

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PREMIER DEVELOPMENT, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF McMinnville,
10 *Respondent.*

11
12 LUBA No. 2005-065

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of McMinnville.

18
19 Norman R. Hill, Salem, filed the petition for review and argued on behalf of petitioner. With
20 him on the brief was Webb, Martinis and Hill.

21
22 Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of respondent.
23 With him on the brief was Miller Nash, LLP.

24
25 DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
26 participated in the decision.

27
28 REMANDED

12/20/2005

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision approving a zone change from a county zoning designation, EF-80, to a city zoning designation, R-2 PD, and granting preliminary approval of a 99-lot planned unit development.

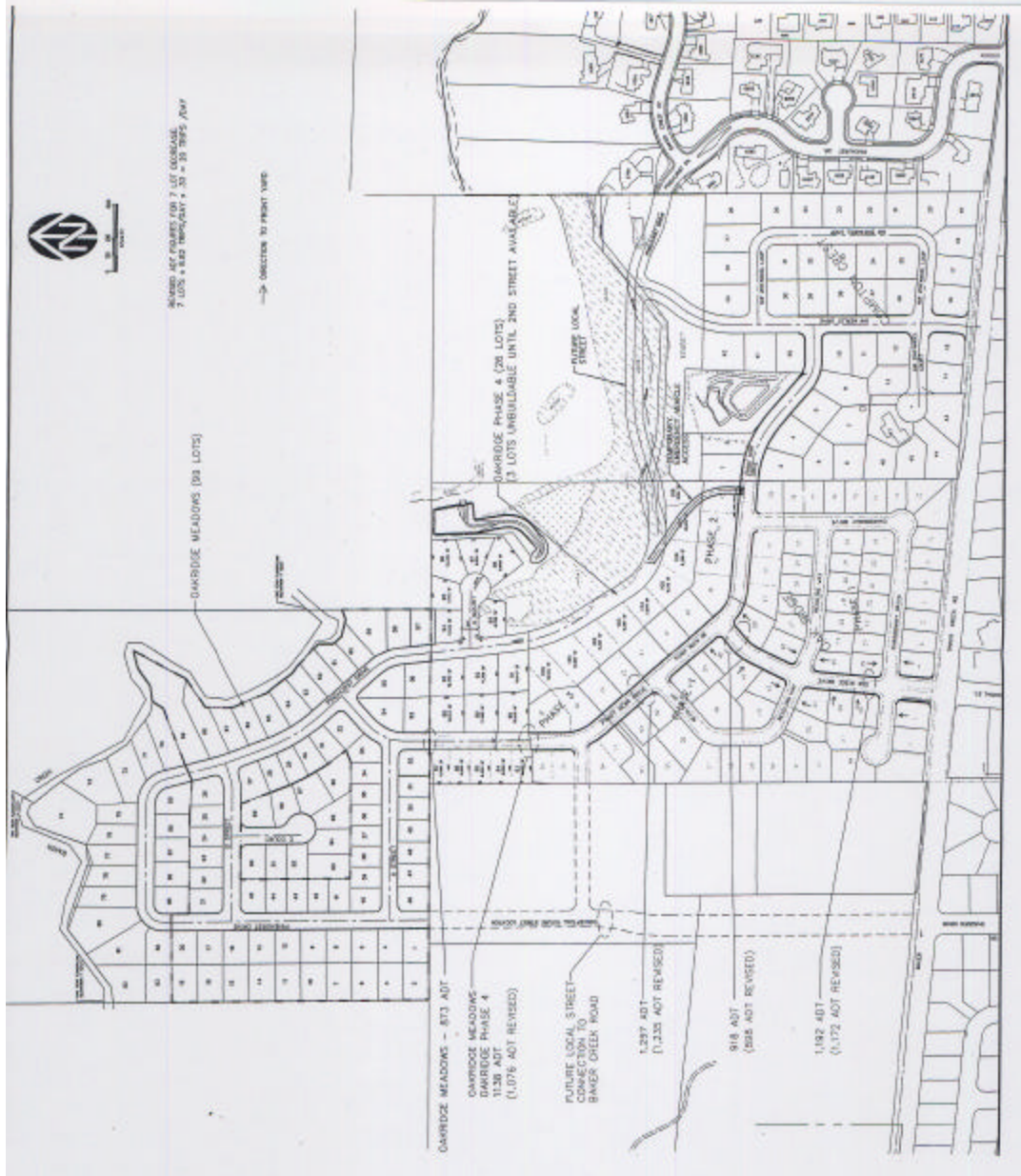
FACTS

The subject property, a 22.3-acre site, was recently annexed into the city. On November 15, 2004, petitioner filed an application for approval of a zone change redesignating the subject property from a county zoning designation, EF-80 (Exclusive Farm Use – 80-acre minimum) to a city zoning designation, R-2 PD (Single-Family Residential Planned Development).

A creek borders the subject property on the north and east sides, substantially limiting options for access to and from the proposed development. The eastern portion of the southern boundary of the subject property abuts a developed residential subdivision known as the Oak Ridge subdivision.¹ See map on following page. To the east of Oak Ridge subdivision is the Compton Crest subdivision. The application proposed only one means of accessing the public street system—through the Oak Ridge subdivision via a northern extension of Pinot Noir Drive. Connections between Pinor Noir Drive and Baker Creek Road would be via Oak Ridge Drive or Merlot Drive. Petitioner proposed to construct street stubs where Pinehurst Drive exits the proposed development at two points along the southern boundary of the development to connect to future streets when neighboring properties develop.

On February 22, 2005, the city council conducted a public hearing, at which there was extensive discussion of possible increased congestion on the local streets to the south of the

¹ The proposed subdivision is Oak Ridge Meadows, and the subdivision to the southeast is the Oak Ridge subdivision.



- 1 proposed development, specifically, congestion anticipated at the intersection of Oak Ridge Drive
- 2 and Pinot Noir Drive. Petitioner and the opponents to the proposal submitted traffic impact studies
