BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BONNIE BRODERSEN,
Petitioner,

vs.

CITY OF ASHLAND,
Respondent,

and

WILLIAM McDONALD and LYNN McDONALD,
Intervenor-Respondents.

LUBA No. 2007-162

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

Bonnie Brodersen, Ashland, filed the petition for review and argued on her own behalf.

Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

Mark S. Bartholomew, Medford, filed a response brief on behalf of intervenor-respondents. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

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

AFFIRMED 12/05/2007

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

Petitioner appeals a city decision approving a Physical and Environmental Constraints Review Permit to construct a driveway and place utilities and a storm drain within a floodplain and riparian area.

MOTION TO INTERVENE

William McDonald and Lynn McDonald (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

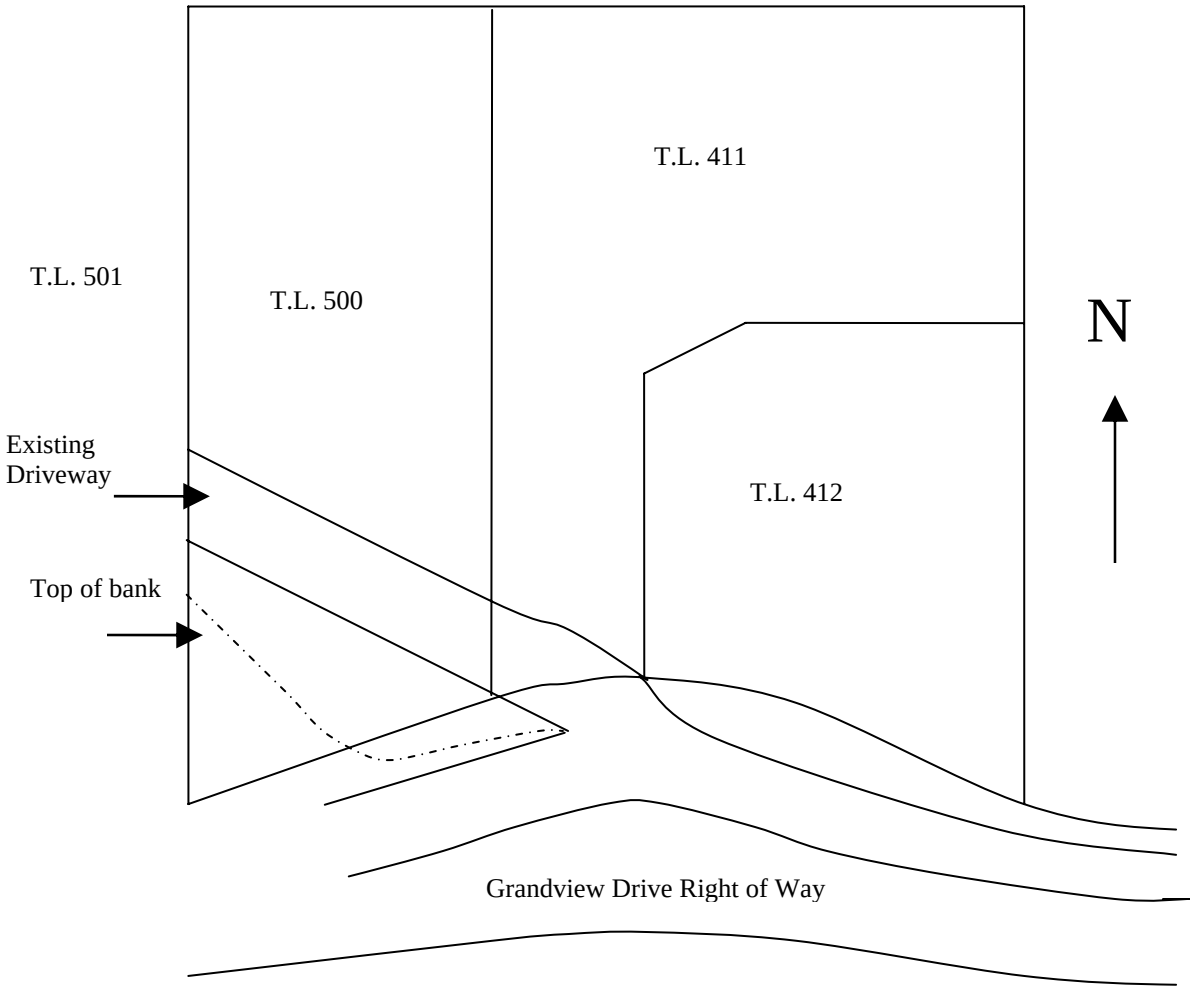
FACTS

Intervenors own the subject property, tax lot 500, a vacant parcel zoned for low density residential use (R-1-10). The subject property is a rectangular parcel with a long north-south axis. Grandview Drive, a county road with a 47-foot right-of-way and a graveled surface that is approximately 12 feet wide, borders the subject property to the south and ends near the property's southwest corner. Tax lot 411 borders the subject property to the east. A 20 foot wide access easement runs from the Grandview Drive right-of-way across tax lot 411 and across the subject property, to provide access to tax lot 501 located to the west, outside the city limits. That easement is developed with an eight foot wide gravel driveway. The existing driveway encroaches slightly onto the southwest corner of tax lot 412, which is owned by petitioner. [1]

Portions of the existing driveway are within a floodplain area and near a riparian preservation area for a branch of Wrights Creek, located to the south and west. The riparian preservation area extends to the top of the bank, while the floodplain area extends an additional 20 feet from the top of the bank.

