

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 STEVE DOOB and LISA BERGER,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF GRANTS PASS,  
10 *Respondent,*

11 and

12  
13 WAYNE KRUSE, ALLEN ELIASON, MAX HULL,  
14 KIRK CHAPMAN, JOHN CHMELIR,  
15 GORDON LONGHURST and TERRY BUNTIN,  
16 *Intervenors-Respondent.*

17  
18 LUBA No. 2004-186

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20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from City of Grants Pass.

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26 Steve Doob, Merlin, and Lisa Berger, Grants Pass, represented themselves. Steve  
27 Doob filed the petition for review and argued on his own behalf.

28  
29 Timothy J. Sercombe, Portland, filed a response brief and argued on behalf of  
30 respondent. With him on the brief was Preston Gates and Ellis LLP.

31  
32 Duane Wm. Schultz, Grants Pass, filed a response brief and argued on behalf of  
33 intervenors-respondent.

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

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38 AFFIRMED 2/18/2005

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

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**NATURE OF THE DECISION**

Petitioners appeal a city decision that amends the Grants Pass Development Code (GPDC).

**MOTION TO INTERVENE**

Wayne Kruse, Allen Eliason, Max Hull, Kirk Chapman, John Chmelir, Gordon Longhurst, and Terry Buntin move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

As we understand petitioners’ disagreement with the city, the dispute focuses on the city’s past practice of approving new subdivisions without requiring immediate construction of all on-site and off-site roadway improvements that are necessary to connect new subdivisions to the nearest existing collector and arterial roads via a city standard road.<sup>1</sup> Under that past practice, the city required that new internal roads be constructed to city standards. However, the city allowed applicants who proposed new subdivisions with access onto substandard roads to post security for future improvement of the portion of that substandard roadway that adjoined the subdivision. The city typically did not require off-site roadway improvements. Petitioner Doob has filed LUBA appeals of city subdivision approval decisions in the past, in which he has challenged the city’s past practice. *Doob v. City of Grants Pass*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2004-120, November 15, 2004); *Doob v. City of Grants Pass*, 47 Or LUBA 152 (2004).

The challenged decision amends GPDC 27.110. The challenged decision was adopted, in part, as a response to our decision in *Doob v. City of Grants Pass*, 47 Or LUBA

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<sup>1</sup> Although the city’s roadway construction requirements apply to both residential subdivision development and other types of development, petitioners’ focus is on residential subdivisions. For simplicity, we limit our references in this opinion to subdivision development.

1 152 (2004) (*Doob v. City of Grants Pass I*). *Doob v. City of Grants Pass I* concerned a city  
2 decision that applied GPDC 27.110 in granting tentative plan approval for a 16-lot  
3 subdivision that had frontage on two streets that did not meet city street standards, Redwood  
4 Avenue and Willow Lane. We set out the relevant portion of our decision in *Doob v. City of*  
5 *Grants Pass I* below:

6 “[GPDC] 17.413 provides the approval criteria for subdivisions. GPDC  
7 17.413(3) provides:

8 “‘When one is required or proposed, the street layout conforms  
9 to the applicable requirements of the adopted street plans,  
10 meets the requirements of Article 27 and other applicable laws,  
11 and best balances needs for economy, safety, efficiency, and  
12 environmental compatibility.’

13 “‘Because a street plan is proposed, the tentative plan must meet the  
14 requirements of GPDC Article 27. GPDC 27.110(1) provides:

15 “‘Where proposed development abuts on an existing  
16 substandard street or a future street as shown on the Official  
17 Street Map, the applicant is obligated to improve one-half (1/2)  
18 the street width for the distance the property abuts the street to  
19 the full standards contained in this Code. The improvements  
20 must be constructed or secured either prior to Final Plat or  
21 Map, if subdividing or partitioning, or prior to final Use and  
22 Occupancy Permit.

23 “‘Proposed subdivisions, major partitions, and private streets  
24 (serving 4 or more dwelling units) shall be connected to an  
25 *existing City standard paved street.*’ [(Emphasis added in *Doob*  
26 *v. City of Grants Pass I*)]

27 “\* \* \* \* \*

28 “GPDC 27.110(1) is not a model of clarity, but it does appear to envision two  
29 different circumstances where improved streets are required. In the first  
30 paragraph, GPDC 27.110(1) provides that when proposed development abuts  
31 a substandard street that the improvements must either be constructed at the  
32 time of development or secured for future construction. That is what occurred  
33 for substandard Redwood Avenue. The second paragraph provides that in  
34 more limited circumstances, namely larger developments (*i.e.* subdivisions,  
35 major partitions, and private streets serving four or more dwelling units); the  
36 development must also be connected to an ‘existing city standard paved

