BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN FREWING,
Petitioner,

vs.

CITY OF TIGARD,
Respondent,

and

WINDWOOD CONTRUCTION,
Intervenor-Respondent.

LUBA No. 2005-042

FINAL OPINION
AND ORDER

Appeal from City of Tigard.

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

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

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

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

REMANDED 09/20/2005

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.

FACTS

The appeal concerns a city decision that was adopted to respond to our decision in *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004) (*Frewing I*). In *Frewing I*, petitioner alleged a large number of assignments of error. We sustained several of them. On remand the city was required to provide further explanation for a steep sag curve it approved for 74th Avenue, which provides access to the subdivision. The applicant was also required to prepare a tree inventory and plan and explain how vegetation would be protected. Finally, the city was required to provide additional justification for two adjustments that were approved to allow a curb-tight sidewalk and a cul-de-sac that is longer than the Tigard Community Development Code (TCDC) allows and serves three more houses than the TCDC would otherwise allow.

MOTION TO FILE REPLY BRIEF

On July 19, 2005, petitioner filed a motion to file a reply brief. In that reply brief petitioner argues for the first time that the tree inventory that the applicant prepared following our remand in *Frewing I* identifies trees by "genus or family names instead of species as called for in the regulation." Although petitioner contends that this argument in the reply brief is presented in response to a new issue raised in the applicant's response brief, the applicant's response brief does not raise a new issue, and the argument petitioner presents is not in response to any new argument that the applicant makes in its brief. As we have already noted, it is an entirely new argument. The motion to allow a reply brief is denied.

POST ORAL ARGUMENT MOTION

Following oral argument, petitioner filed a "Motion for Supplemental Brief to Aid LUBA Decisionmaking." In that supplemental brief, petitioner expands on his arguments concerning certain

trees and provides citations to and discussion of a number of additional LUBA decisions that petitioner believes lend further support to arguments in his petition for review.

Petitioner has been a vigorous and thorough advocate for his positions in *Frewing I* and in this appeal. However, the rules that govern our proceedings require that after petitioner presents his written arguments in the petition for review, respondents are given an opportunity to file a brief to respond to those arguments in writing. Following that exchange of written arguments, and a reply brief where warranted, LUBA must then resolve the legal arguments that are presented, with the benefit of the parties' oral argument. If petitioner continues to expand or refine his legal arguments after oral argument, it makes an already difficult case impossible. LUBA's job becomes unworkable, and it is not possible for LUBA to meet the deadlines that the legislature has imposed on LUBA. Because our rules do not allow the kind of supplemental briefing that petitioner requests, and because there are no special circumstances that might justify such a departure from our rules in this case, the motion is denied.

FIRST ASSIGNMENT OF ERROR

In subassignment of error 5(B) in *Frewing I*, petitioner challenged the city's approval of a vertical sag curve for SW 74th Avenue that is steeper than is allowed under the city's street construction standards for streets with a design speed of 25 miles per hour.[1] We set out the portion of our decision in *Frewing I* that explains petitioner's argument and our reasoning in sustaining subassignment of error 5(B):

> "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. 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 vertical sag curve can be steeper, or more severe, and still be safely

[1] As we explained in *Frewing I*, a vertical sag curve is a dip in a roadway.

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. 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. 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 15 mile per hour vertical curve design, to a 'K value' of greater than 5 (AASHTO).' [*Frewing I*] Record 43.[2]

"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

[2] The record that the city submitted in support of its decision following our decision in *Frewing I* includes the record in *Frewing I*. Where we cite to the record in *Frewing I* or one of the four supplemental records in *Frewing I*, we so indicate.

> 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. *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." *Frewing I*, 47 Or LUBA at 358-60 (footnotes omitted; emphasis added).

The findings the city adopted on remand take two approaches. We discuss those approaches separately below.

A. The Public Improvement Design Standards (PIDS) Do Not Address All Circumstances

The city's street design standards, and the two figures that were attached to the petition for review that we noted in our decision in *Frewing I*, are included in a document that is entitled Public Improvement Design Standards (PIDS), which is included in the First Supplemental Record in this appeal. The city first observes that the city's PIDS were not adopted to address all situations.[3] From that observation, the city reasons that it may reasonably look to Washington County's street improvement standards for K values for a road with a design speed of 15 mph since the city's PIDS do not specify a K value for a roadway with a design speed of 15 mph.[4]

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[3] The PIDS preface includes the following language:

> "The City of Tigard Public Improvement Design Standards have been developed to provide a uniform set of standards and procedures to assist the City and private consulting engineers in coordinating, processing and constructing public improvement projects. The Washington County Uniform Road Improvement Design Standards have been used as a guide in creating these standards. * * * *The form has been kept brief and no attempt has been made to cover all possible situations or to provide detailed explanations.* This manual is intended to be read with the [TCDC]." First Supplemental Record S4 (emphasis added).

[4] The city's PIDS apparently were developed based on the Washington County street design standards.

There are at least two problems with the city's first approach. First, respondents never dispute petitioner's contention that under applicable local law 74th Avenue is a local street and a design speed of 25 mph is required under local law for local streets.[5] Second, as petitioner correctly points out, the PIDS do provide a sag curve K value for local streets with a design speed of 25 mph. The problem presented in this case is not the absence of a minimum K value for sag curves on streets that must be designed for 25 mph. Rather, the problem is that the city and applicant believe achieving the minimum sag curve K value that is required by the PIDS for 74th Avenue as it crosses Ash Creek would result in an economic hardship to the applicant and have undesirable environmental impacts. While those concerns may provide a basis for using one of the procedures provided in the TCDC and PIDS for deviating from the PIDS sag curve K value for local streets with a design speed of 25 mph, they do not provide a basis for saying the PIDS do not provide a sag curve K value for 74th Avenue. If the city were relying entirely on its first approach, remand would almost certainly be required.

B. PIDS Design Modification Authority

The city's findings on remand also take a second approach. Petitioner argues that TCDC 18.810.020(D) requires that the city approve a formal adjustment to deviate from the standards contained in the PIDS.[6] However, the PIDS also include a separate procedure by which "[m]odifications to specifications or standards may be requested" and approved by the city engineer. First Supplemental Record S30. The PIDS provisions for "[d]esign [m]odifications" appear at PIDS Section J and establish a process where an applicant may request "in writing" that a

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[5] We emphasize that this important foundation to petitioner's argument is ignored in the challenged decision and in the response briefs. If there is any legal basis for disputing that 74th Avenue is a local street or that the design speed for local streets is 25 mph, neither respondent nor intervenor-respondent cite it.

[6] TCDC 18.810.020(D) provides:

> "Adjustments. Adjustments to the provisions in this chapter related to street improvements may be granted by means of a Type II procedure, * * * using approval criteria in Section 18.370.030(C)(9)."

standard be modified. *Id*. The criteria for granting such requests for modification appear at paragraph 2.4 of PIDS Section J and are set out below:

> "The City Engineer may grant a modification to the adopted specifications or standards when any one of the following conditions [is] met:
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> "(a) The specification or standard does not apply in the particular application.
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> "(b) Topography, right-of-way or other geographic conditions impose an economic hardship on the applicant and an equivalent alternative that can accomplish the same design is available. Variances to self-imposed hardships shall not be allowed. The variance requested shall be the minimum variance that alleviates the hardship.
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> "(c) A minor change to a specification or standard is required to address a specific design or construction problem which, if not enacted, will result in an undue hardship.
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> "(d) An alternative design is proposed which will provide a plan equal or superior to these standards. In considering the alternative, the City Engineer shall consider appearance, durability, cost of maintenance, public safety, and other appropriate factors." First Supplemental Record S30-S31.

