

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 HELENE BICKFORD, GARY BICKFORD,  
5 JUDY DOBSON and KENNETH DOBSON,  
6 *Petitioners,*  
7

8 vs.  
9

10 CITY OF TIGARD,  
11 *Respondent,*  
12

13 and  
14

15 GAGE FOREST, LLC,  
16 *Intervenor-Respondent.*  
17

18 LUBA No. 2006-035  
19

20 FINAL OPINION  
21 AND ORDER  
22

23 Appeal from City of Tigard.  
24

25 Kenneth Dobson, Portland, filed the petition for review and argued on behalf of  
26 petitioners. With him on the brief was The Dobson Law Firm, LLC.  
27

28 No appearance by City of Tigard.  
29

30 Andrew H. Stamp, Lake Oswego, filed the response brief and argued on behalf of  
31 intervenor-respondent.  
32

33 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.  
34

35 AFFIRMED

07/27/2006

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

**NATURE OF THE DECISION**

Petitioners appeal a city decision that grants subdivision approval and an adjustment to city street spacing requirements.

**MOTION TO INTERVENE**

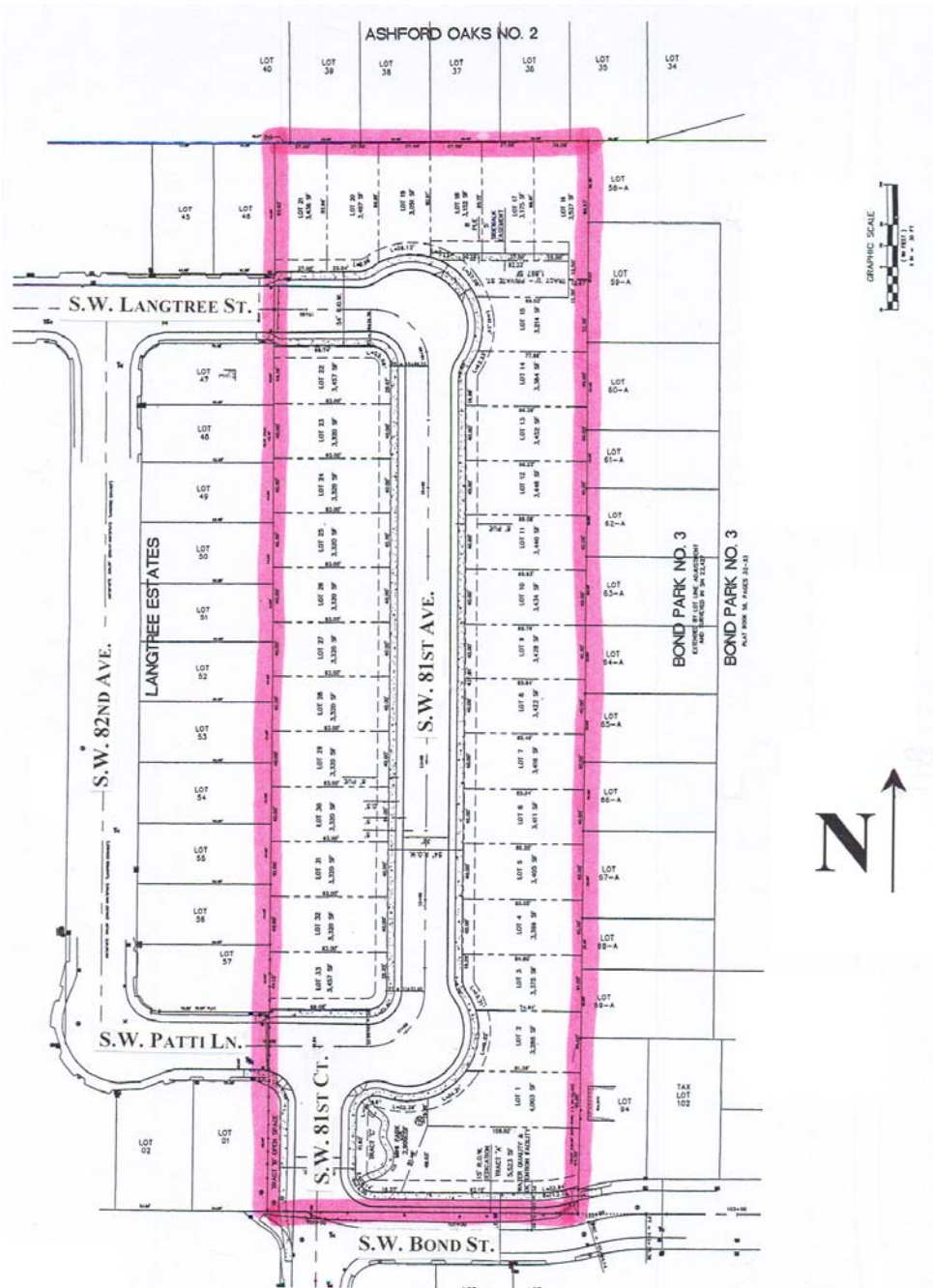
Gage Forest LLC (intervenor), the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

**FACTS**

The subject 3.97-acre parcel is zoned R-12. The R-12 zone is a residential zone that allows single family dwellings on lots as small as 3,050 square feet. Intervenor proposes to divide the parcel into a 33-lot single family residential subdivision (Gage Grove). A map from the record showing the proposed subdivision appears on the next page of this opinion.

As the map shows, the proposed subdivision will be provided access from the west by SW Langtree St. and SW Patti Ln., which are existing improved streets located in Langtree Estates, an existing subdivision to the west. SW Langtree St. travels a short distance west to connect with SW Hall Blvd., a major north/south roadway. SW Bond St. connects with another major north/south roadway, SW 79<sup>th</sup> Ave., a short distance east of the proposed subdivision.