1 street.’ The city appears to have treated the requirement for a connection to an  
2 ‘existing city standard paved street’ in the same manner that it treated required  
3 improvements to development that merely abuts substandard streets: that the  
4 requirement can be satisfied by offering security to construct half-street  
5 improvements on Willow Lane at some future date. The problem with this  
6 interpretation is that it transposes the allowance for future construction from  
7 the first paragraph to the second paragraph. However, that alternative  
8 allowance for future improvements is not provided for in the second  
9 paragraph. As the explicit language of the code provides, the subdivision  
10 must be connected to ‘an *existing* City standard paved street.’ The city’s  
11 interpretation would effectively read the word ‘existing’ out of the second  
12 paragraph and read in an allowance for deferred construction or improvement  
13 to city standards. In essence, the city interpreted the code to provide for  
14 connection to ‘an *existing* or future City standard paved street.’ Although the  
15 city has discretion in interpreting its code, and there are certainly valid policy  
16 considerations expressed in the decision for the interpretation the city adopted,  
17 the city may not interpret its code to say what it does not say. 47 Or LUBA at  
18 153-57 (Emphasis added in *Doob v. City of Grants Pass I.*)

19 In adopting the GPDC amendment challenged in this appeal, the city considered five  
20 alternatives. Alternatives 1-3 were initiated by the city. Alternatives 4-5 were proposed by  
21 petitioners and others. Because at least a general understanding of each of the alternatives is  
22 necessary to understand petitioners’ assignments of error, we describe each of the alternatives  
23 below before turning to petitioners’ assignments of error.

24 In this decision, we use the term “connecting roadway” to refer to the roadway or  
25 roadways that will connect a proposed subdivision with the nearest collector or arterial  
26 roadway. We use the term “adjoining roadway” to refer to the portion of a connecting  
27 roadway that adjoins or borders the proposed subdivision. Alternative 1 generally codifies  
28 the past city practice of requiring that adjoining roadways either be improved to city  
29 standards or that security for the cost of those improvements be posted as part of subdivision  
30 approval.<sup>2</sup> Under the city’s past practice, and contrary to our interpretation of GPDC

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<sup>2</sup> Actually, Alternative 1, GPDC 27.100(1) and past practice only require construction or security for the cost of construction of one-half the required improvements to bring the roadway up to city standards along the subdivision’s frontage on the roadway. The property across the roadway from a proposed subdivision presumably will be responsible for constructing or paying the cost of the other one-half of improvements necessary to result in an adjoining roadway that meets city standards.

1 27.110(1) in *Doob v. City of Grants Pass I*, the city did not require that the remaining length  
2 of the connecting roadway be an *existing* city standard road or that the subdivision applicant  
3 fully construct that road to city standards if it was not an existing city standard road.

4 As we understand Alternative No. 1, it does differ from past practice in at least three  
5 potentially significant ways. First, it requires that a subdivision applicant who proposes to  
6 secure and thereby defer half-street improvements to the adjoining roadway must  
7 nevertheless construct a standard sidewalk along the adjoining roadway at the time of  
8 subdivision development. Second, Alternative 1 imposes certain minimum requirements for  
9 non-standard connecting roadways.<sup>3</sup> Finally, Alternative 1 imposes a minimum requirement  
10 that an interim pedestrian walkway be constructed along the connecting roadway to connect  
11 the subdivision with one of several “destination streets” that are identified in city Resolution  
12 4851.<sup>4</sup> An interim pedestrian walkway is required to be at least 5.5 feet wide, if located next  
13 to the roadway fog line, or at least 4 feet wide, if separated from the roadway by a ditch. As  
14 we understand Alternative 1, the interim walkway would ultimately be replaced when the  
15 adjoining roadway is improved to full city standards, which would include curbs and city  
16 standard sidewalks. Alternative 1 is the alternative that the city selected in the challenged  
17 decision. Alternative 1 is referred to in the challenged decision as the “soft concurrency”  
18 alternative. We understand the “soft concurrency” reference to recognize that (1) a  
19 subdivision applicant can provide security for the cost of required improvements to the  
20 adjoining roadway, with actual construction delayed to a future date; and (2) roadway  
21 improvements that are necessary to make the connecting roadway a city standard street need

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<sup>3</sup> For example, Alternative 1 requires that if the connecting roadway is not built to city standard, it must nevertheless be paved and have two 10-foot wide travel lanes. Record 25.

<sup>4</sup> Resolution 4851 was adopted on July 7, 2004, several months before the decision that is challenged in this appeal. Pursuant to that resolution, the city has begun requiring construction of interim walkways as a condition of subdivision approval before the GPDC was amended to reflect Resolution 4851.

