BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BUTTE CONSERVANCY and ERIK NIELSEN,
Petitioners,

vs.

CITY OF GRESHAM,
Respondent,

and

PERSIMMON DEVELOPMENT,
Intervenor-Respondent.

LUBA No. 2006-084

FINAL OPINION
AND ORDER

Appeal from City of Gresham.

Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of petitioners.

David R. Ris, Senior Assistant City Attorney, Gresham, filed a response brief and argued on behalf of respondent.

John M. Junkin, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief were Krista N. Hardwick and Bullivant Houser Bailey, PC.

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

AFFIRMED 09/15/2006

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city council decision on remand from LUBA approving an 86-lot planned unit development (PUD)

MOTION TO INTERVENE

Persimmon Development (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The challenged decision approves an 86-lot PUD on a 69.5-acre parcel in the City of Gresham near unincorporated areas of Clackamas County. The subject property is steeply sloped and wooded, and within the city's Hillside Physical Constraint Overlay District (HPCD). The proposed development required a variance to allow two cul-de-sacs over 200 feet in length, a tree removal permit to log approximately 1800 trees in areas where streets and utilities are proposed, and construction of a secondary road access for emergency vehicles through an existing residential lot in an adjoining subdivision within unincorporated Clackamas County.

The city's initial approval was appealed to this Board, which sustained three assignments of error, and remanded the decision to the city to address, among other things, whether (1) providing the emergency vehicle access is feasible, and (2) removing 1800 trees constitutes "clear cutting" that is prohibited under city code.

On remand, the city conducted a public hearing and adopted additional findings concluding in relevant part that it is feasible to obtain the required emergency access and that the proposed tree removal did not constitute "clear-cutting" that is prohibited under city code. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In order to gain approval of the requested variance for culs-de-sac longer than 200 feet, intervenor proposed and the city approved a secondary access point that would extend south of the PUD through a residential lot in the adjoining Kingswood Heights subdivision, which is within unincorporated Clackamas County, and connect to SE Yellowhammer Road. Accordingly, the city imposed Condition of Approval 7 requiring that the applicant submit as part of final plat documents: (1) a 20-foot wide right of way or easement across the residential lot within the Kingswood Heights subdivision, dedicated to the county, (2) construction plans for the access, and (3) a county street construction permit.

Before LUBA, petitioners argued that there was no evidence in the record that it was "feasible" to construct the proposed secondary access, given that Covenants, Conditions, and Restrictions (CC&Rs) governing the Kingswood Heights subdivision restrict all use of residential lots to single-family dwellings and accessory buildings.[1] According to petitioners, it is clear under the Kingswood Heights CC&Rs that use of a residential lot to construct a street or other access for a neighboring subdivision is prohibited. We remanded the city's initial decision to address this issue.

On remand, the city adopted findings concluding in relevant part that it is "feasible" to construct the access road either because (1) the CC&Rs can be reasonably interpreted to allow roads that provide access to residential uses and (2) in any case, the city has the legal authority to condemn the right-of-way to provide secondary access notwithstanding the CC&Rs. Petitioners challenge those conclusions, arguing that the CC&Rs are unambiguous

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[1] The Kingswood Heights subdivision restrictions include the following:

> "No building or structure or land shall be used and no building or structure shall hereafter be erected, altered or enlarged in the subdivision except for single-family dwellings and accessory buildings consisting of garages, carports, private green houses, swimming pools or other type of home recreational facilities and temporary structures for uses incidental to construction work which shall be removed upon completion or abandonment of the construction." Petition for Review App. 30.

and clearly would prohibit the proposed access road, and that the city lacks the legal authority to condemn the right-of-way necessary to construct the road.