The record includes a letter signed by the city engineer in which the city engineer acknowledges that the applicant requested that the K value required by the PIDS be modified:

> "The applicant on this development project has submitted design drawings for 74th Avenue that include a sag vertical curve that does not meet the design standards. [The applicant has] asked for an exception to the standards in order to minimize the amount of fill placed over the City of Tualatin water transmission line. The 'K' value that results from this design will not meet the standards for a 25 mph posting. The City Engineer may authorize modification of the street improvement design standards if justified and if the street can be made safe for motorists to use with those modifications in place. To ensure that the appropriate speed is followed for the street at that location, the posting of an advisory 15 mph sign is required. The construction of a street that does not meet the design standards at that sag is acceptable provided a 15 mph advisory sign is posted as part of the project." Record 451.

The city's decision on remand includes the following explanation of the sag curve K value modification:

"The City Engineer has provided a memorandum expressly approving the modified design by granting an exception to the standard. This exception is mitigated by the requirement for additional advisory signage and street lighting, as further described in the memo.

"* * * * *

"In order to clarify the authority to 'set' speed limits, the applicant's engineer contacted the State of Oregon. The speed limit is set by the State at 25 miles per hour as the normal speed limit on all residential streets. Where specific sections of streets cannot meet this standard, cities have authorization to provide design exceptions that allow for sections of streets that they are in ownership of to be constructed, reconstructed, or repaired that don't meet the speed limit standards. The State administers design exceptions on its own highways as well. According to the State, design exceptions at the state level are mitigated by using advisory signs as well as other safety measures. Jurisdictions are, therefore, allowed to post special signs and take other measures to safely control traffic.

"* * * The City Engineer has determined that placement of '15 mph' advisory signage in advance of the crest and sag in each direction are appropriate mitigation measures and are sufficient to address the deficient 'K' value. * * *."[7] Record 18-20.

The city never expressly cites the Design Modification authority provided by PIDS Section J, and it could have been clearer that it was approving the modified K value under PIDS Section J. However, petitioner does not claim that he was unaware that the city was relying on PIDS Section J, and apparently he was aware that the city might be relying on PIDS Section J. In the petition for review, petitioner notes:

"In another alternative, the PIDS themselves deal with deviations. Section J, 'Design Modifications', in the PIDS (Supp Record at S30) sets forth a procedure

[7] The city also imposed the following condition of approval:

"52. Prior to commencing site work, the applicant shall submit construction drawings that show advisory '15 mph' speed limit signs to be placed in advance of the crest and sag curves on SW 74th in accordance with the City Engineer's Memorandum of January 25, 2005, which requires that the sag be monitored after construction to determine if any other measures need to be taken. The applicant shall be responsible for installation of additional measures within a year after construction of the street is accepted by the City if monitoring indicates that additional traffic control measures are needed." Record 13.

> to consider any requested modification or variance to the standards; such procedure has not been followed here (e.g. written request, city engineer decision on the request, adjustment meeting one of specified conditions for modification)." Petition for Review 6 (footnote omitted).

In response to petitioner's first parenthetical point ("written request"), intervenor contends that while the record in *Frewing I* is somewhat equivocal about whether the applicant requested a modification of the PIDS sag curve K value in writing, the applicant's letter to the city following remand includes a request that the 13.4 vertical curve K value that is required by the PIDS be modified to avoid the large amount of fill that would otherwise be required. With regard to petitioner's second parenthetical point ("city engineer decision on the request"), intervenor contends that the city engineer's January 25, 2005 letter constitutes the city engineer's decision to grant the modification. We agree with intervenor on both points.

The third shortcoming alleged in the last clause in petitioner's parenthetical ("adjustment meeting one of the specified conditions for modification") could be read to constitute a challenge to the adequacy of the city's findings to explain why the modification should be granted consistently with PIDS Section J Criteria 2.4(a) through (d). If that was petitioner's intent, it is not sufficiently developed to allow review. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982). Our conclusion that petitioner's argument is insufficiently developed to allow review is a much closer question than it would otherwise be, because the city's findings do not specifically identify PIDS Section J Criteria 2.4(a) through (d). However, even without express references to PIDS Section J Criteria 2.4(a) through (d), it is reasonably clear from the city engineer's January 25, 2005 letter and the city's decision that both the city engineer and the city council believed that forcing the applicant to construct the 74th Avenue/Ash Creek vertical curve at the PIDS required K value would be unnecessarily expensive and that slowing traffic for a short distance while crossing a steeper vertical sag curve over Ash Creek was an acceptable design alternative. It is also clear from the city council's and the city engineer's decision that the sag curve K value that would otherwise be required by the PIDS would result in unnecessary negative environmental

consequences and could result in damage to the existing water line. Those considerations are all clearly relevant under PIDS Section J Criteria 2.4(b), (c) and (d). Petitioner does not claim that he was unaware of PIDS Section J Criteria 2.4(a) through (d) and expressly recognized in his petition for review that the city might be relying on those criteria. If petitioner believes that a remand is warranted for more focused and elaborate city findings that specifically reference PIDS Section J Criteria 2.4(a) through (d) and specifically relate the concerns that are identified in the city's findings to those criteria, a more developed argument is required.

Finally, petitioner contends that remand is required because the city engineer in granting the requested K value modification ran afoul of TCDC 18.210.070(A), which prohibits city "officials, departments and employees" from issuing "permits" or granting "approvals" that violate "standards imposed" by the TCDC.[8] While the PIDS sag curve K values are imposed by the TCDC, so are the PIDS Section J modification provisions. In approving a modification to the sag curve K value that would otherwise apply, the city engineer did not grant an approval that violates the PIDS sag curve K value; the city engineer modified that K value as PIDS Section J allows and required compliance with the modified K value. That action does not run afoul of TCDC 18.210.070.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In *Frewing I*, petitioner alleged in subassignment of error 5(I) that the city erred by not requiring that the applicant submit a tree plan for the part of the property that is to be developed residentially. We sustained subassignment of error 5(I). On remand, the applicant submitted a tree

[8] TCDC 18.210.070(A) provides:

> "Official Action. All officials, departments and employees of the City vested with authority to issue permits or grant approvals shall adhere to and require conformance with this title, and shall issue no permit or grant approval for any development or use which violates or fails to comply with conditions or standards imposed to carry out this title."

plan. Record 397-443. In his second assignment of error in this appeal, petitioner challenges the adequacy of that tree plan to comply with TCDC 18.790.030.[9]

A. Identification of Existing Trees (TCDC 18.790.030(B)(1))

TCDC 18.790.030(B)(1) requires that the applicant submit a tree plan that shows the "location, size and species of all existing trees including trees designated as significant by the city."

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[9] 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.

"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. * * *."

Petitioner argues the tree plan does not accurately show the location, size and species of existing trees in four ways. We discuss those arguments separately below.

1. Trees Over 12 Inches in Caliper

Computation of the mitigation requirements imposed by TCDC 18.790.030(B)(2) is based on the percentage of "existing trees over 12 inches in caliper" that are retained. Petitioner contends that the inventory that is included with intervenor's tree plan is fatally flawed because it counts trees that are listed as 12 inches in diameter as though they were *over* 12 inches in diameter.