1 not be in place at the time of subdivision approval, and the subdivision applicant is not  
2 obligated to contribute financially to the costs of those connecting roadway improvements.

3 Alternative 2 is referred to as the “hard concurrency” alternative. As that reference  
4 suggests, it differs from Alternative 1 in that it requires that the adjoining and connecting  
5 roadway be an existing city standard street. Alternative 2 is the requirement that LUBA  
6 interpreted the second sentence in GPDC 27.110(1) to require in *Doob v. City of Grants Pass*  
7 *I.*

8 Alternative 3 is described in the decision as follows:

9 “Do not codify past practice and do not apply LUBA’s interpretation of the  
10 existing code. Consider new policy based on the range of alternatives used by  
11 other cities.” Record 13.

12 Respondent describes Alternatives 4 and 5 as follows:

13 “Alternatives 4 and 5 were suggested by petitioners after the Urban Area  
14 Planning Commission had held a public hearing. Alternative 4 would require,  
15 prior to the issuance of a Use and Occupancy Permit, interim pedestrian  
16 improvements to be built on top of filled ditches abutting the development.  
17 The alternative would enlarge the interim pedestrian walkway to five feet,  
18 require a minimum of four feet separation between the pedestrian  
19 improvements and the travel lane on the street and a barrier between the  
20 walkway and the road, and would require pedestrian improvements along the  
21 frontage of the property to off-site streets in both directions.

22 “Similarly, Alternative 5 would require interim pedestrian improvements to be  
23 in place prior to the issuance of a Use and Occupancy permit, and would  
24 require the five-foot wide walkway to be located on top of a filled drainage  
25 ditch, separated from the roadway by a ‘car proof physical barrier.’”  
26 Alternative 5 would also require subdivisions to be responsible for off-site  
27 pedestrian improvements for a distance of 50 feet of walkway for every  
28 proposed unit in the subdivision, and would require a ‘proportional’ amount of  
29 walkway for commercial and industrial development.” Respondent’s Brief 4-  
30 5 (record citations omitted).

31 **ASSIGNMENTS OF ERROR**

32 In this appeal, petitioners contend that the city’s decision to select Alternative 1 does  
33 not adequately address two of the city’s criteria for amending the GPDC. The relevant

1 criteria for amending the GPDC text are set out at GPDC 4.103. GPDC 4.103 provides in  
2 relevant part:

3 “Criteria for Amendment. The text of [the GPDC] may be \* \* \* amended  
4 provided that all the following criteria are met:

5 “(1) The proposed amendment is consistent with the purpose of the subject  
6 section and article.

7 “\* \* \* \* \*

8 “(3) The proposed amendment is consistent with the goals and policies of  
9 the Comprehensive Plan, and most effectively carries out those goals  
10 and policies of all alternatives considered.

11 “\* \* \* \* \*”

12 In their first assignment of error, petitioners allege the city’s findings are inadequate  
13 to demonstrate the disputed amendment satisfies the first criterion. In their second  
14 assignment of error, petitioners allege the city’s findings are inadequate to demonstrate that  
15 the disputed amendment satisfies the third criterion. We address the second assignment of  
16 error first.

17 **A. Criterion 3**

18 Criterion 3 requires that the city select the alternative that “most effectively carries  
19 out [the Comprehensive Plan] goals and policies.” The record includes 12 pages of “Goals  
20 and Policies for the Master Transportation Plan.” Record 102-13. There are a total of seven  
21 Goals and under those Goals there are a total of 31 different Objectives. Under those  
22 Objectives there are a total of 88 different Policies.<sup>5</sup>

23 Petitioners cite Transportation Goals 1, 5 and 7.<sup>6</sup> Under those Goals, petitioners cite  
24 four Policies that (1) call for development of bicycle and pedestrian facilities as part of the

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<sup>5</sup> Other parts of the city’s comprehensive plan include many more Goals and Policies.

<sup>6</sup> Goal 1 calls for a multi-modal transportation system and calls for accommodations for bicycles and pedestrians. Goal 5 calls for protection of the “Natural and Built Environment.” Goal 7 calls for implementation of Planned Transportation Facilities.”

1 city's overall transportation system, and (2) call for those bicycle and pedestrian facilities to  
2 minimize conflict and be safe and convenient. Petitioners contend that Alternative 1 will not  
3 provide the most convenient transportation system. Because Alternative 1 allows interim  
4 walkways to be located adjacent to travel lanes, petitioners argue those walkways will invite  
5 conflict and will not be as safe as the sidewalks that would be required under other  
6 alternatives.

