and thus appeared to be designated Industrial under the Metro Plan diagram. However, the city council concluded that there was no conflict between the Metro Plan and refinement plan diagrams, and relied on the refinement plan diagram to determine that the parcel was designated for residential use. LUBA affirmed:

> "The relationship of refinement plans to the Metro Plan is stated in the Metro Plan and the pertinent portions have been quoted previously in this opinion. We believe it was the intent of the Metro Plan, particularly with respect to interpreting the Metro Plan Land Use Diagram, that the refinement plan land use diagrams be used in attempting to ascertain on a site-specific basis the intended use of a particular parcel of property. It may not always be true that the specific designation in a refinement plan land use diagram will control over the more general land use designation contained in the Metro Plan Diagram. Where there is a clear conflict between the two diagrams, the Metro Plan Diagram must control. We do not believe, however, that anything approaching a clear conflict exists in this case. The only fact which suggests there may be a conflict in this case between the Metro Plan and the Whiteaker Refinement Plan is the existence of a 1/16-inch wide shaded area adjacent to Railroad Avenue on the Metro Plan Land Use Diagram. Given the statements contained in the Metro Plan that the plan is a graphic depiction of the broad allocation of projected land use needs in the Metropolitan area, that one cannot determine the exact designation of a particular parcel of land without consulting the appropriate jurisdiction; that more specific interpretations of the general plan diagram are made through refinement plans; that the land use designations on the Metro Plan Diagram are based on local plans and policies, and that the Whiteaker Plan designates *most* of the area included within the shaded area on the Metro Plan Diagram as industrial, we are unable to conclude that the City of Eugene erred in its position that there was no conflict between the Metro Plan and the Whiteaker Plan. There is industrial land located along Railroad Avenue designated in both the Whiteaker Refinement Plan and the Metro Plan. The only question is the depth of that industrial land along the length of Railroad Avenue. To say that the Metro Plan Diagram intended that depth to be 500 feet or 300 feet or any particular depth at any particular point is simply not required given the statements in the Metro Plan concerning its reliance upon and reference to more specific refinement plans. * * *" *Id.* at 180 (emphasis in original).

We agree with Knutson that the planning commission and hearings official erred in concluding that the Metro Plan diagram and WAP diagram conflict with respect to the plan designation of the subject parcels. Based on our review of the Metro Plan diagram, it is not "clearly evident" to us, or evident at all, that the subject property lies entirely outside the Commercial blob west of Coburg Road. As noted, the western and northern edges of that Commercial blob have no referents, such as a street or an intersection, that can be used to fix its position with respect to particular property boundaries with even approximate accuracy. The subject parcels might adjoin the Commercial blob, as the planning commission and hearings official concluded, or they might lie partially inside, or even entirely inside, that red blob. Given the small scale of the Metro Plan diagram, and the lack of referents to fix the western and northern edges of the Commercial blob west of Coburg Road to any particular property, we do not see that it is possible, based solely on examination of the Metro Plan diagram, to determine the plan designation of the subject parcels.

We further agree with Knutson that *Carlson* states the correct view of the relationship between the Metro Plan diagram and refinement plans, and how to determine the plan designation of property located near the borders of blobs on the Metro Plan diagram, at least where the pertinent borders cannot be accurately correlated to any referents or property boundaries, as here. Under such circumstances, we held in *Carlson*, the applicable refinement plan, if any, is used to determine the location of the border between adjoining plan designations with respect to particular properties. Indeed, in *Carlson*, the location of the border between the Industrial and Residential plan designations in the pertinent refinement plan appeared to vary considerably from that shown on the Metro Plan diagram. Nonetheless, both this Board and the city council concluded that there was no conflict between the two plan diagrams, and that the location of the plan designation boundaries, and hence the plan designation of the subject property, was appropriately determined by the refinement plan. In the present case, the location of the border between the Commercial and Medium Density Residential designations as depicted on the Metro Plan diagram and the WAP diagram appears to differ, if it differs at all, less than the difference in *Carlson*. We conclude, as we

did in *Carlson*, that the Metro Plan diagram and the pertinent refinement plan diagram do not conflict. As the Metro Plan diagram and text indicate, local governments have a certain amount of discretion in adopting refinement plans that refine the Metro Plan diagram, including determining the precise location of plan designations with respect to particular properties. Unless that determination conflicts with the Metro Plan diagram much more clearly than it does here, there is no basis to conclude, as the planning commission and hearings official did, that the refinement plan diagram and Metro Plan diagram conflict.