- 3 addressing the possible traffic congestion. At the public hearing, petitioner suggested three

1 alternatives to the access initially proposed in its application.² Petitioner proposed the following
2 condition of approval to address the anticipated congestion:

3 “The Applicant shall not be entitled to plat or construct more than 76 lots unless it
4 demonstrates that an additional public street is available to provide access to the
5 subdivision, in addition to the streets currently proposed.” Record 22-23.

6 Planning staff drafted findings consistent with petitioner’s proposed condition. However, on March
7 22, 2005, when the city council reconvened to review the findings, it directed staff to redraft the
8 findings. The ordinance adopting the zone change included the following condition of approval:

9 “That the number of lots allowed within the Oak Ridge Meadow subdivision shall
10 be limited to a maximum of 76 lots. Additional lots may be permitted consistent
11 with the submitted tentative plan upon the completion and acceptance of public
12 street improvements to City standards that extend south from Pinehurst Drive (as
13 labeled on the applicant’s submitted tentative subdivision plan) and connect to
14 Baker Creek Road.” Record 9.³

15 This appeal challenging that condition of approval followed.

16 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

17 **A. Comprehensive Plan Policies**

18 The McMinnville Comprehensive Plan (MCP) provides a suggested traffic volume range of
19 1,000 to 1,200 vehicles per day for local streets. MCP Goal VI (Transportation System), Policy

² Petitioner’s attorney submitted a letter at the March 8, 2005 hearing that provided as follows:

“As discussed in the Staff Report and at the prior hearing, it is anticipated that in the future that there may be access to the west via the Shadden Claim property, to the east via Compton Crest or by conversion of the temporary vehicle access shown on the street plan to a public street.” Record 23.

³ In addressing a different code provision requiring adequate access to and efficient provision of services to adjoining parcels, McMinnville City Zoning Ordinance (MCZO) 17.51.030.C(3), the challenged findings also provide:

“Adequate access and services will be provided within the proposed development through the construction of streets and sidewalks, and by limiting future development beyond 76 lots to the provision of additional direct access to Baker Creek Road through the southerly extension of Pinehurst Drive to Baker Creek Road, as conditioned by this approval.” Supplemental Record 10.