A. Feasibility

As an initial matter, the city argues that the legal requirement that local governments address the feasibility of compliance with approval criteria should be applied differently where, as here, the issue raised regarding the feasibility of compliance largely involves a legal question and the courts, not the city, have jurisdiction in the final analysis to resolve that question. The city recognizes that, in a line of cases based on *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741 (1984) and *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), the Court and LUBA have held that, in a two-stage approval process such as subdivision approval, where a problem is identified that raises concerns whether proposed development can comply with applicable approval criteria, the local government may, among other options, adopt findings demonstrating that solutions to the identified problem are "feasible," *i.e.*, "possible, likely and reasonably certain to succeed." *Meyer*, 67 Or App at 280, n 5. In *Rhyne*, we explained that:

> "Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. * * *
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> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, * * * instead of finding that the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied

> with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing * * *" 23 Or LUBA at 447-48 (footnotes omitted).

Where the local government takes the first approach—finding that the approval criterion is met or that feasible solutions to identified problems exist, and imposing necessary conditions—those findings and conditions may be challenged as inadequate or not supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415, 428-29 (1999).

The city argues that the above framework is typically applied when the identified "problem" involves a fact-specific technical or physical issue posed by the development, such as the ability to construct public facilities or avoid hazardous conditions. According to the city, that framework is more problematic when the identified "problem" involves an alleged *legal* impediment that is beyond the local government's jurisdiction or authority to resolve. The city argues that the meaning of the Kingswood Heights CC&Rs, specifically whether the CC&Rs prohibit the proposed secondary access, is a question of law or a mixed question of law and fact that is within the jurisdiction of the circuit court, and will be definitively resolved only if residents of the Kingswood subdivision invoke the circuit court's jurisdiction seeking to stop the proposed secondary access.[2] The city argues that its interpretation of the CC&Rs will have no binding legal effect in any circuit court action, and that it makes little sense to require the city to interpret the CC&Rs in the first instance.

Rather than require the local government to engage in a non-binding legal analysis to resolve a question of law that the city has no authority to determine, the city recommends that the obligation to evaluate "feasibility" should proceed differently than when the city is evaluating technical or physical feasibility. According to the city, the local government

[2] The city notes that petitioners are not residents of Kingswood Heights subdivision, and do not have the ability to enforce the terms of the CC&Rs.

should only be required to "determine that the legal position is warranted by existing law or is a nonfrivolous argument based on existing law." City of Gresham's Response Brief 10-11. The city argues that such a test would be similar to the test that LUBA has applied when local land use standards expressly require compliance with state agency requirements or that the applicant secure a state agency permit. In those cases, the city argues, LUBA has held that the local government is not required to establish that the state agency requirements can in fact be satisfied. Instead, the local government need only determine that the necessary agency permit is "available" and that the applicant is not precluded from obtaining such agency permits as a matter of law. *Wetherell v. Douglas County*, 44 Or LUBA 745, 755-56 (2003); *Sam Miller v. City of Joseph*, 31 Or LUBA 472, 478 (1996); *Bouman v. Jackson County*, 23 Or LUBA 628, 646-47 (1992).

We generally agree with the city that the *Meyer* and *Rhyne* feasibility analysis must be applied somewhat differently when the "problem" identified at the first stage of a two-step approval process is an alleged legal impediment to fulfilling a condition of approval requiring facilities necessary for the proposed development, rather than a technical, engineering or similar issue. In such circumstances, where neither the local government nor LUBA have jurisdiction to resolve the legal question, and that legal question must be resolved in a particular way to allow the condition to be fulfilled so that an applicable approval standard will be satisfied, neither the local government nor LUBA need engage in a detailed or definitive legal analysis. In our view, it is sufficient for the local government in such circumstances to (1) adopt findings that establish that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure, in imposing the condition of approval, that the condition will be fulfilled prior to final development approvals or actual development.