Intervenor responds that the inventory did not use any fractional measurements and identified the diameter of all trees in round numbers. We understand intervenor to argue that trees with a fractional diameter between 12 and 13 inches were listed as 12 inches and trees with a diameter between 13 inches and 14 inches were listed as 13 inches. Intervenor contends that inventorying at this level of precision is not prohibited by TCDC 18.790.030(B)(2). Even if that means some trees that are exactly 12 inches in diameter might be counted as trees that are over 12 inches in diameter, that would not have the effect of improperly reducing the applicant's mitigation obligation under TCDC 18.790.030(B)(2). According to intervenor, improper reduction of the TCDC 18.790.030(B)(2) mitigation obligation would only theoretically come into play if trees that are exactly 12 inches in diameter were counted if they are to be saved and not counted if they are to be removed.[10] That is not the case here.

Petitioner's argument concerning the method in which 12-inch diameter trees were inventoried provides no basis for finding the tree plan is inadequate.

[10] Although petitioner does not claim it to be the case here, the mitigation obligation might also theoretically be reduced if a disproportionate number of trees on the property that are exactly 12 inches in diameter are saved. However, we agree with intervenor that the TCDC in no way suggests that this kind of precision in measurement is required.

2. Differential Treatment of Trees with Effective Diameter of 13 Inches and Same Size Trees

Petitioner next complains that tree 162, a tree with two stems with an effective diameter of 13 inches, is not counted as a tree with a diameter greater than 12 inches. Petitioner also cites other cases where multiple stem trees are sometimes counted as trees with an effective diameter in excess of 12 inches (trees 927 and 954) and sometimes they are not (trees 921, 923 and 939). Petitioner contends that these internal inconsistencies result in noncompliance with TCDC 18.790.030(B)(1).

Intervenor explains that effective diameter was only calculated for multiple stem trees that are being removed so that those trees are counted *against* intervenor for mitigation purposes whereas effective diameter was not calculated for multiple stem trees that are being retained. Intervenor contends, and we agree, that this methodology increases intervenor's mitigation obligation and therefore does not violate TCDC 18.790.030(B)(1).

Petitioner also objects that tree 1397 and tree 1399 are the same size but are "accounted for differently." Petition for Review 9. Tree 1397 is described as a 12-inch diameter Western Red Cedar in Good Condition. Tree 1399 is described as a 12-inch diameter Oregon Red Alder in Fair Condition. The only difference we can tell in the way the two trees are inventoried is that Tree 1397 is listed among "Viable Trees Larger Than 12" Diameter" and tree 1399 is not. We assume that means tree 1397 is viable and tree 1399 is not. Petitioner makes no attempt to explain why he thinks that is an inconsistency that renders the inventory inconsistent with TCDC 18.790.030(B)(1).

Petitioner's argument concerning the method in which multiple stem trees and identically sized trees were inventoried provides no basis for concluding that the tree plan is inadequate.

B. Program to Mitigate Removal of Trees over 12 Inches in Diameter

Petitioner contends that intervenor's tree plan is inadequate and that the city has improperly deferred discretionary decisions that must be made concerning the adequacy of intervenor's tree plan to comply with TCDC 18.790.030(B) to the future, where no right of public participation will

be provided. The staff report, which was adopted by the city council, offers the following analysis of the tree plan:

> "* * * The proposed attached tree plan and arborist's report establishes the trees to be saved and those to be cut. As reflected in that plan, there are 893 total trees on site that are larger than 12" diameter. Of those, 115 are deemed hazardous and are not subject to the mitigation requirement. From the remaining 778 net viable trees, 321 are proposed for removal. This constitutes a 59% retention. Since the total number of trees that will be retained is greater than 50%; one-half of the caliper inches being removed is required to be mitigated. A total of 6892 caliper inches are to be removed, so 3,446 caliper inches will be required to be replanted. This may be accomplished by either planting trees on-site, off-site or payment of a fee in lieu. To assure that mitigation is accomplished and that subsequent tree removals are undertaken in accordance with the requirements of this chapter, staff recommends that the following conditions of approval be imposed:
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> "* * * * *
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> "[53.] Prior to commencing site work, the applicant shall submit a bond for the equivalent value of mitigation required (3,446 number of caliper inches times $125 per caliper inch) if additional trees are preserved through the subdivision improvements and construction of houses, and are properly protected through these stages by the same measures afforded to other protected trees on site, the amount of the bond may be correspondingly reduced. Any trees planted on the site or off site in accordance with [TCDC] 18.790.060(D) will be credited against the bond, for two years following final plat approval. After such time, the applicant shall pay the remaining value of the bond as a fee in lieu of planting."
>
> "[54] Prior to issuance of building permits, the applicant/owner shall record a deed restriction to the effect that any existing tree greater than 12" diameter may be removed only if the tree dies or is hazardous according to a certified arborist. The deed restriction may be removed or will be considered invalid if a tree preserved in accordance with this decision should either die or be removed as a hazardous tree." Record 23.

The challenged decision requires that the applicant post a bond sufficient to pay a fee in lieu of actual replacement for the trees that the applicant plans to remove. Petitioner does not argue that the applicant cannot post a bond in lieu of replacement to satisfy its mitigation obligation under TCDC 18.790.030(B). According to intervenor, it will satisfy its obligations under TCDC

18.790.030(B) when it posts the required bond. Intervenor contends that the city's decision goes further and provides intervenor with an incentive to save additional existing trees:

> "* * * If the applicant can, during construction, preserve additional trees, it gets credit for those trees against its bond. The program also encourages planting on-site over paying a fee. All trees planted on-site within two years will also be credited against the bond. The resulting fee will be only for trees that could not be mitigated for by planting on-site. Thus, either trees will be preserved, or replaced; if they are not, the City will have money to replace them. This is the most feasible plan one could develop." Intervenor-respondent's Brief 14.

The tree plan that the applicant submitted identifies the trees that may be removed and those that will not be removed. That known aspect of the tree plan does not appear to be at the heart of this subassignment of error. Rather, it is the explicit recognition that the applicant may take action in the future to save additional existing trees or to plant new trees. If the applicant takes such actions, the city may reduce the amount of the required bond. Petitioner appears to object to the lack of a current decision on the city's part with regard to these potential actions by the applicant in the future. We understand petitioner to object to deferral of resolution of the particulars of these actions to the future, where petitioner may have no right to participate in a public process.

The short answer to petitioner's argument is that TCDC 18.790.030(B)(2) does not require that the tree plan submitted under that section identify what trees will be planted and where they will be planted to satisfy the mitigation obligation imposed by that section of the TCDC. TCDC 18.790.030(B)(2) specifies that any mitigation that is required under that section of the TCDC is to be carried out in accordance with TCDC 18.790.060(D). TCDC 18.790.060(E) expressly provides that a fee in-lieu may be paid in place of a plan of mitigation that actually proposes and replaces trees.[11] As we read TCDC 18.790.030(B)(2) and 18.790.060(D) and (E) a tree plan

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[11] TCDC 18.790.060(D) and (E).provide:

> "D. "Guidelines for replacement. Replacement of a tree shall take place according to the following guidelines:
>
> "1. A replacement tree shall be a substantially similar species taking into consideration site characteristics;

could simply provide a fee in lieu and leave the actual decision making concerning how that fee would be spent to the city. A tree plan that proceeded in that way would necessarily leave resolution of the details of the ultimate mitigation to the city under standards set out in TCDC 18.790.060(D). Given that explicit process for deferring resolution of the particulars for how trees are to be replaced under tree plans required by TCDC 18.790.030(B)(2), we fail to see how it could possibly be improper to allow the applicant to (1) continue to work with the city to save additional existing trees and identify replacement trees that are acceptable to the city and (2) allow the city to reduce the bond if the applicant is successful in saving additional trees and planting replacement trees.

