

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

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4                                   ROBERT PATERSON  
5                                   *Petitioner,*

6  
7                                   vs.

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9                                   CITY OF BEND  
10                                  *Respondent,*

11  
12                                  and

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14                                  BRIAN DRAMEN, MARK DRAMEN  
15                                  and GORDON DRAMEN  
16                                  *Intervenors-Respondent.*

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18                                  LUBA No. 2004-155

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20                                  FINAL OPINION  
21                                  AND ORDER

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23                                  Appeal on remand from Court of Appeals.

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25                                  William Hugh Sherlock, Eugene, represented petitioner.

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27                                  Peter M. Schannauer, Bend, represented respondent.

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29                                  Elizabeth A. Dickson, Bend, represented intervenor-respondent.

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

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34                                  REMANDED

10/20/2005

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

Opinion by Bassham.

On April 5, 2005, this Board issued an opinion in this appeal, sustaining part of petitioner's third assignment of error and his fourth assignment of error, and remanding the city's decision. We rejected a subassignment of error under the first assignment of error that the hearings officer erred in substituting a condition of approval for a finding of compliance with a code criterion requiring that the development plan include a "schedule for initiation of improvements" and a transportation plan. The hearings officer noted that it was "unclear" under the development plan how access to phase 1 of the development would be provided, and imposed a condition requiring the applicant to demonstrate that there will be street access for each phase of development. The hearings officer did not find that providing such access to phase 1 from one of the four access points to the property was "feasible," a finding required under a line of LUBA and appellate cases in certain circumstances. However, we concluded that the hearings officer had implicitly made such a finding, because he obviously believed that providing such access to phase 1 from one of the four access points was feasible, and petitioner identified no reason to believe otherwise. *Paterson v. City of Bend*, 49 Or LUBA \_\_\_ (LUBA No. 2004-155, April 5, 2005) slip op 4.

On appeal, the Court of Appeals affirmed our decision in all respects except for our resolution of the subassignment of error described above. The court agreed that, in principle, nothing "precludes the city from, in effect, postponing a showing of compliance with specific development criteria until the final plat approval, provided there is a showing that compliance is feasible." *Paterson v. City of Bend*, 201 Or App 344, 349, \_\_\_ P3d \_\_\_ (2005). However, because the hearings officer had noted that the location of street access to phase 1 was "unclear," the court could not conclude that the hearings officer implicitly made a finding or showing that providing access was feasible. *Id.* Accordingly, the court reversed our decision in part and remanded with instructions to remand to the city for further consideration of that issue.

The city's decision is remanded for the reasons stated in our April 5, 2005 opinion and the court's August 31, 2005 opinion.