SW 81<sup>st</sup> Ct., an existing street, extends a short distance south from SW Bond St. and deadends. SW 81<sup>st</sup> Ct. presently terminates at the southern boundary of the subject property and will be extended north to connect SW Bond St. with SW Patti Ln. With that connection, traffic from Gage Grove will have the option of traveling east to SW 79<sup>th</sup> Ave. via SW 81<sup>st</sup> Ct. and SW Bond St. or traveling west to SW Hall Blvd. via SW Langtree St. The city required the SW 81<sup>st</sup> Ct. extension in order to improve street system connectivity in the area. The SW 81<sup>st</sup> Ct. extension is the target of three of petitioners' five assignments of error.



The disputed subdivision was first approved by the planning manager on September 29, 2005. Petitioners appealed that decision on October 13, 2005. The city hearings officer

1 held a public hearing in petitioners’ appeal on November 28, 2005. The hearings officer held  
2 the record open for a period of time for all parties to submit new testimony and evidence to  
3 respond to issues raised at the November 28, 2005 hearing. The record was held open for an  
4 additional period of time to allow parties to respond to that additional evidence and the  
5 applicant was allowed time to submit final legal arguments. The record closed on January 6,  
6 2006. The hearings officer reopened the record for additional evidence and legal argument  
7 and the record closed for a second time on February 8, 2006. The hearings officer rendered  
8 his decision on February 15, 2006, and this appeal followed.

## 9 **INTRODUCTION**

10 The Tigard Community Development Code (TCDC) is codified at Title 18 of the  
11 city’s code. Our citations to the TCDC in this opinion sometimes reach 12 digits. A basic  
12 understanding of how the TCDC is structured makes those citations a little easier to  
13 understand.

14 Title 18 include nine major “Sections,” for example TCDC Chapter 18.300 is “Land  
15 Use Decisions.” Each major “Section” is broken down into a number of “Chapters.” For  
16 example TCDC Chapter 18.370 is entitled “Variances and Adjustments.” Those TCDC  
17 Chapters are broken down into a number of sections.<sup>1</sup> For example TCDC Section  
18 18.370.020 is entitled “Adjustments.” Those TCDC Sections are further broken down into  
19 multi-digit subsections.

## 20 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

### 21 **A. Introduction**

22 Before turning to petitioners’ first two assignments of error which challenge the  
23 adjustment that the city approved in this matter, we set out the requirement that made the

---

<sup>1</sup> Confusingly, both the major divisions of Title 18 and the subdivisions of the chapters within each section of Title 18 are referred to as sections.

1 adjustment necessary and describe several key events during the local proceedings, as well as  
2 the hearings officer’s ultimate resolution of several disputed issues below.

3 **1. TCDC 18.705.030.H(4) (125-foot local street minimum spacing**  
4 **requirement)**

5 TCDC Chapter 18.705 governs “Access, Egress, and Circulation.” TCDC  
6 18.705.030.H(4) imposes a 125-foot minimum spacing requirement between intersections on  
7 local streets.<sup>2</sup> SW 81<sup>st</sup> Ct., SW Patti Ln. and SW Bond St. are all local streets. The points at  
8 which SW Patti Ln. and SW Bond St. will intersect extended SW 81<sup>st</sup> Ct. are closer than 125  
9 feet. Thus the required extension of SW 81<sup>st</sup> Ct. in this area will violate the TCDC  
10 18.705.030.H(4) 125-foot minimum spacing requirement. *See* map. The city approved the  
11 disputed adjustment to allow these intersections on SW 81<sup>st</sup> Ct. to be closer than 125 feet  
12 apart.

13 **2. TCDC 18.370.020.C(5) and City Notices**

14 As we have already noted, TCDC Chapter 18.370 governs “Variances and  
15 Adjustments.”<sup>3</sup> TCDC 18.370.020 governs “Adjustments.” TCDC 18.370.020.C sets out a  
16 total of 11 different sets of adjustment criteria which apply to different kinds of TCDC  
17 requirements. The selection of which of the 11 different sets of adjustment criteria applies  
18 depends on the TCDC requirement that will be avoided by the requested adjustment. Until  
19 after the November 28, 2005 public hearing in this matter, all parties and the city believed  
20 that an adjustment to the TCDC 18.705.030.H(4) 125-foot minimum spacing requirement  
21 was required to satisfy the fifth set of criteria, TCDC 18.370.020.C(5).<sup>4</sup> We need not set out

---

<sup>2</sup> TCDC 18.705.030.H(4) provides “[t]he minimum spacing of local streets along a local street shall be 125 feet.”

<sup>3</sup> A “variance” is a tool whereby the city permits deviation from or violation of an applicable zoning standard. Under the TCDC, an adjustment is a species of variance.

<sup>4</sup> That belief was not unreasonable, because TCDC 18.370.020.C(5) is entitled “Adjustment to access and egress standards (Chapter 18.705).” The TCDC 18.705.030.H(4) 125-foot minimum intersection spacing requirement appears in “Chapter 18.705.”

1 all of those criteria, because petitioners only argue that one of those criteria cannot be  
2 satisfied in this case, TCDC 18.370.020.C(5)(b)(2).<sup>5</sup> Petitioners argue:

3 “[T]here are two alternative access points to the proposed subdivision – SW  
4 Langtree Street and Patti Lane. Because it is indisputable that alternative  
5 access will exist, the City’s decision to grant the variance was wrong as a  
6 matter of law and must be reversed.” Petition for Review 5 (underlining in  
7 original; record citation and footnote omitted).