7 Not surprisingly, the challenged decision focuses on other Policies. While petitioners  
8 likely overstate the city's lack of concern about safety, it is fair to say that the city was at least  
9 as concerned about the potential effect on immediate development costs that hard  
10 concurrency might have. The city was similarly concerned about the potential costs of the  
11 off-site improvements that might be required under Alternatives 4 and 5. Related to these  
12 concerns about up-front costs to development, and concerns about its legal authority to exact  
13 such off-site improvements, the city expressed concerns that the other alternatives might  
14 actually slow or prevent the very subdivision development that the city is relying on to  
15 achieve its housing goals and fund needed transportation improvements.<sup>7</sup>

16 While the focus of petitioners' second assignment of error is the city's findings  
17 concerning criterion 3, the city is permitted to elaborate on those findings in its brief and  
18 provide citations to the record in defending this legislative land use regulation amendment.  
19 *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304, 314 (2004);  
20 *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560, 563-64 (1994).  
21 Because the city's brief is consistent with the adopted findings in the decision, but also cites  
22 to discussion in the record of specific concerns that led the city to select Alternative 1, we set  
23 out the relevant parts of the city's brief below:

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<sup>7</sup> The city points out that its concerns about its legal authority to require roadway improvements via development exactions are not academic. *Schultz v. City of Grants Pass*, 131 Or App 220, 884 P2d 569 (1994).



1 “Here the City was faced with a decision about whether to require  
2 construction of full street improvements prior to the issuance of an occupancy  
3 permit, or to allow those improvements to be secured and constructed at a later  
4 date in accordance with its current practice. It was also faced with  
5 Alternatives 4 and 5, both of which would change the standards previously  
6 adopted by the City for ‘interim’ pedestrian walkways [in Resolution 4851].

7 “\* \* \* Although petitioners identify safety policies in the plan, these policies  
8 are not the only criteria. The Council identified concerns about whether  
9 greater or more immediate improvement responsibilities would be unfair to  
10 developers, create undue housing costs and inhibit buildout of a more  
11 comprehensive transportation system. These concerns are reflected in  
12 Comprehensive Plan Policies 9.11 and 9.13. These policies, related to the  
13 City’s housing goals, require the City to ‘explore service design standards  
14 (roads, water, sewer, storm drainage) which endeavor to lower the costs of  
15 development and maintenance while ensuring public safety and health’ and  
16 ‘balance the benefits of its regulatory actions with the impact of such  
17 regulations to the cost of housing \* \* \*.”

18 “The goals and objectives of the Master Transportation Plan are broad and  
19 varying, and not capable of equal applicability to every situation. The City  
20 Council, in an attempt to provide safe pedestrian access in the interim, found  
21 that a four foot berm between the pedestrian and traffic was not necessary.  
22 This was a reasonable decision based on experience and the prior hearings on  
23 the standards. In addition, it found that the expense of requiring storm  
24 drainage, as would be mandated by Alternatives 4 and 5, did not fulfill the  
25 Master Transportation Plan’s goals and policies of encouraging equity in  
26 financing transportation improvements. The City did not accept Alternative 3,  
27 because it did not want to delay the matter leaving developers in limbo about  
28 the applicable standards. The City is permitted to strike a balance between  
29 goals and objectives of the Master Transportation Plan. Respondent’s Brief  
30 11-12 (record citations omitted).

31 The city goes on to set out a number of policies from the Master Transportation Plan that  
32 favor financing transportation improvements in a way that is equitable to the private  
33 landowners who must absorb most of the cost of those improvements. The city then  
34 concludes with the following argument in its brief:

35 “All of these policies and goals recognize that there are tradeoffs in the  
36 requirements placed on development for immediate and full improvement of  
37 transportation facilities adjacent to and near development. The judgment of  
38 the City Council here was that the selected alternative would best ensure  
39 completion of the transportation system, capture short-term private investment  
40 in facilities, be fair to developers and be consistent with past city practices.

1            “In evaluating an alternative that would be the most effective in complying  
2            with the goals and policies of the Master Transportation Plan, the City Council  
3            considered its existing experience with such ‘interim’ pedestrian walkways  
4            and found them to be safe. It also considered testimony from developers who  
5            had relied on the interim walkway standards in planning their developments.  
6            The only evidence offered by petitioners were their opinions about walkways  
7            next to roads not being inviting or safe. It was reasonable for the City to  
8            conclude that the existing tried and true method for providing interim  
9            pedestrian access along streets was the most effective alternative.”  
10           Respondent’s Brief 13 (record citations omitted).