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

"2. If a replacement tree of the species of the tree removed or damaged is not reasonably available, the Director may allow replacement with a different species of equivalent natural resource value;

"3. If a replacement tree of the size cut is not reasonably available on the local market or would not be viable, the Director shall require replacement with more than one tree in accordance with the following formula: The number of replacement trees required shall be determined by dividing the estimated caliper size of the tree removed or damaged by the caliper size of the largest reasonably available replacement trees. If this number of trees cannot be viably located on the subject property, the Director may require one or more replacement trees to be planted on other property within the City, either public property or, with the consent of the owner, private property;

"4. The planting of a replacement tree shall take place in a manner reasonably calculated to allow growth to maturity.

"E. In lieu-of payment. In lieu of tree replacement under Section D above, a party may, with the consent of the Director, elect to compensate the City for its costs in performing such tree replacement."

C. Tree Plan and Arborist's Report Do Not Identify the Trees to be Saved and the Trees to be Cut

Under this subassignment, petitioner makes three discrete subarguments.[12] We address them separately below:

1. Participation of the Arborist

Petitioner contends that the applicant's arborist distanced himself from the tree plan by noting that the applicant selected trees for removal. Petitioner also contends that the latest participation by the arborist was on November 19, 2004, "whereas a later 'revised' tree preservation plan was completed on 1/10/05 and received at Tigard on 1/14/05." Petition for Review 13. Petitioner argues:

> "Without at least review and approval by the certified arborist, one cannot conclude that the most recent tree preservation plan is 'prepared by a certified arborist" [as required by] TCDC 18.790.030(A)." *Id*.

Intervenor disputes petitioner's contention that the arborist "distanced" himself from the tree plan. Intervenor contends that there is nothing improper about the applicant and the applicant's engineer providing information about which trees must be removed to accommodate development, since they know where development will occur and how it will impact trees. We agree with intervenor.

Intervenor also argues that there is nothing improper about the way the tree preservation plan was assembled and submitted to the city.

> "The Petitioner attempts to make an issue over the timing of the tree plan's preparation and submission. The arborist's tree inventory was prepared in November 2004. The site plans illustrating the location of the trees contained in the inventory were completed on January 10 and 11, 2005. The site plan component was then submitted on January 14, 2005. The Petitioner does not point to any discrepancy between the two components. Thus, it appears the engineer correctly illustrated the trees to be saved and those to be cut using the tree inventory." Intervenor-Respondent's Brief 15, n 3 (record citations omitted).

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[12] Petitioner actually identifies four separate arguments, but we combine the first and fourth, which deal with the participation of the applicant's arborist.

We agree with intervenor that petitioner has not demonstrated that the tree protection plan violates the TCDC 18.790.030(A) requirement that it be "prepared by a certified arborist." There is nothing in TCDC 18.790.030(A) that suggests that others may not assist the certified arborist in preparing the required tree plan.

2. Recognition that Additional Trees May be Protected

Petitioner faults the arborist's statement that "it may be decided at a later date to retain some of the trees on each of the lots." Petitioner also points to the applicant's characterization of the tree plan as a "worst case scenario." We understand petitioner to contend that the tree plan that is required by TCDC 18.790.030 must precisely and accurately identify each tree that will be removed and each tree that will be protected. We understand petitioner to argue further that a tree plan (1) may not explicitly recognize that during the development process opportunities may be presented for protecting additional trees and (2) may not provide that in the event such opportunities are presented additional trees will be protected. We reject that argument.[13]

3. Differences Between the Tree Plan Submitted in *Frewing I* and the Tree Plan Submitted Following Remand

Petitioner identifies a number of differences between the original tree protection plan, that LUBA found to be inadequate in *Frewing I*, and the tree protection plan that was developed in response to LUBA's remand in *Frewing I*.

Intervenor responds that the tree plan in *Frewing I* and the tree plan that is at issue in this appeal "are totally unrelated." Intervenor-Respondent's Brief 15. Intervenor goes on to argue as follows:

> "* * * Any findings related to the plan for trees under the prior submission are irrelevant. The Applicant's entire approach to trees had to change based on LUBA's remand. With its current submission, the Applicant included a formal tree plan. Part of that plan was a site map that contains every tree on-site with a number

[13] Petitioner also argues that the recognition that ways may be discovered during actual development to save additional trees means the tree plan does not protect trees to "the greatest degree possible." We reject that argument as well.

> that corresponds to the arborist's inventory. The site map indicates precisely the trees that will be retained and those to be removed. As that map reflects, now there are many trees in buildable areas that are being retained. For example, trees within * * * certain lots such as Lots 13 through 18, will now be retained whereas previously they would have been removed. (* * * Trees numbered 6135, 6117, 5303, 5310, 5391, 5393). While Petitioner proclaims his belief that more trees would be preserved under the original approval, he points to no specific evidence to support that belief." Intervenor-Respondent's Brief 15-16 (footnotes and record citations omitted).[14]

The inconsistencies between the prior tree protection plan and the tree protection plan that was prepared in response to our decision in *Frewing I* are not the kind of inconsistencies that might render the latter tree protection plan inadequate. It is clear from the record that it is the latter plan that the city is relying on to support its decision and that the latter plan was prepared to respond to our remand in *Frewing I.* That there are some incorporated findings that were adopted to address the first plan that can be read to be inconsistent with the latter plan does not require remand.

D. The Obligation to Preserve Trees

1. TCDC 18.350.100(B)(3)(a)(1)

In *Frewing I*, we rejected petitioner's subassignment of error 5(D), which concerned TCDC 18.350.100(B)(3)(a)(1). TCDC 18.350.100(B)(3)(a)(1) is one of the conceptual planned development approval criteria, and it requires preservation of "the existing trees, topography and natural drainage to the *greatest degree possible*." (Emphasis added.)[15] In *Frewing I*, petitioner argued that if the subdivision proposal were fundamentally redesigned in character and concentrated

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[14] In one of the omitted footnotes, intervenor-respondent argues:

> "On page 15 of his brief, Petitioner lists a number of trees he believes will now be removed. Some of those trees are clearly in building envelope[s] (6120, 6121) and would be removed under any plan. Others are small trees not protected under the City's code (6136, 6137 and 6138). One tree (6129) will actually be retained." Intervenor-Respondent's Brief 16, n 5.

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

> "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[.]"

in small areas of the property where there are few trees then more trees could be protected than were proposed for protection in *Frewing I*. We rejected that argument:

> "* * * 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." *Frewing I*, 47 Or LUBA at 365.

Petitioner first contends that because our decision in *Frewing I* required that the applicant prepare a new tree plan, the city was required to use that tree plan "to make a new decision according to the criteria of the TCDC." Petition for Review 13. If by that argument petitioner is arguing that the city was obligated to start from scratch and completely rejustify its decision under all applicable approval criteria, as though its decision in *Frewing I* and LUBA's affirmance of significant parts of that decision did not happen, we reject the argument. The fact that our decision in *Frewing I* obligated the applicant to prepare a tree plan that complies with TCDC 18.790.030 does not necessarily mean that all issues that were finally resolved by our decision in *Frewing I* are necessarily revived.

Intervenor takes an equally extreme position. Intervenor contends that because we rejected the broad interpretation of TCDC 18.350.100(B)(3)(a)(1) that petitioner advanced in *Frewing I* and rejected subassignment of error 5(D), it necessarily follows under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) that all issues regarding compliance with the TCDC 18.350.100(B)(3)(a)(1) tree protection criterion are foreclosed in this appeal of the city's decision on remand. Intervenor argues that in *Beck* "the court confirmed that when the record is reopened on remand, the parties may raise only issues related to the remand and not issues already resolved." Intervenor-Respondent's Brief 17.