The hearings official also relied on the zoning in the area of the subject property to support her conclusion that the subject properties are designated Medium Density Residential. The hearings official found that "C-1 and the GO zones are appropriate zones through which to implement both the Residential and Commercial designations." Record 111. Accordingly, the hearings official reasoned that the border between the Commercial plan designation and the Medium Density Residential plan designation corresponds to the border between the C-1 and GO-zoned properties in the area, and the C-2 zoned properties in the area. As noted above, the planning commission disagreed with the hearings official that the GO zone is consistent with the Medium Density Residential plan designation, but otherwise affirmed the hearings official's reasoning.

Both the C-1 and GO zones are commercial zones, that implement the Commercial plan designation. It is not clear why the hearings official believed that the GO zone is an "appropriate zone" to "implement" the Residential plan designation, and the planning commission appears to be correct that it is not. The GO zone is mentioned nowhere in the EC provisions governing residential zones that we can see. To the extent zoning is indicative of the plan designation, the fact that the GO zone implements the Commercial plan designation rather than or in addition to any Residential plan designation would seem to support Knutson's position that at least tax lot 4900, which is zoned GO, is designated Commercial, consistent with the WAP diagram. It would also seem to indicate that the GO-zoned parcels north of the subject parcels are designated Commercial, consistent with the WAP diagram. In turn, that would support the conclusion that the C-1 zoned subject lots south

of these GO-zoned parcels and north of the C-2 zoned parcels at the intersection of Coburg Road and Willakenzie Road are designated Commercial, consistent with the WAP diagram.

It is also not clear why the hearings official believed the C-1 zone implements the Medium Density Residential plan designation. That conclusion is apparently based on EC 9.2740, a table of uses allowed in the R-1, R-1.5, R-2, R-3 and R-4 zones. EC 9.2740 allows in the R-1, R-2, R-3 and R-4 zones those uses that are permitted outright or subject to site review in the C-1 zone, subject to additional restrictions set out at EC 9.2741(7) or (8).[6] EC 9.2740 does not permit conditional uses allowed in the C-1 zone. While EC 9.2740 allows *some* C-1 uses in *some* residential zones, under certain restrictions, it is simply inaccurate to conclude that the C-1 zone "implements" the Medium Density Residential plan designation, or any Residential plan designation. At best one can conclude that some C-1 uses are allowed in some residential zones, under certain restrictions, pursuant to EC 9.2740. Again, to the extent zoning is indicative of the plan designation, the fact that four of the five subject parcels are zoned C-1 supports the conclusion that they are designated Commercial, not that they are designated Medium Density Residential.

For the foregoing reasons, we agree with Knutson that the city erred in concluding that the subject parcels are designated Medium Density Residential, rather than Commercial.[7]

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[6] EC 9.2741(7) and (8) provide, in relevant part:

> "(7) **C-1 Neighborhood Commercial in Residential Zones**. Uses permitted outright in C-1 Neighborhood Commercial zone shall be permitted in any residential zone through the planned unit development process with a demonstration that the commercial uses will serve residents living in the PUD.
>
> "(8) **C-1 Neighborhood Commercial in R-2, R-3 and R-4 Zones**. Uses permitted outright or subject to site review in the C-1 Neighborhood Commercial zone shall be conditionally permitted in the R-2, R-3 and R-4 zone when the minimum residential density is achieved on the development site. All applicable standards for uses in the C-1 zone shall be complied with or granted an adjustment through the conditional use permit process except as follows [listing eight additional restrictions]."

[7] Prior to the planning commission decision on Knutson's application, the city council adopted Ordinance No. 20319, which, among other things, amends the Metro Plan diagram to make it partially parcel-specific. The amended Metro Plan diagram shows the subject property as Commercial, consistent with the WAP diagram. Petitioner Knutson argues that the city council's findings in support of the ordinance characterize the amendments as "housekeeping," simply reflecting what the Metro Plan diagram and refinement plans have

The first assignment of error (Knutson) is sustained.

**SECOND ASSIGNMENT OF ERROR (KNUTSON)**

The planning commission and hearings official found the proposed zone change to be inconsistent with applicable text in the Metro Plan and WAP, and therefore denied it pursuant to EC 9.8865(1) and (2). According to Knutson, those findings are fatally skewed by the erroneous assumption that the subject property is designated Medium Density Residential rather than Commercial. In the alternative, Knutson argues that those findings misinterpret the applicable law, are inadequate, and are not supported by substantial evidence.

We agree with Knutson that the city's findings that the proposed zone change is inconsistent with Metro Plan and WAP text under EC 9.8865(1) and (2) is predicated on a finding that the subject properties are designated Medium Density Residential rather than Commercial. As explained above, that finding is erroneous. It is reasonably clear that the Metro Plan and WAP text that the city considered to be applicable under EC 9.8865(1) and (2), and the manner in which it considered that text, was strongly influenced by the finding that the subject property is designated Medium Density Residential. Remand is necessary for the city to reconsider what text is applicable and adopt new findings addressing whether or not the proposed rezoning is consistent with any text the city finds to be applicable. Given that conclusion, it is unnecessary to consider Knutson's alternative challenges to the city's findings.