Although we did not couch it in those terms, we applied a similar approach in a recent case with very similar facts. In *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006),

the city approved a residential subdivision based in relevant part on a finding that sanitary sewer facilities were "available." The petitioner argued that the proposed sewer facilities required access to a sewer line on his property, and that the service provider did not own an easement over petitioner's property for that purpose. The hearings officer disagreed, finding that the service provider's easement over petitioner's property allowed service to the proposed development. In the alternative, the hearings officer found that the service provider had the legal authority and ability to condemn easements necessary to serve the subject property. On appeal to LUBA, the petitioner disputed both findings, arguing in relevant part that the outcome of any condemnation proceeding was doubtful, because the petitioner intended to challenge any such proceeding. We declined to review the merits of the parties' dispute over the meaning and extent of the existing easement, because we affirmed the hearings officer's alternative disposition that even if the existing easement did not authorize service, the service provider had the authority to condemn an easement:

> "The parties argue at great length whether the existing easements and applicable property law establish that the district has an easement over petitioner's property; however, that is not the issue before us. The issue is whether PZC [Portland Zoning Code] 33.652.020A.1 is satisfied. It is well established that, where there is conflicting evidence over whether an approval criterion is satisfied or can be satisfied, a local government may either (1) find that the approval criterion is satisfied, or (2) find that it is feasible to satisfy the approval criterion and impose conditions necessary to ensure that the criterion will be satisfied. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447 (1992). In this case, the hearings officer apparently did both—he found that the district had an easement over petitioner's property and also imposed a condition that the district obtain an easement to provide sanitary service to the subdivision. Thus, even if petitioner is correct that the existing easements do not grant the district the ability to connect the proposed subdivision to the existing line on petitioner's property, the finding that the district will condemn the easement if necessary is sufficient to demonstrate that it is feasible to satisfy PZC 33.652.020A.1. If intervenors ultimately cannot satisfy the condition of approval then they will not be able to develop the subdivision." 50 Or LUBA at 565-66

We then distinguished our initial decision in the present appeal:

> "It is true that, in [*Butte Conservancy*], we held that a condition of approval to construct necessary access through an adjoining subdivision lot in itself did not establish that such access was feasible when the legal right to construct such access was disputed. However, unlike *Butte Conservancy*, the hearings officer in the present case adopted findings and conditions of approval sufficient to demonstrate that sanitary sewer service is feasible. Although petitioner argues that he will challenge any condemnation proceeding, *Rhyne* does not require absolute certainty, only a finding that compliance with applicable criteria is feasible, and imposition of conditions necessary to ensure compliance. The decision properly finds that PZC 33.652.020A.1 is satisfied or can feasibly be satisfied through the imposition of conditions." *Id.* at 566.

Turning back to the present case, the city on remand took essentially the same approach as the hearings officer in *Stoloff*. As in that case, we see no point in addressing the parties' arguments regarding the meaning of the Kingswood Heights CC&Rs, because for the reasons set out below the city's findings adequately demonstrate that it is feasible for the city to condemn the disputed right-of-way, even if it is ultimately determined that the CC&Rs prohibit use of the residential lot for that purpose.[3] In other words, couched in the analysis set out above, the city's findings adequately establish that fulfillment of the condition of approval is not precluded as a matter of law, and the city adequately ensured that the condition will be fulfilled prior to final development approval.

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[3] Petitioners do not dispute the city's finding that following a lawful condemnation the use of the property for an access road would not be subject to the CC&R restrictions. At oral argument, petitioners questioned whether condemnation is even theoretically possible, since intervenor owns the lot and presumably would dedicate (in fact is required to dedicate) the right-of-way to the local government with jurisdiction, in this case the county. We understand petitioners to suggest that condemnation is a last resort that is reached only if voluntary dedication or conveyance is not possible, and here, it is clear that intervenor is willing and indeed is required to dedicate or convey the right-of-way. We further understand petitioners to argue that if the right-of-way is dedicated or conveyed in some manner rather than via eminent domain, then the CC&R restrictions would continue to apply to dedicated property. Because condemnation will likely never occur, we understand petitioners to argue, the theoretical possibility of employing eminent domain to avoid the CC&R restriction fails to establish that it is "feasible" to fulfill the condition of approval.

Petitioners are probably correct that the city's exercise of eminent domain is unlikely. However, the city has adequately demonstrated that it has the legal authority to condemn the disputed right-of-way and thus avoid the legal impediment identified by petitioners. That demonstration is sufficient to satisfy the feasibility requirement of *Meyer* and *Rhyne*, as construed here, even if the city is unlikely in fact to ever exercise that condemnation authority.