Intervenor is correct, but the point it makes begs the question of what issues were resolved in *Frewing I*. The issue of whether the city was obligated to apply petitioner's expansive interpretation of TCDC 18.350.100(B)(3)(a)(1) was resolved. The issue of whether the

subdivision that the applicant proposed in *Frewing I* and the trees that the applicant proposed to remove and preserve to accommodate that subdivision was consistent with the tree preservation requirement in TCDC 18.350.100(B)(3)(a)(1) was resolved in *Frewing I*. However, if the applicant now proposes to cut trees that it proposed to save in the original proposal and the applicant now proposes to preserve trees that were to be cut under the original proposal, the new proposal may not comply with TCDC 18.350.100(B)(3)(a)(1). It is petitioner's obligation to show that the proposal has changed so that additional trees are to be removed that could be preserved as TCDC 18.350.100(B)(3)(a)(1) requires, but petitioner is not barred by the *Beck* waiver principle from attempting to do so in this appeal.

Intervenor appears to be correct that the proposed subdivision is essentially unchanged. The plan that appears at *Frewing I* Record 325 shows the trees to be saved and the trees to be removed under the original proposal. When that plan is compared with the tree plan that was prepared in response to our remand in *Frewing* I, which appears at Record 443, it is clear that there are differences. The new tree plan is far more detailed. It shows trees where the old tree plan did not show trees. Some trees in the area to be developed are to be preserved in the new plan, whereas all trees in the developed area were to be removed under the original plan. But some trees that were to be preserved in the old plan are now to be removed.

The tree plan that appears at *Frewing I* Record 325 shows a "Tree Removal Boundary" (TRB) running 15 feet south of the north property line west to east across the northern part of lots 1-10. The TRB then turns south and runs 15 feet west of the east property line across the eastern part of lots 10-12. Finally, the TRB turns west and runs through lots 13 through 18. Petitioner contends that while that initial tree plan shows trees located on these lots north, east and south of the "Tree Removal Boundary" as being cut, the applicant agreed to preserve those trees during the proceedings in *Frewing I*. Because neither intervenor nor the city dispute that argument, we will assume that petitioner is correct. Petitioner identifies a number of trees that the applicant now

proposes to cut.[16] Petitioner contends there is no explanation for why it was possible to preserve those trees before and now they cannot be preserved.[17]

It may be that with a more detailed inventory and better information about the condition of these trees, there are reasons why the trees petitioner identifies can no longer be safely preserved. However, the city did not explain what those reasons might be. Because that explanation is missing, the city has failed to demonstrate the new proposal preserves "the existing trees * * * to the greatest degree possible," as TCDC 18.350.100(B)(3)(a)(1) requires. We therefore must sustain this part of petitioner's second assignment of error.

To assist the parties on remand so that this issue may be put to rest, we clarify the scope of our remand and the nature of the inquiry that is required under TCDC 18.350.100(B)(3)(a)(1).

a. Scope of the Remand

In responding to petitioner's contentions about some of the trees listed in n 16, intervenor suggests in its brief that the obligation to preserve "the existing trees * * * to the greatest degree possible," under TCDC 18.350.100(B)(3)(a)(1) only extends to trees greater than 12 inches in diameter and does not include "small trees." *See* n 14. Given the complexity and multiple layers of regulation present in the TCDC, that misreading of TCDC 18.350.100(B)(3)(a)(1) is perhaps understandable. But while the mitigation obligation under TCDC 18.790.030 and 18.790.060 is determined by the percentage of trees in excess of 12 inches in diameter that are retained, the obligation to preserve "the existing trees * * * to the greatest degree possible," under TCDC 18.350.100(B)(3)(a)(1) is not limited to trees that are greater than 12 inches in diameter. *See* n 15.

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[16] Petitioner specifically identifies a total of 14 trees on lots 13, 14, and 15 that petitioner contends were to be preserved in the initial proposal in *Frewing I*: "6116, 6118, 6120, 6121, 6125, 6126, 6127, 6128, 6129, 5377AS, 6136, 6137, 6138 and 6319." Petition for Review 15. Although petitioner does not identify them by number, there are a total of 9 trees east or north of the TRB that are now to be removed, but presumably were to be saved in the *Frewing I* proposal: 6070, 6071, 6074, 6107, 6108, 5267, 6100, 5289, and 5283.

[17] Intervenor, in its brief, offers a partial explanation for why some of those trees must be removed and contends one of the trees will be preserved. *See* n 14.

Whatever the city may have intended when it adopted TCDC 18.350.100(B)(3)(a)(1), that limitation is simply not stated.

In fulfilling their obligation to preserve trees if possible, the city and applicant are generally entitled to rely on the applicant's tree plan, which was prepared by a certified arborist in consultation with the applicant and the applicant's engineer, to identify the trees it is possible to preserve and the trees it is not possible to preserve. But if a real issue is raised about whether it is in fact possible to preserve particular trees that the tree plan slates for removal, some specific explanation for why those trees must be removed must be included in the city's findings. That findings obligation may in turn necessitate additional justification by the certified arborist. Neither the city nor the intervenor claim that no issue was raised about the trees petitioner identifies on page 15 of his petition for review. *See* n 16.

However, we also caution that our remand does not obligate the city to provide petitioner another opportunity to identify additional trees that might be preserved. The city's obligation on remand is limited to the trees identified in n 16 of this opinion.

b. The Meaning of Preserve if Possible

In discussing the meaning of the preservation obligation under TCDC 18.350.100(B)(3)(a)(1) in *Frewing I*, we noted:

> "* * * Under TCDC 18.120.010, where a word is not defined in the TCDC, the 'commonly 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[.]"
>
> "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.' *Frewing I*, 47 Or LUBA at 364 (citation and footnote omitted).

Some additional clarification of our understanding of the obligation to preserve "the existing trees * * * to the greatest degree possible" under TCDC 18.350.100(B)(3)(a)(1) is in order, since that issue will now have to be confronted more directly on remand. In one sense, it is "possible" to preserve, at least briefly, any tree that need not be cut down to build houses, streets or other subdivision structures. However, the TCDC explicitly recognizes that trees may be hazardous or a nuisance and authorizes removal of such trees without a permit. TCDC 18.790.050(D)(2) and (3).[18] In deciding whether it is "possible" to preserve an existing tree, and therefore whether that existing tree must be preserved in approving a subdivision under TCDC 18.350.100(B)(3)(a)(1), for trees that are not displaced by development the question will likely turn on the condition of the existing tree and whether it is safe to leave the tree in an environment where there will now be houses and people in the vicinity of those trees. The closer those trees are to proposed houses, the more likely they will be damaged by construction and the more likely they will cause damage to houses and people if they die or become diseased. An important question will therefore be whether it is safe to attempt to preserve the tree. In that regard it seems likely that city decision makers are entitled to give great deference to the views of the certified arborist and other tree professionals and

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[18] TCDC 18.790.020(A)(3) provides the following definition:

> "3. 'Hazardous tree' means a tree which by reason of disease, infestation, age, or other condition presents a known and immediate hazard to persons or to public or private property [.]"

As relevant, TCDC 18.790.050(D) provides:

> "Removal permit not required. A tree removal permit shall not be required for the removal of a tree which:
>
> "* * * * *
>
> "2. Is a hazardous tree;
>
> "3. Is a nuisance affecting public safety as defined in Chapter 7.40 of the Municipal Code[.]

to balance the city's policy favoring retention of trees against the threat that particular trees may pose, depending on their existing condition and proximity to people and structures.

With those observations, we sustain this part of petitioner's second assignment of error. On remand the city must explain why it is not possible to preserve the trees identified in n 16, or require that the tree plan be amended to preserve those trees.