8 As petitioners point out, the city was required to list the applicable criteria in this case  
9 three times: (1) after the original administrative approval (TCDC 18.390.040.C(3)), (2) in the  
10 notice that preceded the hearings officer’s November 28, 2005 hearing in this matter (TCDC  
11 18.390.050.C(2)(b)), and (3) at the beginning of the hearings officer’s November 28, 2005  
12 hearing (TCDC 18.390.050.D(1)(a)). All three times the city identified TCDC  
13 18.370.020.C(5) as establishing the applicable criteria that must be satisfied to grant the  
14 adjustment to the TCDC 18.705.030.H(4) 125-foot minimum spacing requirement.

### 15 **3. Intervenor’s Request After the November 28, 2005 Hearing**

16 Intervenor submitted its final legal arguments on January 6, 2006. In those final legal  
17 arguments, intervenor advised the hearings officer that following consultation with planning  
18 staff, intervenor and staff took the position that the TCDC 18.370.020.C(5) criteria do not  
19 govern the requested adjustment to the TCDC 18.705.030.H(4) 125-foot minimum spacing  
20 requirement.<sup>6</sup> Among other things, intervenor argued that either TCDC 18.370.020.C(1) or  
21 18.370.020.C(11) supply the correct adjustment approval criteria.<sup>7</sup>

---

<sup>5</sup> TCDC 18.370.020.C(5)(b)(2) requires that the city find “[t]here are no other alternative access points on the street in question or from another street[.]”

<sup>6</sup> Although we generally agree with the reasoning that led intervenor and the hearings officer to conclude that the TCDC 18.370.020.C(5) adjustment criteria are not the correct criteria by which to judge an adjustment to the TCDC 18.705.030.H(4) 125-foot minimum spacing requirement, discussion of that reasoning here would needlessly complicate this opinion.

<sup>7</sup> TCDC 18.370.020.C(1) sets out special adjustment criteria for “development standards within subdivisions (Chapter 18.430)” and TCDC 18.370.020.C(11) sets out criteria for “[a]djustments for street improvement requirements (Chapter 18.810).” Neither of those criteria include a “no alternatives” criterion like TCDC 18.370.020.C(5)(b)(2). Although we normally set out the text of code provisions to assist in

1 In requesting that the hearings officer apply these different adjustment criteria,  
2 intervenor acknowledged that doing so at such a late stage of the city's proceedings could  
3 constitute a procedural error:

4 "The applicants recognize that the change of criteria from [TCDC  
5 18.370.020.C(5)] to either [TCDC 18.370.020.C(1) or 18.370.020.C(11)]  
6 comes at a rather late stage in the proceeding. In the event that the Hearings  
7 Officer agrees with the applicant and staff that either subsection C(1) or C(11)  
8 provide the proper criteria for review of a request for an adjustment to a street  
9 spacing standard, we believe it would be appropriate to allow parties an  
10 opportunity to comment on this issue. Otherwise, the Hearings Officer might  
11 create a possibility of a procedural error. We believe that the easiest way to  
12 cure a possible procedural error is for the Hearings Officer to issue an Order  
13 (1) reopening the record for one or two weeks, (2) granting all persons who  
14 have already obtained party status (via oral or written testimony) the  
15 opportunity to comment on this limited issue during that window, and (3)  
16 clarifying that only evidence that is relevant to this particular issue will be  
17 accepted during this open-record period." Record 104.

18 On January 17, 2006, the hearings officer issued an order in which he agreed with  
19 intervenor that the TCDC 18.370.020.C(5) adjustment criteria for access and egress  
20 standards do not apply to the requested adjustment. Record 73. The hearings officer also  
21 agreed with intervenor that the TCDC 18.370.020.C(1) or 18.370.020.C(11) adjustment  
22 criteria apply or that the proposal for SW 81<sup>st</sup> Ct. could be authorized by a variance under  
23 TCDC 18.370.010.C(2), although he stated in the order that he was not sure which of those  
24 three sets of criteria apply. *Id.* The hearings officer ordered the public record to be held  
25 open until January 25, 2006, for comment on which adjustment or variance criteria should  
26 apply. Record 75. The hearings officer ordered that the record be held open for an  
27 additional week until February 1, 2006, to allow all parties to respond to the comments  
28 submitted during the initial one-week period. *Id.* Finally, the hearings officer ordered that  
29 the applicant have until February 8, 2006, to submit final legal argument. *Id.*

---

understanding our resolution of assignments of error, our ultimate disposition of the first and second assignments of error makes it unnecessary to do so here.

1                   **4.       The Hearings Officer’s Decision Regarding the Adjustment**

2           The hearings officer first repeated his earlier finding in his January 17, 2006 order  
3 that the TCDC 18.370.020.C(5) adjustment criteria for access and egress standards do not  
4 apply in this case. The hearings officer next found that the TCDC 18.370.020.C(11)  
5 adjustment criteria for street improvement requirements apply here and that the proposal  
6 complies with those criteria. Record 23-25. Next, the hearings officer adopted alternative  
7 findings that if the TCDC 18.370.020.C(1) adjustment criteria for subdivision standards  
8 apply, the proposal complies with those criteria as well. Record 25-26. Finally, the hearings  
9 officer found, as a second alternative finding, that the proposal for SW 81<sup>st</sup> Ct. could be  
10 authorized by granting a variance under TCDC 18.370.010.C(2). Record 26-27.

11                   **B.       First Assignment of Error**

12           Under the first assignment of error, petitioners argue that the adjustment does not  
13 comply with TCDC 18.370.020.C(5)(b)(2). *See* n 5. What petitioners do not do under the  
14 first assignment of error is assign error to the hearings officer’s finding that the adjustment  
15 criteria at TCDC 18.370.020.C(5) do not apply in this case. Neither do petitioners assign  
16 error or offer any argument to contradict the hearings officer’s rationale for why he reached  
17 that conclusion regarding TCDC 18.370.020.C(5). Petitioners cannot ignore the hearings  
18 officer’s explanation for why the adjustment criteria at TCDC 18.370.020.C(5) do not apply  
19 and simply argue that the proposal violates one of the TCDC 18.370.020.C(5) criteria.