B. Condemnation Authority

Petitioners concede that ORS 223.930 grants the city the authority to condemn property outside city limits to acquire a street right-of-way.[4] However, petitioners argue that the city's authority under ORS 223.930 is subject to two express limitations. First, petitioners argue that ORS 223.930(1) requires that the city, and not the land use applicant, must construct the street. The city cannot rely on ORS 223.930 in the present case, petitioners contend, because it is clear that intervenor and not the city will construct the "roadway."

Second, petitioners argue, that ORS 223.930(1) limits the city's right to condemn under that statute to "roadways" as defined by the Oregon Vehicle Code. According to petitioners, the Oregon Vehicle Code definition of "roadway" and related definitions specify that the right-of-way must be used or intended for use by the "general public." *See* ORS 801.450 (defining "roadway" as the "portion of a highway that is improved, designed or ordinarily used for vehicular traffic"; and ORS 801.305 (defining "highway" in turn as a public way, road, street, etc. that is "used or intended for use of the general public for vehicles or vehicular traffic"). Because the emergency vehicle access can be accessed only by emergency vehicles, petitioners argue, it is not open for "use of the general public" and thus not a "highway" or "roadway."

The city responds that it is common to require developers to construct public roads necessary to serve the proposed development, and that ORS 223.930(1) does not limit the city's condemnation powers to public streets that the city directly constructs, improves,

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[4] ORS 223.930(1) provides, in relevant part:

> "Any city may construct, improve, maintain and repair any street the roadway of which, as defined in the Oregon Vehicle Code, is along or along and partly without, or partly within and partly without the boundaries of the city and may acquire, within and without the boundaries of such city, such rights of way as may be required for such street by donation or purchase or by condemnation in the same manner as provided in ORS 223.005 to 223.105 * * *."

maintains or repairs. We agree. ORS 223.930(1) does not explicitly require that the city itself construct, improve, maintain or repair the roadway, in order to exercise the condemnation authority.

With respect to public use of the proposed access road, the city explains that the city's Future Street Plan contemplates a public local street between the subject property and SE Yellowhammer, constructed to local street standards. The city chose not to require that the access street be constructed to local street standards in this decision and opened to general traffic, because it determined that streets within the Kingswood Heights subdivision cannot handle the additional traffic from development on the subject property, and the number of trips generated from the subject development could not justify requiring intervenor to upgrade the Kingswood Heights streets. Consequently, the city argues, the city required dedication of right-of-way necessary to construct code-required access for emergency vehicles, with a condition requiring dedication of additional right-of-way upon improvement to the streets within the Kingswood Heights subdivision.

According to the city, requiring such limited access does not mean that the access street is not a "roadway" or "highway" as those terms are defined in the Oregon Vehicle Code. The city contends that nothing in the relevant statutes or the Oregon Vehicle Code requires unrestricted public access in order for the street to constitute a "roadway" as that term is used in ORS 223.930(1). Once a right-of-way is acquired by a public entity with road jurisdiction, the city argues, that entity has the broad authority to impose restrictions on its use to protect the interests and safety of general public, including closing a public street to travel except as needed for emergency access. The city argues that such a restricted public street is as much a "roadway" for purposes of the relevant statues as are unrestricted public streets.

Finally, the city argues that even if ORS 223.930(1) does not authorize condemnation in the present case, other statutes may. The city first cites to ORS 225.320 and 225.330,

which authorize condemnation of property within or without the city for "fire protection" facilities. According to the city, the access road is intended to provide access for fire trucks and alternative public evacuation routes in case of wildland fires, and thus would qualify as a "fire protection" facility. Finally, the city cites to ORS 223.005, which grants the city broad authority to appropriate any private real estate within or without city limits for "any public or municipal use or for the general benefit and use of the people of the city[.]"