2. TCDC 18.350.100(B)(3)(g)(1)

TCDC 18.350.100(B)(3)(g)(1) is one of the approval criteria for planned development review.[19] Under this subassignment of error, petitioner alleges that the proposal does not comply with TCDC 18.350.100(B)(3)(g)(1), as he interprets that provision. In *Frewing I*, we held that the city council was within its interpretive discretion in interpreting 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." *Frewing I* 47 Or LUBA at 379. If TCDC 18.350.100(B)(3)(g)(1) is interpreted and applied in that way, the proposal complies with that standard. We agree with intervenor that this interpretive issue was resolved in *Frewing I*, and petitioner may not raise that same issue again in this proceeding on remand. *Beck*, 313 Or at 153.

Petitioner's second assignment of error is sustained in part and denied in part.

THIRD ASSIGNMENT OF ERROR

In *Frewing I*, the city applied TCDC 18.370.020(C)(1) to grant three special adjustments to city street improvement standards.[20] One of the approved special adjustments was an

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[19] TCDC 18.350.100(B)(3)(g)(1) provides:

> "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[.]"

[20] 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:

adjustment to city street improvement sidewalk construction standards, to allow a curb-tight sidewalk where SW 74th Avenue crosses the Ash Creek drainageway. The other two adjustments were to permit the proposed cul-de-sac to exceed 200 feet in length and to serve 23 houses. Without the special adjustments, the SW 74th Avenue crossing of the Ash Creek drainageway would be required to include a 5-foot planting strip between the sidewalk and the edge of the roadway, and the cul-de-sac apparently would have to be replaced with a loop road.

In *Frewing I*, petitioner alleged that the city erred in finding that the proposed special adjustment statisfied TCDC 18.370.020(C)(1)(c) and (d). We will refer to those two criteria as "public health safety and welfare criterion (c)" and "extraordinary hardship criterion (d)." With regard to public health safety and welfare criterion (c), we agreed with petitioner in *Frewing I* that the city's finding that there was no evidence that the three disputed adjustments will be detrimental to the health safety or welfare or surrounding property owners was not supported by the record, because there was evidence in the record to that effect. With regard to extraordinary hardship criterion (d), we rejected petitioner's challenge to the cul-de-sac adjustment but sustained his challenge regarding the curb-tight sidewalk adjustment. *Frewing I*, 47 Or LUBA at 378.

On remand the city adopted additional findings to address the deficiencies we identified in our decision in *Frewing I* regarding public health safety and welfare criterion (c), and extraordinary hardship criterion (d). In addition, the city adopted additional findings to address TCDC 18.370.020(C)(11), which provides a somewhat different criterion for approval of adjustments to

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"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."

"street improvement requirements."[21] Finally, with regard to the curb-tight sidewalk, the city considered whether an adjustment was required or whether the TCDC 18.810.070(C) requirement for planter strips itself authorized approval of the requested curb-tight sidewalk, which would make approval of an adjustment unnecessary.[22]

On pages 17 and 18 of the petition for review, petitioner argues that the city erred by applying the street improvement adjustment criteria at TCDC 18.370.020(C)(11), for the first time on remand, as an alternative basis for granting the requested adjustments. Although we noted in *Frewing I* that TCDC 18.370.020(C)(11) seemed to be the more appropriate choice of adjustment criteria, petitioner accurately points out that LUBA did not *require* that the city apply TCDC 18.370.020(C)(11) on remand. However, that does not mean the city could not choose to do so, provided appropriate steps were taken to notify petitioner that it intended to apply TCDC 18.370.020(C)(11) as well as TCDC 18.370.020(C)(1) on remand. Petitioner does not claim that he was not made aware of the city's intent to apply both TCDC 18.370.020(C)(11) and TCDC 18.370.020(C)(1) on remand. The city did not err in doing so.

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[21] 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."

[22] TCDC 18.810.070(C) provides:

> "Planter strip requirements. A planter strip separation of at least five feet between the curb and the sidewalk shall be required in the design of streets, except where the following conditions exist: there is inadequate right-of-way; the curbside sidewalks already exist on predominant portions of the street; it would conflict with the utilities, there are significant natural features (large trees, water features, etc) that would be destroyed if the sidewalk were located as required, or where there are existing structures in close proximity to the street (15 feet or less). Additional consideration for exempting the planter strip requirement may be given on a case by case basis if a property abuts more than one street frontage."

Petitioner also argues that the city should have utilized the PIDS modification procedure that was noted in our discussion of the first assignment of error above. The disputed adjustments were not adjustments to standards in the PIDS. We seriously question whether the PIDS Section J modification procedure could be used to waive TCDC Chapter 18.810 street improvement standards. Even if the city could have relied on PIDS Section J, the city certainly did not commit error by applying the TCDC 18.370.020(C) adjustment criteria.

A. The Curb-Tight Sidewalk

The TCDC 18.810.070(C) requirement for planter strips is set out at n 22. The city adopted the following findings on remand in support of its determination that the curb-tight sidewalk could be allowed under TCDC 18.810.070(C).

> "There is adequate right of way to accommodate the required planter strip, and sidewalks do not yet exist on predominant portions of the street. There are some potential conflicts with utilities, but not on the side where the planter strip is required. There are also no existing structures that would be in such close proximity to the new sidewalk. However, additional large trees and water features would be destroyed if the sidewalk were required to be moved five feet further east into the sensitive lands resource. Staff interprets the term 'destroyed' to mean that additional trees would be removed, and additional area within the sensitive resource area would be disturbed by grading activity, vegetation removal and possible stream bank rechanneling. Although it is acknowledged that in some instances, these areas can be restored by planting new trees, or through revegetation and redirection of the stream channel, it is the general preference and the expressed intent of this exemption to avoid impact in the first place." Record 26-27.

Petitioner argues that the above findings are not supported by substantial evidence in the record. The finding regarding the trees appears to be wrong. Based on the new tree plan, petitioner is correct that the planter strip would have no effect on the number of trees that are planned for removal. Petitioner also questions whether the stream channel would have to be redirected. We have some difficulty following petitioner's argument, but neither respondent nor intervenor identify any evidence that including the planter strip would require that the stream channel be redirected. The evidence on this point is inconclusive. However, intervenor does identify

evidence that was provided by the applicant's engineer that requiring the five-foot planter strip would require additional fill in the wetland.

> "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 required public street standards." *Frewing I* Third Supplemental Record 9.

Although we understand petitioner to dispute the magnitude of the impact, based on our review of the drawings at *Frewing I* Record 633, 635 and 636 and the above statement by the applicant's engineer, there is substantial evidence in the record that at least some additional drainageway and wetland area will be filled if the 5-foot planting strip is required. We reject petitioner's argument to the contrary.

TCDC 18.810.070(C) was set out earlier at n 22. Under the language of that provision the city need not require a planting strip if "significant natural features" areas will be "destroyed." We do not understand petitioner to dispute that the wetlands and drainageway qualify as significant natural features. The city concluded that filling wetlands and drainageways destroys them. While petitioner appears to dispute that conclusion, we agree with the city. Given those conclusions, the city appropriately allowed the portion of 74th Avenue that crosses the Ash Creek drainageway to be designed without a planting strip to reduce the amount of fill in that area.