1 122.00(3).⁴ The challenged decision cites that policy, as well as residential design policies 79.00
2 and 99.00 of the MCP’s housing goal, in support of the condition challenged in this appeal.⁵ In its
3 first assignment of error, petitioner argues that the city’s findings are not supported by substantial
4 evidence. In its second assignment of error, it argues that the findings are inadequate in various
5 respects.

6 **1. Adequacy of Findings**

7 The parties agree that the findings must (1) identify the relevant approval standards; (2) set
8 out the facts which are believed and relied upon; and (3) explain how those facts lead to the

⁴ Policy 122.00 of the MCP’s transportation goal provides, in pertinent part:

“The City of McMinnville shall encourage the following provisions for each of the three functional road classifications:

“* * * * *

“3. Local Streets

“* * * * *

“-Traffic volumes should be less than 1,000 to 1,200 vehicles per day.”

⁵ Policy 79.00 provides:

“The density allowed for residential developments shall be contingent on the zoning classification, the topographical features of the property, and the capacities and availability of public services including but not limited to sewer and water. Where densities are determined to be less than that allowed under the zoning classification, the allowed density shall be set through adopted policies enumerating the reasons for the limitations, or shall be applied to the specific area through a planned development overlay. In no case shall densities greater than those allowed by the zoning classification be allowed, except where specifically provided in the zoning ordinance.”

Policy 99.00(3) provides:

“An adequate level of urban services shall be provided prior to or concurrent with all proposed residential development. Services shall include, but not be limited to:

“3. Streets within the development and providing access to the development, improved to city standards (as required).”

1 decision on compliance with the approval standards. *Wood v. Crook County*, 36 Or LUBA 143,
2 157 (1999). The parties do not agree, however, that the city’s findings satisfy that standard.⁶

3 Petitioner first argues that the city’s findings are inadequate because they do not explain the
4 city’s rationale for requiring a *direct* connection from the proposed development to Baker Creek
5 Road. It alleges that the city failed to consider other alternatives proposed by petitioner. The city
6 concedes that the findings do not explain why the alternatives offered by petitioner were rejected.
7 However, it notes that petitioner does not cite anything in the record that indicates that its suggested
8 alternatives are adequate to address the traffic congestion expected from the proposed
9 development.

10 We need not decide in this case whether the city was required to adopt findings addressing
11 and/or rejecting petitioner’s suggested alternatives, because even if it was, that omission does not

⁶ The city’s findings supporting imposition of the condition provide:

“Policies 79.00, 99.00(3), and 122.00 are satisfied by the request, as residential development will occur, as conditioned, commensurate with the ability of the existing and planned street system to accommodate traffic without unduly impacting the livability of the neighborhood. This will be accomplished by the requirement for additional public street access to Baker Creek Road as a prerequisite to platting of lots in excess of 76 (to a maximum of 99). This condition results from testimony received from opponents to this proposed development, and the findings of their traffic engineer (study dated December 13, 2004, authored by The Transpo Group). This traffic study concluded that if Oak Ridge Meadows is developed as proposed (99 lots), streets within portions of the adjacent Oak Ridge neighborhood would experience weekday traffic volumes that would exceed the ‘environmental capacity’ of these streets and have a resultant detrimental impact on the livability of the adjacent neighborhood. This is contrary to McMinnville comprehensive plan policy and zone change criteria. As recommended by The Transpo Group study, this impact could be mitigated by reducing the number of lots allowed within the subject Oak Ridge Meadows subdivision, by constructing an additional street connection to Baker Creek Road, or combination of these two measures. [Footnote omitted].

“The applicant offered into the record a study conducted by its own traffic engineer, DKS Engineering. The traffic studies submitted into this record were crafted based, in part, on different assumptions and data and provided conflicting results and recommendations. Having thoroughly reviewed and considered this information as well as additional testimony received relative to this issue, in addition to their knowledge of the subject site and surrounding area, the Council determined to afford greater weight to the study offered by The Transpo Group and, as such, agreed with its conclusions and recommendations. To satisfy these plan policies the City has, therefore, conditioned the Oak Ridge Meadows development such that phasing of the lots would occur as recommended by the opponents’ traffic engineer, and described in the conditions of approval for this subject zone change and subdivision.” Supplemental Record 8.