20           The first assignment of error is denied.<sup>8</sup>

---

<sup>8</sup> We note that given the structure and complexity of the TCDC generally, and its adjustment provisions in particular, the hearings officer’s conclusion that TCDC 18.370.020.C(5) does not apply appears reasonable. The hearings officer concluded that the TCDC 18.370.020.C(5) adjustment criteria apply only to “access and egress” standards. While TCDC 18.370.020.C(5) includes a parenthetical reference to TCDC “Chapter 18.705,” *see* n 4, the hearings officer concluded that the TCDC 18.705.030.H(4) 125-foot minimum intersection *spacing* requirement is not an *access and egress* standard. Record 22. Rather, the hearings officer concluded, the TCDC 18.705.030.H(4) 125-foot minimum spacing requirement is a “street improvement requirement,” and therefore the adjustment is governed by TCDC 18.370.020.C(11), which governs such adjustments. *See* n 7. While the TCDC 18.705.030.H(4) 125-foot minimum intersection spacing requirement is not separately listed as a street improvement requirement under TCDC Chapter 18.810, the TCDC



1           **C.     Second Assignment of Error**

2           Under the second assignment of error, petitioners argue it was error for the hearings  
3 officer to apply criteria other than the TCDC 18.370.020.C(5) criteria in approving the  
4 requested adjustment. More precisely, as was the case under the first assignment of error,  
5 petitioners never argue that the TCDC 18.705.030.H(4) 125-foot minimum spacing  
6 requirement is the type of TCDC requirement for which the adjustment criteria in TCDC  
7 18.370.020.C(5) must be applied. Instead, petitioners argue, without regard to whether the  
8 hearings officer is correct about the inapplicability of TCDC 18.370.020.C(5), it was error to  
9 abandon the TCDC 18.370.020.C(5) adjustment criteria late in the proceedings and apply  
10 different criteria in their place. In support of that position, petitioners only assert one  
11 cognizable argument.

12           Petitioners contend that because intervenor neither appealed the planning manager’s  
13 September 29, 2005 decision to apply the TCDC 18.370.020.C(5) criteria in approving the  
14 disputed adjustment nor asserted during the November 28, 2005 hearing that the TCDC  
15 18.370.020.C(5) adjustment criteria should not be applied to the challenged adjustment, it  
16 was error for the hearings officer to consider that question in his final decision.

17           The scope of the appeal before the hearings officer was governed by TCDC  
18 18.390.040(G)(2).<sup>9</sup> In finding that the issue of whether the TCDC 18.370.020.C(5) criteria

---

18.810.030 street standards incorporate TCDC 18.705.030.H(4) by reference. In its entirety, TCDC 18.810.030.G provides:

“Street spacing and access management. Refer to 18.705.030.H.”

<sup>9</sup> TCDC 18.390.040(G)(2)(b) provides:

“Scope of appeal. The appeal of a Type II Administrative Decision by a person with standing shall be limited to the specific issues raised during the written comment period, as provided under Section 18.390.040C, unless the Hearings Officer, at his or her discretion, allows additional evidence or testimony concerning any other relevant issue. The Hearings Officer may allow such additional evidence if he or she determines that such evidence is necessary to resolve the case. The intent of this requirement is to limit the scope of Type II Administrative Appeals by encouraging persons with standing to submit their specific concerns in writing during the comment period. The written comments received during the comment period will usually limit the scope of issues on appeal. Only in extraordinary circumstances should new

1 apply to the disputed adjustment was properly before him, the hearings officer adopted the  
2 following findings:

3 “The appellant argued that the applicant has no standing to raise this issue at  
4 this time, because the applicant did not appeal the director’s decision. TCDC  
5 18.390.0[4]0.G(2)[(b)] limits appeals to ‘[t]he specific issues raised during the  
6 written comment period...’ The hearings officer finds that the applicability of  
7 TCDC 18.370.030.C(5) falls within the scope of the appeal in this case  
8 because the appeal alleged that the application does not comply with this  
9 section. In addition, TCDC 18.390.0[4]0.G(2) further provides that ‘[t]he  
10 Hearings Officer, at his or her discretion, [may] allow ... additional evidence  
11 or testimony concerning any other relevant issue ...[where] such evidence is  
12 necessary to resolve the case.’ The hearings officer finds that determination  
13 of the applicable adjustment standard and whether the application complies  
14 with the criteria for the relevant adjustment standard is ‘necessary to resolve  
15 the case.’” Record 22.

16 We tend to agree with the hearings officer and intervenor that because *petitioners*  
17 appealed the planning manager’s September 29, 2005 decision and asserted that the proposed  
18 adjustment does not comply with the TCDC 18.370.020.C(5)(b)(2) alternative access points  
19 criterion, the issue of whether the TCDC 18.370.020.C(5) criteria apply at all was also  
20 properly before the hearings officer. In any event, TCDC 18.390.040.G(2)(b) does not  
21 strictly limit the issues before the hearings officer in the way petitioners suggest, and the  
22 hearings officer’s findings expressly invoke the authority granted by TCDC 18.390.040.G(2)  
23 to expand the issues on review. Petitioners neither acknowledge nor assign error to those  
24 findings. Petitioners’ assignment of error that the hearings officer erred by considering  
25 whether the TCDC 18.370.020.C(5) adjustment criteria apply in this case cannot be sustained  
26 when the petitioners (1) fail to assign error to the hearings officer explanation for why he  
27 considered that issue and (2) make no attempt to argue that the hearings officer’s explanation  
28 is faulty in some way.