This subassignment of error is denied.[23]

B. The Cul-de-sac

As noted earlier, this cul-de-sac will serve 23 residences, three more than allowed under TCDC 18.810.030(L). The cul-de-sac is also longer than the 200-foot limit imposed by TCDC 18.810.030(L). The disputed adjustments are to allow these three additional houses to be served

[23] Because we agree with the city's decision that a planting strip need not be required under TCDC 18.810.070(C), we need not and do not consider whether the city adequately justified an adjustment to allow the roadway to be designed without a planting strip.

and to allow the over length cul-de-sac. In addressing public heath safety and welfare criterion (c) on remand, the city adopted the following findings to address public health, safety and welfare concerns that might be presented by allowing a cul-de-sac that is longer than 200 feet and serves more than 20 houses:

> "The length of the cul-de-sac is a planning issue related to an attempt to geometrically control block sizes fom becoming too long. This standard allows continuity of blocks without having long dead-end streets affecting block sizes. * * * By limiting the length of cul-de-sacs, developers are encouraged to provide more through streets, thereby enhancing connectivity. This enhanced welfare is balanced by increased through traffic which may disturb residents. From a safety standpoint, culs-de-sac are vulnerable from the standpoint of only having one available ingress/egress. In certain situations, this access could become blocked preventing residents access to or from their homes. This is also balanced from a public safety perspective by the fact that culs-de-sac are more defensible spaces from burglary, and are generally less prone to break-ins and vandalism. The length of a cul-de-sac has no bearing on public health. Additionally, neither the Tigard Police nor [Tualatin Valley Fire and Rescue (TVF&R)] raised any safety concerns over the length of the proposed cul-de-sac. Extending the length of the cul-de-sac reduces the number of intersections and the safety risks associated with intersections.
>
> "Opponents testified generally that the adjustments allowing a longer cul-de-sac that would serve more than 20 residences would increase the amount of traffic [on] nearby streets and then concluded with no further evidence that an increase in traffic will automatically result in decreased safety. The City finds that the amount of traffic is a function of the number of proposed units, not the arrangement of streets. It may be the case that more traffic will use the single point of access, than if there were two entries into the street, but the net difference from a conforming cul-de-sac is approximately 30 cars per day ** *. This limited number of additional vehicles that will result from the adjustments as opposed to the development itself will not automatically result in decreasing safety as the streets within and adjacent to the proposed subdivision are capable of handling the full amount of traffic from this development. Moreover when the property to the north is developed, a new street will connect to the proposed subdivision and serve to offset the traffic impact at SW 74th and the Ash Creek Estates public street intersection.
>
> In examining the detrimental impacts to the public health, safety, and welfare, it is important to consider that a conforming cul de sac is limited to 20 units. The subject application represents an increase of 3 units. ** * Staff found that safety will not be impacted by the three additional units as the cul-de-sac street and intersection is in all other manners conforming with design requirements and capable

> of handling the additional vehicle trips. * * * TVF&R makes the determination of whether the number of lots poses a safety concern. According to Eric McMullin, TVF&R requires two (2) accesses for safety when more than 25 residential houses are on a street. Here, that standard is met because only 23 houses will be served. * * *" Record 28-29.

The above findings are adequate to explain the competing considerations in limiting the length of culs-de-sac and why the city believes allowing the cul-de-sac to exceed 200 feet in length will not, given the existing street system and surrounding traffic facilities, "be detrimental to the public health, safety, and welfare or injurious to the rights of other owners of property," as required by the public health, safety and welfare criterion (c). The city relies primarily on the small deviation from the limit of 20 houses to explain why it does not believe that small deviation will be a detriment to the public health, safety and welfare. While petitioner clearly disagrees with that reasoning, our role is not to second guess the city in applying such a subjective standard, at least not where there is at best conflicting evidence to support petitioner's contrary view that those three additional houses will be detrimental to the public health, safety and welfare.

Most of the argument that petitioner presents in this appeal focuses on TVF&R fire code requirements that are not directly applicable here. That TVF&R fire code requirement apparently calls for a road to have two or more fire apparatus accesses if the road serves 25 or more dwellings. While the proposed cul-de-sac will only serve 23 dwellings, the short "Street A" that connects the cul-de-sac to 74th Avenue to the west, serves four more dwellings. If those four dwellings are added to the 23 dwellings on the cul-de-sac, Street A and the cul-de-sac would serve 27 dwellings.[24] In his petition for review, petitioner questions whether TVF&R was aware that combined Street A and the cul-de-sac would represent a single access roadway serving 27

[24] The subdivision adjoins 74th Avenue, but the northerly 27 lots will all be provided with access by Street A or the disputed cul-de-sac. Street A travels east from 74th Avenue a short distance and provides access to four lots, lots 24, 25, 26, and 27. At that point, Street A will end. A future southern extension of 73rd Avenue would connect Street A to roadways to the north. But until that happens, Street A stops where the cul-de-sac begins. As noted in the text, unless and until 73rd Avenue is extended south to connect with Street A, Street A and the cul-de-sac represent a combined single access road that will serve 27 dwellings.

dwellings. Assuming that it did not know, petitioner questions whether TVF&R might have objected to the proposal on safety grounds.

Notwithstanding petitioner's speculation, TVF&R did not object to the proposal. We do not know if TVF&R was aware of the fact that Street A and the cul-de-sac together would constitute a single access street serving 27 houses until 73rd Avenue is extended south to provide a second access to the subdivision. Admittedly most of the discussion focused on the 23 houses that would be served by the cul-de-sac, because the adjustment to the 20-house cul-de-sac requirement was the central issue. But there is no reason to assume, as petitioner does, that TVF&R was unaware of the four houses that will be served by Street A. Moreover, it is far from clear to us that the 25 house limit would lead TVF&R to conclude that a single access road that serves 27 houses is unsafe. TVF&R's memorandum to petitioner also notes that under the City of Tigard fire code and model national fire code, up to 30 homes may be served by a road with a single access. Record 204, 206.

In summary, we do not agree with petitioner that it can be or must be assumed that TVF&R was unaware that Street A and the cul-de-sac would be a one-access roadway serving 27 dwellings until SW 73rd Avenue is extended south at some time in the future. The city relied in part on TVF&R's failure to express any public safety concern in finding that the proposed cul-de-sac satisfies the public health, safety and welfare criterion (c). The city's findings adequately express its rationale and are supported by substantial evidence in the record.

This subassignment of error is denied.[25]

The third assignment of error is denied.

[25] Because we reject petitioner's challenge concerning the public health, safety and welfare criterion (c), we need not and do not consider the city's alternative findings concerning the alternative adjustment criterion provided by TCDC 18.370.020(C)(11).

FOURTH ASSIGNMENT OF ERROR

In *Frewing I*, we sustained petitioner's subassignment of error 5(K) in part and denied it in part. As we have already explained earlier in our discussion under section (D)(2) of the second assignment of error above, we rejected petitioner's interpretive argument concerning the 20% landscaping requirement of TCDC 18.350.100(B)(3)(g)(1) in *Frewing I*. To the extent petitioner attempts to reargue that interpretation under the fourth assignment of error, we reject that attempt for the same reason we rejected it under section (D)(2) of the second assignment of error. However, in *Frewing I*, we sustained subassignment of error 5(K) in part, because neither the city nor intervenor responded to petitioner's contention that the applicant failed to provide a landscape plan to protect existing vegetation as much as possible, as required by TCDC 18.745.030(E).[26]

On remand, the city adopted the following findings:

> "LUBA had found that since the applicant had not prepared a tree plan, there was inadequate evidence to evaluate the petitioner's claim that vegetation was not being protected. The applicant has submitted the required tree plan, including a protection program. Apart from the areas that will be disturbed to construct the infrastructure (sewer, water, storm drainage, streets, etc.) and the lots that will be graded for soil stability and proper drainage, the remainder of the site will be required to be protected from disturbance. The applicant will be required to erect protection fencing round each tree or group of trees to be retained. To ensure that the remaining vegetation is protected as much as possible, the following conditions should be required.
>
> "* * * * *

[26] 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)."