1 provide a basis for reversal or remand here. *See* ORS 197.835(11)(b).⁷ In this case, the record
2 clearly reflects that the challenged condition, rather than petitioner’s proposed condition, was
3 adopted because the city was not convinced that the other alternatives proposed by petitioner
4 would solve the traffic congestion problem. Record 12.⁸

5 In response to petitioner’s argument that the findings fail to explain how the challenged
6 decision complies with the policies referenced in those findings, the city offers the following
7 response:

8 “Policies 79.00, 99.00(3), and 122 are interrelated. Policy 79.00 provides that
9 residential density is contingent on the capacities and availability of public services.
10 Policy 99.00(3) requires provision of an adequate level of urban services prior to or
11 concurrent with residential development, including streets providing access to the
12 development improved to city standards. Policy 122.00 establishes the City’s
13 traffic volume standard for local streets. The condition limits full build-out of the

⁷ ORS 197.835(11)(b) provides:

“Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

⁸ The minutes of the April 12, 2005 hearing reflect the following discussion:

“Councilor Springer reviewed the three proposed avenues of entering and exiting the subdivision and stated that it was his belief that the Council had asked that the access would be direct to Baker Creek Road, as suggested in Alternative One (extend south from Pinehurst Drive – as labeled on the applicant’s submitted tentative subdivision plan) and connect with Baker Creek Road. He stated that it was his understanding that was the plan that he had voted on.

“Councilor Olson agreed with Councilor Springer and stated that he did not believe that an access way that traveled through Crestbrook would remove any traffic pressure from the subdivision. Following discussion, Councilor Olson suggested an amendment which provided that no more than 76 houses could be constructed without direct access to Baker Creek Road but not running through Crestbrook or in front of Mr. Toth’s home. He asked that just the first alternative be left in the ordinance.

“Following discussion, Councilor Olson MOVED to table the discussion and direct staff to recraft Paragraph Five of the proposed ordinance to reflect no more than 76 lots without direct access to Baker Creek Road; Councilor Springer SECONDED the motion. Motion PASSED unanimously.” Record 11-12.

1 subdivision until sufficient street capacity is available pursuant to City standards to
2 serve additional houses. The condition thereby ensures compliance with all three
3 policies. The City submits that the finding quoted above adequately explains how
4 these standards apply and why the condition was imposed based on these
5 standards.” Respondent’s Brief 7-8 (footnotes and citations omitted).

6 We agree with the city.

7 **2. Substantial Evidence**

8 In its first assignment of error, petitioner argues that the challenged condition is not
9 supported by substantial evidence. It alleges that the evidence the city relied upon is insufficient
10 because it does not take into account the alternate routes petitioner suggested, and that there is “not
11 sufficient evidence on the record as a whole to demonstrate that the southwestern extension of
12 Pinehurst is the only acceptable alternative.” Petition for Review 8, 9.

13 Respondent responds, we believe correctly, that the question is whether the challenged
14 decision is supported by substantial evidence, not “whether [the city] could have made a different or
15 ‘better’ decision.” Respondent’s Brief 3. We agree with respondent that petitioner’s argument,
16 which focuses on the decision’s failure to demonstrate that the required access is the *only*
17 acceptable alternative, misses the point. The city is not required to demonstrate that the required
18 access is the only possible alternative, or even the best alternative, that will ensure compliance with
19 the applicable criteria. Rather, the inquiry presented in petitioner’s first assignment of error is
20 whether the condition that the city did impose is supported by substantial evidence in the record.
21 For the following reasons, we conclude that it is.