11           The requirement that the city decide which of the considered alternatives “most  
12           effectively [carries out comprehensive plan] goals and policies” necessitates a certain amount  
13           of balancing, where those policies can be interpreted in ways that work at cross-purposes.  
14           *See Waker Associates Inc. v. Clackamas Co.*, 111 Or App 189, 194-95, 826 P2d 20 (1992)  
15           (“a balancing process that takes account of relative impacts of particular uses on particular  
16           goals and of the logical relevancy of particular goals to particular uses is a decisional  
17           necessity”). The ultimate decision under a standard such as criterion 3 will almost always  
18           turn on which overlapping goals and policies the decision maker chooses to emphasize.  
19           Petitioners would emphasize policies that call for safe pedestrian and bicycle facilities and  
20           would require that they be provided concurrently with development. The city has chosen to  
21           emphasize other policies that favor *encouraging* private funding of transportation  
22           infrastructure and promote easing the financial burden that is placed on current development  
23           in areas where significant transportation infrastructure improvements are needed. The city  
24           interprets those policies to allow the GPDC to be amended to adopt Alternative 1, which is  
25           designed to achieve needed transportation infrastructure. Under Alternative 1 that needed  
26           transportation infrastructure is built over time as other properties in the area are developed  
27           rather than by requiring immediate on-site and off-site transportation improvements to make  
28           sure that city standard roads are provided concurrently with each new subdivision.

1 The city’s explanations in the challenged decision and in its brief for why it applied  
2 relevant comprehensive plan goals and policies and concluded that Alternative 1 “most  
3 effectively” carries out those goals and policies are adequate to comply with criterion 3.

4 The second assignment of error is denied.

5 **B. Criterion 1**

6 Criterion 1 requires that the disputed GPDC amendment must be “consistent with the  
7 purpose of the subject section and article.” The purpose of Article 27 is set out at GPDC  
8 27.010:

9 “27.010. Purpose

10 “The provisions of this Article are intended to provide for the general  
11 circulation of pedestrians, bicyclists and motor vehicles, as well as  
12 establishing the legal access requirements for the purpose of land  
13 development. The standards contained herein shall serve to provide safe,  
14 efficient and noncongested traffic conditions for the community and the  
15 general traveling public.”

16 The challenged decision includes the following findings addressing criterion 1:

17 “This purpose statement summarizes the purpose of the entirety of Article 27.  
18 Section 27.110 specifies the requirements for provision of street  
19 improvements associated with new developments. The alternatives discussed  
20 [in this decision], including Alternative 1 as revised, are consistent with this  
21 criterion. Each ensures new interior streets are constructed with curb, gutter,  
22 sidewalk, [and] drainage. Each ensures development is obligated for the  
23 frontage of the development, either through construction or financial security.  
24 Each alternative provides a different approach to the timing of those  
25 improvements, and the timing and obligations for off-site improvements:  
26 specifically, whether they will occur at the time of development, or over time  
27 as additional development occurs, or as [local improvement districts] are  
28 formed in areas that are already predominantly developed.” Record 17.

29 The city apparently accepted petitioners’ argument that the existing connecting roads  
30 that lack *any* specially dedicated facilities for pedestrians or bicyclists are not safe. By virtue  
31 of the disputed amendment, the GPDC now requires that subdivision developers provide  
32 interim walkways to nearby destination streets. It may be that the interim walkways that  
33 would be required under the other alternatives that petitioners favor would be *safer*. It may

1 also be that because some of the destination streets themselves lack sidewalks, the interim  
2 sidewalks fall significantly short of a complete resolution of all safety issues that pedestrians  
3 and bicyclists face in this urbanizable area. However, as the city correctly points out, GPDC  
4 27.010 does not require that the provisions of the GPDC must provide the “safest” traffic  
5 conditions or that safe traffic conditions must be achieved in the “fastest” way possible and  
6 without regard to other city policies. As we have already explained in our discussion of the  
7 second assignment of error, there were other policy considerations that the city applied that  
8 led it to question whether immediate maximization of pedestrian and bicyclist safety would  
9 necessarily be achieved under the other alternatives and to question whether such an  
10 emphasis on immediate pedestrian and bicyclist safety might require the city to sacrifice other  
11 policies that emphasize equity in sharing the burden of funding needed transportation  
12 facilities. While the emphasis on achieving maximum pedestrian and bicyclist safety as  
13 quickly as possible that petitioners favor might be “consistent with the purpose” of GPDC  
14 27.010, we agree with the city that nothing in GPDC 27.010 compels that particular  
15 emphasis.

16           The first assignment of error is denied.

17           The city’s decision is affirmed.