"Prior to commencing any site work, the applicant shall submit construction drawings that include the approved Tree Removal, Protection and Landscape Plan. The 'Tree Protection Steps' identified in Teragan & Associates Letter of November 19, 2004 shall be reiterated in the construction documents. The plans shall also include a construction sequence including installation and removal of tree protection devices, clearing, grading, and paving. Only those trees identified on the approved Tree Removal plan are authorized for removal by this decision.

"Prior to commencing any site work, the applicant shall establish fencing as directed by the project arborist to protect the trees to be retained. The applicant shall allow access by the City Forester for the purpose of monitoring and inspection of the tree protection to verify that the tree protection measures are performing adequately. Failure to follow the plan or maintain tree protection fencing in the designated locations shall be grounds for immediate suspension of work on the site until remediation measures and/or civil citations can be processed.

"* * * * *

"Prior to issuance of building permits, the applicant shall submit site plan drawings indicating the location of the trees that were preserved on the lot, location of tree protection fencing, and a signature of approval from the project arborist regarding the placement and construction techniques to be employed in building the house. All proposed protection fencing shall be installed and inspected prior to commencing construction, and shall remain in place through the duration of home building. After approval from the City Forester, the Tree protection measures may be removed." Record 31-33.

TCDC 18.745.030(E) provides that "[e]xisting vegetation on a site shall be protected as much as possible." However, TCDC 18.745.030(E)(1) implicitly recognizes that much of the vegetation on subdivision lots will be displaced by houses and the construction process. That is particularly true where the residential lots are relatively small, as is the case here. We have already seen that the City of Tigard emphasizes protection of larger trees. The same measures that must be employed to protect those larger trees and their root systems during the construction process (snow fencing) will have the incidental effect of protecting some of the existing vegetation from the construction and house building process. Beyond that, vegetation in the large common area that is to be protected from development will be protected. We understand the city to have found that this process, which is focused on protecting large trees in the developed area and protecting the

common area from development, is sufficient to satisfy the TCDC 18.745.030(E) requirement to protect "existing vegetation on [the] site" "as much as possible."

Even if it is possible to read TCDC 18.745.030(E) to impose a much more rigorous effort to protect existing vegetation on lots that are to be developed residentially, we do not believe the city is required to embrace such an interpretation. Presumably once the lots are developed and sold, the new owners will be free to remove any existing vegetation they wish to remove, to accommodate lawns and gardens and other uses of the lot. The requirement to fence off the large trees that are to be saved will present the lot purchasers with the option of retaining existing vegetation near the retained trees if they wish. Most or all of the vegetation in the common area will remain. The city's implicit interpretation and application of TCDC 18.745.030(E) to allow that approach to suffice to protect "existing vegetation on [the] site" "as much as possible" is not reversibly wrong under ORS 197.829(1), and we defer to the city's interpretation and application of TCDC 18.745.030(E) in this case.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Under his fifth assignment of error, petitioner argues that the city allowed the applicant to submit evidence and argument following our remand in *Frewing I* so close to the February 8, 2005 city council hearing on remand, that there was not sufficient time for city planning staff and city council consideration of that material, and there was not sufficient time for petitioner to be allow to rebut that evidence and argument.

Intervenor responds:

> "The Applicant believes it is beyond debate that participants in the land use system may submit evidence until the record closes. The timing of any submissions by a party may trigger additional procedures to avoid prejudice to other parties, and may, in some cases, even require a record to be reopened. ORS 197.763(6)(c).
>
> "In this case, the City's planning staff responded to all of Petitioners pre-hearing requests for information. He received the Applicant's remand submission. Petitioner was at the hearing and was given time to respond to that evidence. When

> Petitioner arrived at the remand hearing, he heard all of the evidence that was submitted in this matter. He was then given an opportunity to respond. Petitioner exclaimed that he did not have sufficient notice and an opportunity to examine some of the evidence to fully respond at that time. Accordingly, the city afforded Petitioner an opportunity to present orally the objections he did have and gave him an additional period of time to submit additional written responses. Petitioner complied with that procedure and submitted a voluminous written response. (Rec. 147-208) The procedure followed by the City is consistent with both its own code and state law. ORS 197.763. In fact, the City went above and beyond state law in that it granted Petitioner an additional opportunity to respond even though the remand hearing was not the initial evidentiary hearing. Petitioner's argument under his Fifth Assignment of Error is not basis for remand." Intervenor-Respondent's Brief 30.

We agree with intervenor. The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner makes what appear to be two arguments under this assignment of error. In its decision on remand, the city adopted a resolution. In that resolution the city council notes that it is responding to LUBA's remand in *Frewing I*, states that it has reviewed "additional evidence and staff's analysis," and then states:

> "The Tigard City Council approves * * * Ash Creek Estates Subdivision – 'REMAND', subject to the conditions of approval stated the staff's January 25, 2005 report to Council, attached hereto as Exhibit A and incorporated herein by this reference." Record 4.

We understand petitioner to argue that the above-quoted language in the resolution is sufficient to incorporate the conditions of approval in the attached staff report, but it is not sufficient to adopt the attached 28-page staff report itself as *findings* in support of its decision. Even if it is possible to read the resolution language narrowly to say what petitioner says it says, it is just as possible to read that language to incorporate the entire 28-page staff report as part of the city council's decision on remand. The city clearly intended the latter meaning, and we reject petitioner's argument that the city council's decision should be interpreted to the contrary.

Next petitioner complains that the city relies both on findings that were adopted to support its decision in *Frewing I* and on the findings and conditions in the 28-page staff report. Petitioner

contends that where decisions incorporate findings from multiple sources there is the possibility of conflict and confusion. Petitioner is certainly correct about that, and we have pointed out the problem on several occasions. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239, 249-50, *aff'd* 189 Or App 335, 75 P3d 922 (2003); *Hannah v. City of Eugene*, 35 Or LUBA 1, 4, *aff'd* 157Or App 396, 972 P2d 1230 (1998); *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98, 106 (1992). But the only specific example of conflict or confusion that petitioner cites is to compare conditions 31 and 54. We do not see that those conditions are in conflict or that they create any confusion that would warrant remand.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

In this assignment of error, petitioner asks that we consider certain issues that he contends were not resolved on their merits in our 45-page slip opinion in *Frewing I*. With one possible exception, all of the arguments petitioner requests that we consider now were presented in support of assignments of error or subassignments that we rejected in *Frewing I*. If petitioner believed those arguments should have led LUBA instead to sustain those assignments of error or subassignments of error, his remedy was to appeal our decision in *Frewing I* to the Court of Appeals. Having failed to do so, he may not reassert those arguments in this appeal.

The possible exception concerns the TCDC 18.350.100(B)(3)(a)(1) requirement that trees be retained to "the greatest degree possible." Petitioner contends that while LUBA rejected his interpretation of TCDC 18.350.100(B)(3)(a)(1) to require consideration of fundamental redesign of the proposal to preserve trees where possible, the issue of whether the current, changed proposal for retention and preservation of trees is consistent with TCDC 18.350.100(B)(3)(a)(1) is an issue that is properly presented in this appeal. Petitioner simply cross-references arguments that he presented elsewhere in his petition for review. We consider those arguments in section D(1) of our discussion under the second assignment of error.

Except as noted above, the seventh assignment of error is denied.

The city's decision is remanded in accordance with our resolution of subassignment of error 2(D)(1).