---

issues be considered by the Hearings Officer on appeal of a Type II Administrative  
Decision[.]”

1           Petitioners next argue that after the record closed the first time following the  
2 November 28, 2005 hearing, even if the hearings officer could determine that adjustment  
3 criteria other than TCDC 18.370.020.C(5) apply, “the appropriate remedy would be to deny  
4 the application” because “the whole proceeding would have been flawed from the very  
5 beginning.” Petition for Review 6-7.

6           We assume without deciding that the hearings officer *could have* taken the approach  
7 petitioners suggest he was *required* to take. However, petitioners cite no TCDC provision  
8 that establishes the hearings officer was obligated to restart the city’s review process at the  
9 beginning, when he concluded in his January 17, 2006 order that the wrong adjustment  
10 criteria had been applied up until that point.

11           The local record had closed on January 6, 2006 with all parties believing that the  
12 TCDC 18.370.020.C(5) adjustment criteria governed the city’s decision concerning the  
13 requested adjustment. We have no doubt that the hearings officer’s January 17, 2006  
14 decision not to apply the TCDC 18.370.020.C(5) adjustment criteria would have been an  
15 error that would have required remand of the city’s decision if the hearings officer had not  
16 taken appropriate steps to allow the parties to challenge his decision to apply different  
17 adjustment approval criteria. Intervenor argues, however, that if the hearings officer’s  
18 decision was error, it was procedural error. We agree with intervenor. Even if that error  
19 could be described as substantive rather than procedural, the same steps the city took to avoid  
20 prejudice to petitioners’ substantial rights render the error harmless, if it is correctly  
21 characterized as a substantive error.

22           As we have already explained, the hearings officer provided all parties an opportunity  
23 to respond to his proposal to apply criteria other than TCDC 18.370.020.C(5). Intervenor  
24 asked the hearings officer to proceed in that manner to avoid a procedural error that might  
25 prejudice petitioners’ substantial rights. In his January 17, 2006 order, the hearings officer  
26 explained that he was providing that opportunity to ensure “a full and fair understanding of

1 the relevant law and afford the public a meaningful opportunity to comment.” Record 74.  
2 Petitioners make no attempt to argue that the hearings officer’s actions in this case were  
3 inadequate to assure that they had an adequate opportunity to argue *on the merits* that the  
4 hearings officer should reject the intervenor’s contention that the TCDC 18.370.020.C(1) or  
5 TCDC 18.370.020.C(11) adjustment criteria apply and should instead continue to apply  
6 TCDC 18.370.020.C(5) adjustment criteria and find that the proposal does not comply with  
7 TCDC 18.370.020.C(5)(b)(2). As far as we can tell, petitioners were given the opportunity  
8 to do so and exercised that opportunity. Record 68-69. Petitioners have failed to  
9 demonstrate that any procedural error the hearings officer may have committed in applying  
10 the TCDC 18.370.020.C(1) and TCDC 18.370.020.C(11) adjustment criteria and the TCDC  
11 18.370.010.C(2) variance criteria in place of the TCDC 18.370.020.C(5) adjustment criteria  
12 prejudiced their substantial rights. If that error constitutes a substantive error rather than a  
13 procedural error, the steps taken by the hearings officer rendered that error harmless.

14 The second assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 As we noted in our discussion of the first assignment of error, TCDC Chapter 18.705  
17 governs “Access, Egress and Circulation.” One of the sections of that chapter is TCDC  
18 18.705.030, which sets out “General Provisions.” TCDC 18.705.030.G is one of those  
19 General Provisions. TCDC 18.705.030.G(1) provides in part:

20 “Applications for building permits shall be referred to the [Planning]  
21 Commission for review when, in the opinion of the Director, the access  
22 proposed:

23 “a. Would cause or increase existing hazardous traffic conditions[.]”

24 Petitioners contend, based on TCDC 18.705.030.G(1), that the hearings officer erred  
25 by failing to impose a condition of preliminary subdivision approval requiring that all  
26 building permits for dwellings in the proposed subdivision be referred to the planning  
27 commission. Petitioners contend that such a referral to the planning commission is required

1 because at least some cars from the proposed subdivision will use SW 79<sup>th</sup> Ave. and that SW  
2 79<sup>th</sup> Ave. is already in a hazardous condition.

3 Intervenor offers a number of responses to the third assignment of error. We need not  
4 address all of them. TCDC 18.705.030.G(1), by its terms, is directed at decisions to grant or  
5 deny building permits, not decisions to grant or deny applications for subdivision approval.  
6 Approval of the disputed subdivision may lead to applications for building permits in the  
7 future that might have to be referred to the planning commission under TCDC  
8 18.705.030.G(1). But the application for subdivision approval that led to the challenged  
9 decision is not an application for a building permit. The hearings officer found that TCDC  
10 18.705.030.G(1) does not apply to the subdivision application:

11 “The hearings officer finds that TCDC 18.705.030.G(1) is inapplicable to this  
12 subdivision application. This section only applies to review of building  
13 permits, not subdivisions, and to access (driveways), not public street  
14 connections, based on the plain meaning of the words in the [TCDC]. \* \* \*”  
15 Record 20.