We agree with the city that under one statute or another the city likely has the authority to condemn the disputed right-of-way, if that becomes necessary. Certainly, petitioners have not demonstrated that any uncertainty with respect to the city's condemnation authority is such that it can be said that fulfillment of the condition of approval requiring dedication and construction of the access road is precluded as a matter of law. The city appropriately drafted that condition in a manner that is sufficient to ensure that fulfillment of the condition will occur prior to final development approval. If for one reason or another the condition is unsatisfied, intervenor will not be able to obtain final subdivision approval. We do not understand *Meyer*, *Rhyne* or *Stoloff* to require more, under the present circumstances.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

City of Gresham Community Development Code (CDC) 5.0232 provides that "[a]ny removal of trees which would result in clear cutting is prohibited on land within the [HPCD]."[5] Similarly, CDC 9.1010(F) provides that "[a]ll tree removal that would result in clear cutting on slopes in excess of 15% is prohibited." CDC 3.0010 defines "clear cutting" as:

> "Any tree removal which leaves fewer than an average of one tree per 1,000 square feet of lot area, well-distributed throughout the entirety of the site. * * *"

[5] CDC 5.0232 has since been amended or deleted.

CDC 9.1011 requires the applicant for tree removal to submit a tree survey of regulated and/or significant trees on site. Further, the code defines "tree survey" as a "drawing that provides the location of all trees" of a prescribed diameter. Intervenor initially presented a tree survey based on a one-acre sample of the subject property, and the city accepted that survey. We remanded the city's initial decision, however, concluding that under the above code definitions and provisions the county erred in determining that proposed development did not involve "clear-cutting" based on a one-acre sample rather than a survey of all trees on the property.

On remand, intervenor submitted a survey depicting all trees on the subject property, and an analysis indicating that removal of the proposed 1800 trees for roads and utilities would leave approximately 1.07 trees per 1,000 square feet of gross site area. The city accepted that survey and analysis. Petitioners argued below, and argue on appeal, that intervenor's analysis erroneously considers only trees removed for roads and utilities, and fails to consider trees that will be removed in the buildable area of individual lots for dwellings. The city adopted findings responding that (1) petitioners could have but failed to raise this issue in the previous appeal, and therefore the issue is waived, and (2), in any case, the CDC requires consideration only of trees that must be removed for the development proposed, not subsequent development authorized under individual building permits, which are separately governed by CDC 9.1010(B).[6] Petitioners challenge both findings.

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[6] The city's findings state, in relevant part:

> "* * * The removal of any trees for purposes of building specific homes within the proposed subdivision is not to be included in determining whether the Applicant's development will result in a 'clear cutting.' The removal of any trees for a home is not authorized by approval of this Application and is subject to CDC 9.1010(B) when a building permit is sought. * * *
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> "* * * The Appellants did not raise the issue of including tree removal from individual homes sites at LUBA. The LUBA remand required a tree survey of the entire site. The tree survey of the entire site establishes that more trees will remain after the tree removal than was estimated by the original sample tree survey. The tree survey of the entire site supports the original decision that approval of this Application does not result in clear cutting. Not having

We need not resolve the issue of waiver, because we agree with the city and intervenor that the CDC does not require intervenor to consider trees that will not be removed under the proposed development—the PUD—but may be removed under subsequent individual building permits for lots created by that PUD.

As the city and intervenor point out, nothing in the CDC requires a PUD applicant to identify specific building pads or envelopes for lots created by the PUD approval. Under petitioners' reading of the code, the PUD applicant and city would be required to guess where building pads and envelopes would be proposed on individual lots, in order to determine which and how many trees are likely to be removed pursuant to future, individual building permits. Instead, CDC 9.1010(B)(2) appears to contemplate that such tree removals are evaluated at or following the time when individual building permits are applied for.[7]

Petitioners argue that the city misconstrues CDC 9.1010(B)(2) to allow tree removal for individual building sites to be evaluated at the time a building permit is sought. While that construction of CDC 9.1010(B)(2) may be the rule outside the HPCD, petitioners argue that CDC 9.1010(E) clarifies that where the HPCD applies, removal of regulated trees requires a Type II development permit, and cannot be approved as part of a mere building

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raised the issue of tree removal from individual home sites at LUBA, Appellants have waived any opportunity to raise the issue now." Record 15 (underline in original; footnote omitted).