The second assignment of error (Knutson) is sustained, in part.

**ASSIGNMENT OF ERROR (CARLEE)**

As explained, Carlee's petition for review argues that the planning commission erred in reversing the hearings official's determination that the Knutson application failed to comply with

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depicted all along, in more detail. Knutson acknowledges that the amended Metro Plan is not directly applicable to his rezoning request, but argues that the city council's adoption of the ordinance reflects an interpretation consistent with Knutson's position that the subject properties are in fact designated Commercial on the unamended Metro Plan diagram. Knutson contends that LUBA should consider and give deference to that interpretation, in resolving the first assignment of error. Carlee disputes Knutson's arguments on these points, and urges us not to consider Ordinance No. 20319. Because we have resolved the first assignment of error on other grounds, we need not and do not consider the significance, if any, of Ordinance No. 20319.

EC 9.8865(3). That criterion requires a finding that "the uses and density that will be allowed by the proposed zoning in the location of the proposed change can be served through the orderly extension of key urban facilities and services." *See* n 2.

The hearings official agreed with Knutson that EC 9.8865(3) does not require a full-scale traffic impact analysis of specific uses permitted in the C-2 zone. However, the hearings official found that EC 9.8865(3) requires more than a showing that an existing transportation system serves the site. Because there was evidence that the existing transportation system is currently challenged to meet the demands of present zoning, the hearings official required Knutson to present some evidence that transportation facilities in the area "be extended in an orderly fashion to meet substantially more intense uses." Record 116.

Knutson submitted a traffic study that the hearings official found deficient in two respects. According to the hearings official's findings, the traffic study evaluated uses on only three of the five parcels, under an assumption that the two developed parcels would not be redeveloped with more intensive uses after being rezoned to C-2. Further, the traffic study evaluated the three vacant parcels under an assumption that, given the relatively small size of those parcels, the three parcels would likely develop with less intense commercial uses allowed in the C-2 zone, similar to the intensity of those allowed in the C-1 zone. To comply with EC 9.8865(3), the hearings official found, Knutson must evaluate more intense levels of development for all five parcels. Because the traffic study did not do so, the hearings official concluded, Knutson failed to sustain its burden of proof under EC 9.8865(3).[8]

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[8] The hearings official found, in relevant part:

> "The applicant has responded to concerns regarding the existing transportation system by submitting a trip generation and traffic impact letter, which the applicant explains was intended to 'investigat[e] the trip generation characteristics and potential traffic impacts to be expected as a result of the requested zone change on Coburg Road north of Willakenzie Road.' This letter, however, does not address whether the uses and density that would be allowed under the C-2 zone can be served through the orderly extension of the transportation system. Rather, it presumes that two of the five lots subject to this request will remain as they are currently developed, presumably generating the same amount of traffic as they currently

Knutson appealed the denial under EC 9.8865(3) to the planning commission, arguing that "[t]he Hearings Official erred in her interpretation of what is required to demonstrate compliance with the EC 9.8865(3) * * *." Record 8. The planning commission agreed, finding:

> "The Eugene Planning Commission sustains the appellant's fourth assignment of error and finds that the Hearings Official erred with respect to the scope of EC 9.8865(3). The Hearings Official improperly concluded that the applicant failed to demonstrate that the existing transportation system can be extended in an orderly fashion to serve a more intense level of development. The Eugene Planning Commission concludes that the evidence in the record is adequate to demonstrate that transportation facilities can be extended to serve the C-2 uses that would be permitted on the five tax lots. Specifically, the traffic analysis submitted by the applicant, and included in the record, provides sufficient evidence that the transportation facilities can be appropriately extended." *Id*.

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generate. With regard to the other three lots, it presumes that the C-2 development would be smaller uses expected to attract customers from a narrow geographic area. Neither of these assumptions accurately characterizes the intensity of development permitted in the C-2 zone and thus, neither facilitates evaluation of whether the uses and intensity permitted in the C-2 zone can be served through the orderly extension of the transportation system.

"* * * * *

"Two key distinctions between commercial uses allowed in the C-1 zone as compared to the C-2 zone are the size and the intensity of the uses. C-1 uses are specifically intended to be smaller, to serve a smaller geographic area and, accordingly, to generate less traffic. In contrast, C-2 uses are intended to be larger, to attract more of a regional customer base and, accordingly, to generate more traffic from further distances. The intensity of use has a direct relationship to the amount of traffic generated by the use. Thus, while the applicant is correct that a complete traffic impact study is not necessary to establish compliance with this zone change criterion, the applicant must nonetheless provide sufficient analysis to establish that the uses and density allowed in the C-2 zone can be served through the orderly extension of the transportation system. This necessarily requires that the applicant consider the uses permitted in the C-2 zone that are more intense than uses permitted in the C-1 zone. A rationale that the likely uses are either the uses that exist on the parcels now, or that uses to be developed are ones that are either allowed in the C-1 zone or have the same impacts as those in the C-1 zone, is not sufficient.