16 Petitioners do not assign error to the above finding and offer no argument in the  
17 petition for review to establish that the hearings officer’s reasoning is in some way faulty.  
18 That failure alone requires that the third assignment of error be denied. In addition, even if  
19 we were to (1) overlook petitioners’ failure to challenge the hearings officer’s finding, and  
20 (2) accept as true petitioners’ contention that SW 79<sup>th</sup> Ave. is currently in a hazardous  
21 condition and that a building permit to authorize a dwelling on one of the lots in Gage Forest  
22 subdivision might increase that hazardous condition, we would still deny the third  
23 assignment of error. Petitioners make no attempt to explain why they think TCDC  
24 18.705.030.G(1) mandates imposition of the condition of subdivision approval that they seek,  
25 when the text of TCDC 18.705.030.G(1) seems to say that it applies at the time a building  
26 permit is requested. From all appearances, assuming the allegedly hazardous condition of  
27 SW 79<sup>th</sup> Ave. remains uncorrected in the future when building permits are sought, that

1 condition would do nothing more than duplicate what TCDC 18.705.030.G(1) would require  
2 in any event.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 One of the TCDC subdivision preliminary plat approval criteria is TCDC  
6 18.430.040.A(3), which provides as follows:

7 “The streets and roads are laid out so as to conform to the plats of  
8 subdivisions and maps of major partitions already approved for adjoining  
9 property as to width, general direction and in all other respects unless the City  
10 determines it is in the public interest to modify the street or road pattern[.]”

11 Petitioners’ entire argument under the fourth assignment of error is set out below:

12 “As aerial photographs and plat maps demonstrate, the neighborhoods around  
13 Gage Grove currently enjoy numerous cul de sacs and other ‘no outlet’  
14 streets. However, the proposed subdivision will disrupt the current street  
15 configurations and alter the traffic flows by putting in through streets where  
16 none existed before. Because the proposed streets do not conform ‘in all other  
17 respects’ to the existing streets, the City’s decision must be reversed or, at the  
18 very least, remanded for additional findings as to why the proposed  
19 modification is in the public interest.” Petition for Review 9.

20 In a December 16, 2005 letter, petitioners similarly argued to the hearings officer that  
21 the proposed subdivision should be modified to mimic surrounding subdivisions, which  
22 employ “[a] fused grid design [with] greenspace \* \* \* at the end of cul de sac and dead end  
23 streets to provide pedestrian and cycling connections that are closed to vehicle traffic.”  
24 Record 171. In response to that letter, the hearings officer adopted the following findings:

25 “11. The hearings officer finds that the applicant is required to extend SW  
26 Patti Lane, SW Langtree Street and SW 81<sup>st</sup> Avenue through the site to  
27 comply with the street extension and connectivity standards of TCDC  
28 18.810.030.H and TCDC 18.81.030.D(2).<sup>10</sup> There is no adopted

---

<sup>10</sup> As relevant, TCDC 18.810.030.H provides:

“2. All local, neighborhood routes and collector streets which abut a development site shall be extended within the site to provide through circulation when not precluded

1 street plan for this area. Therefore the applicant is required to ‘provide  
2 for the continuation or appropriate projection of existing streets in the  
3 surrounding area.’ TCDC 18.810.030.D(2). The hearings officer  
4 finds that the proposed preliminary plat ‘[c]onform[s] to the plats of  
5 subdivisions and maps of major partitions already approved for  
6 adjoining property...’ by continuing these streets, which prior  
7 developments stubbed to the boundaries of the site. TCDC  
8 18.430.040.A(3). The proposed street layouts connects the existing  
9 streets in the area, enhancing compliance with TCDC 18.810.030.H(1)  
10 and the city’s connectivity goals.

11 “a. The appellants argue that the street layout should be designed  
12 to maintain a ‘fused grid’ street design with cul-de-sac and  
13 dead end streets. \* \* \* The hearings officer understands that  
14 some residents may prefer to live on dead-end streets that limit  
15 through traffic. The City presumably considered the  
16 advantages and disadvantages of a ‘fused grid’ versus an  
17 interconnected street design when it adopted the current Code.  
18 The City concluded that the advantages [and] benefits of  
19 connectivity outweigh the disadvantages and adopted the  
20 current standards which are intended to result in the creation of  
21 an interconnected street grid. \* \* \*” Record 18-19 (footnotes  
22 omitted).

23 Petitioners do not challenge the hearings officer’s findings that the extension of SW  
24 Langtree St., SW Patti Ln, and SW 81<sup>st</sup> Ct. which result in a connected street system in this

---

by environmental or topographical constraints, existing development patterns or  
strict adherence to other standards in this code. \* \* \*

“\* \* \* \* \*

“4. All developments should provide an internal network of connecting streets that  
provide short, direct travel routes and minimize travel distances within the  
development.”

As relevant, TCDC 18.810.030.D(2) provides:

“Where the location of a street is not shown in an approved street plan, the arrangement of  
streets in a development shall either:

“a. Provide for the continuation or appropriate projection of existing streets in the  
surrounding areas, or

“b. Conform to a plan adopted by the Commission, if it is impractical to conform to  
existing street patterns because of particular topographical or other existing  
conditions of the land. \* \* \*”

1 area is required to comply with the connectivity requirements of TCDC 18.810.030.H and  
2 TCDC 18.81.030.D(2). Indeed the hearings officer found that the proposed connected street  
3 system also conforms with TCDC 18.430.040.A(3), the very provision that petitioners rely  
4 on to argue the connected street system should be avoided.

5 TCDC 18.430.040.A(3) requires that the subdivision streets “conform to the plats of  
6 subdivisions and maps of major partitions already approved for adjoining property as to  
7 *width, general direction and in all other respects.*” (Emphasis added.) Full width eastern  
8 extensions of SW Langtree St. and SW Patti Ln are proposed, as is a full width northern  
9 extension of SW 81<sup>st</sup> Ct. These extensions conform to the adjoining subdivisions in that they  
10 accomplish precisely what the first part of TCDC 18.430.040.A(3) requires, they conform  
11 with the “width [and] general direction” of the adjoining streets. Petitioners rely entirely on  
12 the general “in all other respects” language in TCDC 18.430.040.A(3) to argue the city  
13 instead (1) should not have required that SW 81<sup>st</sup> Ct. be extended north and (2) should have  
14 required dead end extensions of SW Langtree St. and SW Patti Ln or extensions that end in  
15 cul-de-sacs. Petitioners argue that it was error to neither take those actions nor adopt a  
16 finding that shows it is in the public interest to modify the existing disconnected system of  
17 cul-de-sacs.