22 As the challenged findings explain, the city council reviewed the traffic impact analysis of the
23 opponents to the proposal and the traffic impact analysis prepared by petitioner’s expert. *See* n 6.
24 Petitioner’s expert assumed that once a certain level of congestion was reached on Oak Ridge
25 Drive, approximately one third of the traffic from the proposed development would be diverted
26 away from Oak Ridge Drive and continue east on Pinehurst Drive, to access Baker Creek Road via
27 Merlot Drive. With that anticipated diversion of traffic, petitioner’s expert concluded that the traffic
28 numbers would be consistent with the goal of 1,200 vehicle trips per day. The city, however,

1 decided “to afford greater weight” to the opponent’s expert, and relied on the conclusions and
2 recommendations of that study as a basis for imposing the challenged condition.⁹

3 Substantial evidence is evidence upon which a reasonable person would rely in reaching a
4 decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475
5 (1984). Where LUBA concludes that a reasonable person could reach the decision made by the
6 local government, in view of all of the evidence in the record, the choice between conflicting
7 evidence belongs to the local government. *Younger v. City of Portland*, 305 Or 346, 360, 752
8 P2d 262 (1988). Where a reasonable person could have chosen to rely on a particular expert’s
9 conclusions, a local government may choose to believe that expert over another expert expressing a
10 contradictory opinion. *Molalla River Reserve Inc. v. Clackamas County*, 42 Or LUBA 251,
11 268 (2002).

12 In this case, the city relied on the opponents’ expert’s conclusions and adopted its
13 recommendation regarding the required access. We agree with the city that petitioner’s proposed
14 condition that allows a secondary access in a different location “does not undermine the
15 substantiality of the evidence relied upon by the [city].” Respondent’s Brief 4. The city imposed
16 the challenged condition, which was recommended in the opponents’ expert’s traffic impact
17 analysis. Petitioner offers no reason to question the qualifications of that expert, and the city was
18 entitled to rely on that expert’s recommendation, rather than on the conclusions of petitioner’s

⁹ The footnote omitted in the findings referenced in n 6 provides:

“The Transpo Group ‘Findings,’ found on page 7 of their December 13, 2004 study, states:

“Our analysis indicates that the Oak Ridge Meadows development, proposed as 120 new dwelling units, will generate new traffic along Oak Ridge Drive and Pinot Noir Drive in excess of the City’s standard. These impacts can be mitigated, either by:

- “(1) Limiting the number of new lots within the proposed Oak Ridge Meadows subdivision from 120 to approximately about 65 (until such time as additional, direct street connections to Baker Creek Road are constructed), or
- “(2) Ensuring a fully accessible, second public access and direct connector between Oak Ridge Meadows and Baker Creek Road via the lands immediately southwest of the proposed site.” Supplemental Record 8.

1 expert. We therefore conclude that the condition, which was based upon the opponent's
2 recommendation, is supported by substantial evidence in the record.

3 **B. MCZO 17.72.035**

4 Finally, petitioner argues that the findings are inadequate because they fail to explain how the
5 challenged condition complies with MCZO 17.72.035.¹⁰ The city asserts that the challenged
6 condition was not imposed to ensure compliance with MCZO 17.72.035 and that the findings were
7 therefore not required to address how the condition complies with that provision.

8 While we agree that the condition of approval was likely not imposed in order to ensure
9 compliance with MCZO 17.72.035, we disagree with the city that it was not required to adopt
10 findings addressing consistency of the condition with that code provision. The requirement to
11 address needed housing and to give "added weight" to the MCP's housing policies is found in
12 MCZO 17.72.035. *See* n 10. Petitioner alleges that the challenged decision is void of any
13 discussion of whether or how the challenged condition impacts needed housing, and in particular

¹⁰ MCZO 17.72.035 provides the applicable zone change criteria:

"An amendment to the official zoning map may be authorized, provided that the proposal satisfies all relevant requirements of this ordinance, and also provided that the applicant demonstrates the following:

- "A. The proposed amendment is consistent with the goals and policies of the Comprehensive Plan;
- "B. The proposed amendment is orderly and timely, considering the pattern of development in the area, surrounding land uses, and any changes which may have occurred in the neighborhood or community to warrant the proposed amendment;
- "C. Utilities and services can be efficiently provided to serve the proposed uses or other potential uses in the proposed zoning district.

"When the proposed amendment concerns needed housing (as defined in the McMinnville Comprehensive Plan and state statute), criterion 'B' shall not apply to the rezoning of land designated for residential use on the plan map.