"The applicant has requested C-2 zoning for all five parcels. The applicant has also asserted that by changing the zone, these parcels will become part of a very large commercial area. (Applicant's closing memorandum, page 8.) Thus, in determining whether the existing transportation system can be extended in an orderly fashion to serve a significantly more intense level of development than is presently permitted, the applicant must include an evaluation of a C-2 level of development for all five parcels. The applicant has not attempted such a demonstration. Accordingly, the applicant has not sustained its burden to establish that the uses and density permitted in the C-2 zone can be served through the orderly extension of the transportation system in this location and, therefore, the application does not satisfy this criterion." Record 116-17.

Carlee argues that the planning commission misconstrued EC 9.8865(3) and, conversely, that the hearings official correctly construed it. According to Carlee, the hearings official was correct in interpreting EC 9.8865(3) to require an evaluation of the adequacy of the transportation system to accommodate more intensive C-2 uses on all five parcels. Carlee argues that the above-quoted planning commission finding simply disagrees with the hearings official's interpretation, without explaining why that interpretation is incorrect or setting forth the planning commission's own view of what EC 9.8865(3) requires. Further, Carlee argues, the planning commission finding is conclusory and fails to explain how the traffic study demonstrates compliance with EC 9.8865(3).

While not conceding that EC 9.8865(3) requires any traffic analysis or evaluation of the adequacy of the existing transportation system at all, Knutson responds that the planning commission did not err in rejecting the hearings official's interpretation of EC 9.8865(3), which required the applicant to demonstrate that the transportation system is adequate to accommodate more intensive C-2 uses on all five parcels. According to Knutson, the planning commission implicitly rejected the hearings official's two criticisms of the traffic study: (1) that it assumed no redevelopment of the two currently developed parcels and (2) that it assumed a less intense level of commercial development on the three undeveloped parcels than is typical in the C-2 zone. Knutson argues that, read in conjunction with the hearings official's decision, the traffic study, and the arguments on appeal to the planning commission, the above-quoted planning commission finding is adequate and supported by substantial evidence.

We agree with Carlee that the above-quoted planning commission finding is conclusory and inadequate. It neither explains what the planning commission believes EC 9.8865(3) to require or why the traffic study demonstrates compliance with those requirements, whatever they are. Remand is necessary for the planning commission to adopt adequate findings explaining what EC 9.8865(3) requires and why the planning commission believes the evidence in the record satisfies those requirements, if it does.

In remanding under this assignment of error, we do not intend to express agreement either with Carlee's interpretation of EC 9.8865(3) or with Knutson's much more limited interpretation.[9] The question of what EC 9.8865(3) means and requires must be resolved by the planning commission on remand.

Carlee's assignment of error is sustained, in part.

**CROSS-ASSIGNMENT OF ERROR (KNUTSON)**

Knutson's cross-assignment of error is contingent on remand under Carlee's assignment of error. Because we have remanded the decision under that assignment of error, we now resolve the cross-assignment of error.

Knutson argues that it asked the hearings official as well as the planning commission to approve the requested zone change for any of the five parcels for which a change of zoning was justified, if a zone change could not be justified for all five. However, Knutson argues, the hearings official instead bundled all tax lots together for purposes of evaluating traffic impacts under EC 9.8865(3), while the planning commission did not resolve that issue, presumably because it concluded that the traffic study demonstrated compliance with EC 9.8865(3) for all five parcels. If LUBA does not affirm the planning commission decision under EC 9.8865(3), Knutson argues that LUBA should remand the decision to the planning commission with instructions to consider zone change approval under EC 9.8865(3) for any parcels for which the record supports approval, if zone changes for all five parcels cannot be justified.

We agree with Knutson that, if on remand the planning commission determines that the record does not support the requested zone change for all five parcels under EC 9.8865(3), it should consider whether to grant Knutson's request to approve zone changes for any parcels supported by the record. We express no opinion on whether the planning commission must grant

[9] Knutson argues, among other things, that "orderly extension of key urban facilities and services" concerns extension of urban facilities and services into unserved territory, not the adequacy of a fully developed arterial road.

that request, and hold only that it should consider the issue and adopt findings explaining its resolution.

The cross-assignment of error is sustained.

The city's decision is remanded.