18 The map at Record 736 shows that the surrounding subdivisions frequently employ  
19 cul-de-sacs. However, it is an overstatement to say the proposed subdivision does not  
20 conform “in all other respects” simply because the extension of stubbed streets to the west  
21 and south will result in a connected street system. As that map shows there is an existing  
22 east/west street to the north (Ashford Street) that provides access to lots and a through  
23 connection between SW Hall Blvd. and SW 79<sup>th</sup> Ave. Moreover, most the subdivisions  
24 surrounding the subject property are at the edge of the larger area framed by Ashford Street  
25 to the north, Durham Road to the south, SW 79<sup>th</sup> Ave. to the east and SW Hall Blvd. to the  
26 west. The subject property is in the middle. It appears to be the last possibility to provide an



1 east west connection between SW 79<sup>th</sup> and SW Hall Blvd. in the area between Ashford Street  
2 to the north and Durham Road to the south. SW Langtree St., SW Patti Ln, and SW 81<sup>st</sup> Ct.  
3 were stubbed at the subject property’s western and southern border in the past to allow that  
4 connection to be made. Viewed in this context, we do not agree with petitioners’ essential  
5 premise that the connected road system approved for the Gage Forest represents a  
6 modification of the “existing street or road pattern” that requires a “public interest” finding  
7 under TCDC 18.430.040.A(3).

8 Moreover, although the hearings officer did not explicitly say so, we understand the  
9 hearings officer to interpret the “in all other respects” language in TCDC 18.430.040.A(3)  
10 not to require that the proposed subdivision mimic the cul-de-sac street design features in  
11 surrounding subdivisions if doing so would require that the streets violate other more explicit  
12 TCDC requirements for street system connectivity.<sup>11</sup> We agree with that interpretation and  
13 petitioners do not specifically assign error to that interpretation.

14 The fourth assignment of error is denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 **A. Petitioners’ Argument**

17 The “General Provisions” of the TCDC “Subdivision” chapter appear at TCDC  
18 18.430.020. Two of those “General Provisions are set out below:

19 “Minimize flood damage. All subdivision proposals shall be consistent with  
20 the need to minimize flood damage.” TCDC 18.430.020.F.

21 “Need for adequate drainage. All subdivision proposals shall have adequate  
22 drainage provided to reduce exposure to flood damage.” TCDC 18.430.020.I

23 In their fifth assignment of error, petitioners contend the hearings officer erred in approving  
24 the disputed subdivision because intervenor “failed to adequately explain how erosion and

---

<sup>11</sup> As intervenor points out, the disconnected cul-de-sac design favored by petitioners likely would also violate TCDC 18.810.030.L, which provides in part that “[a] cul-de-sac shall be no more than 200 feet long[.]”

1 runoff will be controlled.” Petition for Review 9. We understand petitioners to argue that  
2 TCDC 18.430.020.F and TCDC 18.430.020.I require such an explanation.

3 At petitioners’ request, an engineer reviewed the preliminary subdivision drawings.  
4 Those drawings show that to provide level building sites, some of the lots along the eastern  
5 border of the property will be graded to change the existing contours. After grading, the lots  
6 will slope steeply onto adjoining lots to the east. Petitioners’ engineer observed that the soils  
7 on the property drain poorly and are subject to erosion after vegetation is removed. The  
8 engineer’s November 28, 2005 letter included the following observation:

9 “The silt curtains proposed in the preliminary design will only be adequate  
10 during the driest season and to control erosion at any other time of the year  
11 will require a more comprehensive plan.” Record 247.

12 The engineer also suggested that water would drain from the yards of the proposed lots onto  
13 lots in adjoining subdivision “to the east causing flooding.” *Id.*

14 **B. The Hearings Officer’s Decision**

15 It is not clear to us whether petitioners challenge the adequacy of the hearings  
16 officer’s findings to provide the explanation that they believe is required concerning TCDC  
17 18.430.020.F. and TCDC 18.430.020.I or challenge the adequacy of the evidence that  
18 supports the hearings officer’s relevant findings concerning TCDC 18.430.020.F. and TCDC  
19 18.430.020.I. We set out the hearings officer’s findings concerning CDC 18.430.020.F. and  
20 TCDC 18.430.020.I. below:

21 “g. The hearings officer finds that the proposed development will not  
22 increase the overall volume of runoff flowing onto adjacent properties.  
23 To the contrary, the proposed development is likely to reduce the  
24 overall volume of stormwater runoff flowing onto adjacent properties.  
25 The topography maps in the record demonstrate that stormwater  
26 falling on this site flows downhill to the south, and southeast, onto  
27 adjoining properties, under existing conditions. The applicant  
28 proposed to collect stormwater from the impervious areas of the site  
29 and to convey it to a detention pond at the south end of the site prior to  
30 discharge to the existing drainage system at less than predevelopment  
31 rates. The proposed stormwater facilities will capture runoff that  
32 would otherwise flow onto adjacent properties and will divert it to the

1 detention pond. The applicant opined that the proposed development  
2 will reduce the total land area from which surface [water] flows onto  
3 adjacent properties to the east by approximately 95% or more. \* \* \*

4 “i. The hearings officer finds that the proposed grading may result  
5 in localized increases or concentration of storm water runoff  
6 onto some adjacent properties. Based on the topographic maps  
7 in the record, it appears that the southeast corner of the site  
8 generally drains directly south under existing conditions. The  
9 proposed grading will alter the existing topography, creating  
10 small areas of steeper (3:1) grade in the rear yards of Lots 1  
11 through 9 and Lots 13 through 15 that slope down to the east. \*  
12 \* \*. These sloped areas may alter existing storm water flows  
13 and direct additional runoff onto adjacent properties to the east.  
14 However the hearings officer finds that it is feasible to reduce  
15 or eliminate this impact consistent with Clean Water Services  
16 (CWS) regulations and state law regarding surface water  
17 runoff. If necessary, the applicant can grade the site to direct  
18 runoff away from adjacent properties, install drains near the  
19 boundaries of the site or utilize other measures to capture  
20 surface water before it leaves the site. This is required by  
21 condition 21 of the director’s decision.<sup>[12]</sup> The applicant can  
22 address this issue during the final engineering stage.” Record  
23 29-30.