"In addition, the housing policies of the McMinnville Comprehensive Plan shall be given added emphasis and the other policies contained in the plan shall not be used to: (1) exclude needed housing; (2) unnecessarily decrease densities; or (3) allow special conditions to be attached which would have the effect of discouraging needed housing through unreasonable cost or delay."

1 does not explain the interplay between the comprehensive plan’s residential and transportation
2 policies. Petition for Review 12. We read petitioner’s needed housing argument as an argument
3 that the findings fail to address the needed housing language in MCZO 17.72.035.

4 The city argues, first, that petitioner did not raise this issue in the local proceedings and that
5 it is therefore waived. ORS 197.835(3).¹¹ It alleges that petitioner only discussed needed housing
6 in the context of supporting its proposal to rezone the property to R-2 PD, but did not argue that
7 the challenged condition would unreasonably delay needed housing.

8 The challenged condition of approval, however, first appeared in the final decision, and
9 petitioner could not have been expected to raise issues regarding it at the local proceedings. *See*
10 *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998) (ORS 197.835(3) does not require a
11 petitioner to raise issues concerning a condition of approval where the condition of approval first
12 appeared in the final decision.). We will therefore address petitioner’s needed housing argument.

13 We question the validity of the substance of petitioner’s needed housing argument,
14 presented in its third assignment of error, *i.e.*, whether the challenged condition has the effect of
15 unreasonably burdening or delaying needed housing. However, the challenged decision completely
16 misquotes the applicable approval criterion, and omits any reference to the needed housing language
17 in MCZO 17.72.035.¹² The omitted language, for instance, clarifies that with regard to a zoning

¹¹ ORS 197.835(3) provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

¹² The challenged decision quotes MCZO 17.72.035 as follows:

“17.72.035 Review Criteria. An amendment to the official zoning map may be authorized, provided that the proposal satisfies all relevant requirements of this ordinance, and also provided that the applicant demonstrates the following:

- “A. The proposed amendment is consistent with the goals and policies of the comprehensive plan;
- “B. The proposed amendment is orderly and timely, considering the pattern of development in the area, surrounding land uses, and any changes which may have occurred in the neighborhood or community to warrant the proposed amendment;

1 map amendment concerning needed housing, subsection (B), which requires that the proposal be
2 “orderly and timely,” does not apply. However, the challenged decision treats that subsection as
3 applicable, adopts findings addressing it, but then fails to address the applicable needed housing
4 language.¹³ Consequently, its findings are inadequate in this regard. Remand is appropriate for the
5 city to address, in the first instance, the needed housing language in MCZO 17.72.035 and to
6 explain how the challenged decision, and specifically the challenged condition, complies with that
7 language.

8 The first assignment of error is denied.

9 The second assignment of error is sustained in part and denied in part.

10 **THIRD ASSIGNMENT OF ERROR**

11 Petitioner argues that the city violated MCZO 17.72.035 by imposing the challenged
12 condition because it has the effect of unreasonably burdening or delaying needed housing. Because
13 we sustain petitioner’s findings challenge in this regard, we need not address petitioner’s third
14 assignment of error. On remand, the city shall address how the challenged decision, and the
15 condition of approval in particular, complies with the language of MCZO 17.72.035 that the city
16 omitted from the challenged decision.

17 The city’s decision is remanded.

“C. Utilities and services can be efficiently provided to serve the proposed use or other potential uses within the proposed zoning district.” Supplemental Record 7.

Compare full quotation of MCZO 17.72.035 at n 10.

¹³ The challenged findings address only subsections (A), (B) and (C) of MCZO 17.72.035, stating, in relevant part:

“The applicable requirements of Section 17.72.035 (Review Criteria) of the McMinnville Zoning Ordinance are satisfied by the request in that the proposal is consistent with the goals and policies of the Comprehensive Plan as demonstrated in Conclusionary Findings for Approval No. 1 listed above. This request is orderly and timely considering the pattern of development in the surrounding area and the intent to develop this land in a manner and at a density consistent with the City’s Comprehensive Plan Map and Zoning Ordinance, and with the recently adopted ‘McMinnville Growth Management and Urbanization Plan.’ Utilities and services are available to the subject site commensurate with the proposed subdivision’s needs.” Supplemental Record 10.