[7] CDC 9.1010(B) provides, in relevant part:

> "Removal of Regulated Trees: Removal of Regulated Trees as defined in Section 3.0010 shall be reviewed under Type II procedures for compliance with the standards of Sections 9.1010-9.1012,
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> "* * * * *
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> "(2) Regulated trees located within 10 feet of the outer edge of the outline of a proposed single family residence or related site improvements may be removed without a separate or additional development permit after issuance of the building permit for the proposed residence. When additional trees are to be protected on the site outside the building envelope, a tree protection plan as approved by the City shall accompany the building plans and shall be enforced during all construction activities on the site. Mitigation in accordance with an approved mitigation plan for lost perimeter trees shall be completed or guaranteed prior to Final Inspection."

permit.[8] Thus, petitioners argue, outside HPCD zones tree removal may be authorized under CDC 9.1010(B)(2) at the time of building permit approval, without obtaining a Type II development permit, but within HPCD zones such tree removal requires a Type II development permit.[9]

Petitioners may be correct that CDC 9.1010(E) would require a Type II development permit for tree removal to site dwellings on individual lots within the HPCD zone, but petitioners do not explain why CDC 9.1010(E) or any other code provision compels that such future tree removals be evaluated as part of a PUD application seeking a tree removal permit that does not propose removing any trees to site dwellings on individual lots. Petitioners may also be correct that the city's interpretation of CDC 9.1010 to effectively allow piecemeal cutting of regulated trees over a series of applications may undercut the prohibition on "clear cutting.".[10] However, that there may be loopholes that undercut the "clear-cutting" prohibition does not mean that the city's interpretation is subject to reversal

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[8] CDC 9.1010(E) provides:

> "Tree Removal in Overlay Districts: Except as provided below, no removal of regulated trees shall be permitted within a Hillside Physical Constraint, Flood Plain, or Natural Resource Overlay District without a Type II Development Permit."

[9] The city points out that CDC 9.1010(E) has since been amended to provide an exception for removal of regulated trees within 10 feet of the outer edge of the outline of a proposed single family residence or related site improvements, so that such tree removals no longer require a Type II Development Permit. The city argues that any building permit/tree removal applications for individual lots within the subdivision will be governed by the amended CDC 9.1010(E), and therefore petitioners' arguments under former CDC 9.1010(E) are essentially moot. It seems unlikely to us that if the CDC in effect at the time of the challenged PUD/tree removal permit required evaluation of trees to be removed for dwellings, subsequent amendments to the CDC would moot a challenge that the city failed to conduct that required evaluation. However, we need not address that argument, because we agree with the city that nothing in CDC 9.1010 or elsewhere cited to us requires that the city determine *in this decision* which and how many trees will be removed for dwellings.

[10] The city also points out that Condition of Approval 6(c), a condition imposed in the city's initial decision and not challenged by petitioners, requires that the CC&Rs for the subdivision include a restriction against removing regulated trees on individual lots where the result would leave fewer than one tree per 1,000 square foot of lot area. We understand the city to argue that that condition effectively ensures that development of individual lots will not run afoul the prohibition on "clear-cutting," as that prohibition is applied to applications to develop individual residential lots in the PUD.

under the deferential scope of review we must apply to a governing body's code interpretation under ORS 197.829(1).[11]

The fact remains that nothing in CDC 9.1010 compels the applicant for a tree removal permit necessary to site roads and utilities for a proposed PUD or subdivision to take into account trees that may have to be removed in subsequent development applications to site and build houses on individual lots on that same property. Because it is difficult if not impossible in the context of PUD approval to determine which trees and how many trees will be removed when individual PUD lots are developed, such a requirement would be unworkable, even if there were a basis in the code for an implicit requirement to that effect. The city's code interpretation declining to infer such a code requirement is well within the city's interpretative discretion under ORS 197.829(1).

The second assignment of error is denied.

The city's decision is affirmed.

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[11] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"