24 The hearings officer then relies in part on the foregoing findings to explain why he  
25 found that the proposal complies with TCDC 18.430.020.F and TCDC 18.430.020.I:

26 “i. The hearings officer finds that the proposed subdivision does or can  
27 comply with the flood control requirements of TCDC 18.430.020.F  
28 through I, to the extent those provisions apply to this development.

29 “i. The hearings officer finds that the subdivision is designed to  
30 minimize flood damage. TCDC 18.430.020.F. The applicant  
31 will collect storm water runoff from the site and convey it to a  
32 treatment and detention pond prior to release to the existing  
33 storm system at less than predevelopment rates. The applicant

---

<sup>12</sup> Condition 21 is as follows:

“A final grading plan shall be submitted showing the existing and proposed contours. The plan shall detail the provisions for surface drainage of all lots, and show that they will be graded to insure that surface drainage is directed to the street or a public storm drainage system approved by the Engineering Department. For situations where the back portions of lots drain away from a street and toward adjacent lots, appropriate private storm drainage lines shall be provided to sufficiently contain and convey runoff from each lot.” Record 35.

1 will grade the site to direct stormwater towards the storm water  
2 inlets.

3 “ii. The site is not located within or near the 100-year floodplain.  
4 Therefore TCDC 18.430.020.G is inapplicable.

5 “iii. The hearings officer finds that it is feasible to design and  
6 install public utilities and facilities such as sewer, gas,  
7 electrical, and water systems in a manner that will minimize  
8 flood damage. The City can ensure compliance with this  
9 requirement during the final engineering review.

10 “iv. The hearings officer finds that the proposed development will  
11 provide adequate drainage to reduce exposure to flood damage,  
12 based on the above discussion regarding the design of the  
13 storm water system and compliance with CWS [Clean Water  
14 Services] regulations. There is no substantial evidence to the  
15 contrary.” Record 30.

16 Finally, having explained that the proposed subdivision will significantly reduce the  
17 amount of water that now flows from the subject property onto adjoining lots to the east and  
18 that any alteration of existing surface waterflow that may result from regrading certain lots  
19 along the eastern boundary of the proposed subdivision can be managed, the hearings officer  
20 specifically addresses petitioners’ engineer’s testimony:

21 “a. The appellants’ engineer testified that ‘soil movement (erosion) is  
22 likely to be severe’ given the ‘fine silty loam soils...’ on the site. \* \* \*  
23 He argued that the erosion control measures proposed in the  
24 applicant’s preliminary erosion control plans ‘will only be adequate  
25 during the driest season...’ ‘A more comprehensive plan’ will be  
26 required to control erosion at any other time of the year. \* \* \*

27 “b. CWS’s Design and Construction Standards regulate erosion control to  
28 reduce the amount of sediment and other pollutants reaching the public  
29 storm and surface water system resulting from development,  
30 construction, grading, excavating, clearing, and any other activity  
31 which accelerates erosion. Per CWS regulations, the applicant is  
32 required to submit an erosion control plan for City review and  
33 approval prior to issuance of City permits. \* \* \* The applicant will  
34 design the erosion control measures as necessary to control erosion  
35 based on actual construction methods and season. CWS can require  
36 additional erosion controls if necessary to accommodate wet weather,  
37 steep slopes or other unique conditions. The hearings officer finds that

1                   it is feasible to comply with the CWS regulations. There is no  
2                   substantial evidence to the contrary.” Record 30-31

3                   The hearings officer goes on to find that the applicant is not required to provide more  
4 detailed engineering designs at this preliminary subdivision plan stage and that the plans  
5 intervenor did submit are sufficient to establish that it is feasible to comply with applicable  
6 criteria.<sup>13</sup>

7                   We have set out the hearings officer’s findings to demonstrate that the issue that  
8 petitioners assert in the fifth assignment of error clearly was recognized below. After  
9 recognizing that issue, the hearings officer provided a thorough and detailed response to that  
10 issue. We perceive no obvious flaws in the hearings officer’s reasoning and the evidentiary  
11 record supports his findings. Petitioners neither acknowledge these findings nor make any  
12 attempt to fault the hearings officer’s logic in rejecting petitioners’ concerns. Neither do  
13 petitioners acknowledge or challenge intervenor’s expert’s testimony that any surface water  
14 runoff or potential erosion problems posed by the proposed lots along the eastern edge of the  
15 subdivision can be solved. Petitioners’ arguments under the fifth assignment of error  
16 essentially ignore the explanation concerning TCDC 18.430.020.F. and TCDC 18.430.020.I  
17 that they allege was required. Because petitioners ignore the explanation that they argue was  
18 required, their fifth assignment of error provides no basis for reversal or remand.

19                   The fifth assignment of error is denied.

20                   The city’s decision is affirmed.

---

<sup>13</sup> Intervenor cites to testimony in the record submitted by its experts that supports the hearings officer’s findings. Record 266-67.