[1] Figure 1, which is set out on the following page, is a very rough, not-to-scale depiction of the locations of the tax lots, existing driveway, and other relevant features.

FIGURE 1



In 2004, intervenors applied for and the city approved a building permit to construct a single-family dwelling on tax lot 500. As part of that building permit, intervenors proposed improving and paving the existing driveway to serve both tax lot 500 and 501. Petitioner appealed the building permit approval to LUBA. In denying the city's motion to dismiss the appeal of the building permit, LUBA concluded that the city had exercised legal or policy judgment in determining, among other things, whether intervenors would need a Physical and Environmental Constraints Permit (hereafter, physical constraints permit) to authorize the driveway improvements within the riparian area. After the petition for review was filed,

the city moved for voluntary remand of the building permit decision, and LUBA granted the motion.

The city apparently took no immediate action on remand of the building permit approval. On September 8, 2006, intervenors submitted an application for a physical constraints permit to authorize the proposed driveway improvements within the floodplain area and riparian preservation area. Intervenors did not submit a new building permit application for the dwelling itself, or request that the city conduct remand proceedings on the 2004 building permit.

City staff tentatively approved the physical constraints permit. At petitioner's request, the staff approval was set for a public hearing before the planning commission, which heard testimony and approved the physical constraints permit. Petitioner appealed the planning commission approval to the city council, arguing in part that the planning commission decision does not address all the issues raised in her appeal of the 2004 building permit. After a hearing, the city council issued a decision that (1) approves the physical constraints permit, and (2) addresses various challenges petitioner raised regarding the 2004 building permit and the proposed dwelling on the subject property. This appeal followed.

INTRODUCTION

Several of petitioner's assignments of error in this appeal challenge the city council findings addressing issues that relate not to the physical constraints permit application before the city, but rather to the 2004 building permit or intervenor's ultimate proposal to construct a dwelling on the subject property. Petitioner appears to assume that the challenged decision approves a building permit for the proposed dwelling, or that the proceedings on the physical constraints permit application were the proceedings on remand from the 2004 appeal.

In its response brief, we understand the city to take the following positions: (1) the 2004 building permit has now expired and, in order to obtain authorization to construct the proposed dwelling on tax lot 500, intervenors must submit a new building permit application;

and (2) the decision challenged in this appeal involves only the physical constraints permit, and that decision is not the result of the city's proceedings on remand of the 2004 building permit decision. Consequently, we understand the city to argue that the challenged decision need only address issues related to the physical constraints permit, and the city was not required to address other issues. Therefore, the city argues, the findings that address the issues petitioner raised regarding the 2004 building permit or a future building permit to construct the dwelling are merely surplusage, and not final determinations that are binding on the city or the parties.

Intervenors' position is less clear, but we understand intervenors to argue that the findings in this decision addressing issues related to the dwelling are final resolutions of those issues, binding on the city and the parties in any future proceeding on a new building permit application.

ORS 227.181(1) requires the city to take final action on a permit, limited land use decision or zone change within 90 days of a LUBA remand. The 90-day period does not begin until the applicant requests in writing that the city proceed with the application on remand. ORS 227.181(2). Although it is not clear to us that the 2004 building permit decision is subject to ORS 227.181(1) and (2), it seems possible under that statute for an applicant to essentially abandon a remanded approval decision, by not requesting in writing that the city proceed, and instead filing a new application. Something like that is apparently what happened in the present case. Intervenors have apparently abandoned the 2004 building permit approval, and instead intend to file new applications in two sequential steps: first, the physical constraints permit for improvements within the floodplain and riparian preservation area and, second, the building permit for the dwelling and associated improvements outside the floodplain and riparian area.[2] We are cited to no statute or other authority that would

[2] It is not entirely clear whether that course of action was intervenors' choice or a course the city required intervenors to take. However, it is reasonably clear under the city's decision in this case approves only the

prohibit that course of action, or require that the city instead conduct proceedings on the remanded 2004 building permit. Therefore, we agree with the city that in approving the 2006 physical constraints permit application it was under no particular obligation to address issues raised in petitioner's challenge to the 2004 building permit, or issues that relate to a future building permit application for development outside the floodplain and riparian preservation areas.

The city is generally obliged to adopt findings addressing issues raised during the proceedings on the physical constraints permit application that are relevant to the approval criteria that govern that application. *Rouse v. Tillamook County*, 34 Or LUBA 530, 536 (1998). Here, petitioner apparently raised a number of issues regarding the criteria that govern the physical constraints permit application, and other issues that have no relevance to those criteria. The city prudently adopted findings to address all issues raised, carefully denominating those findings that address issues related to the applicable approval criteria and those issues that do not. Accordingly, we agree with the city that those findings that address issues unrelated to compliance with the criteria applicable to the physical constraints permit application are surplusage. It follows that those findings are not binding on the city or parties in any subsequent building permit application, and that no purpose would be served by addressing those assignments of error in this appeal that challenge those findings. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 580 (1995).

As far as we can tell, only the first, second, fifth and eighth assignments of error challenge the city's findings of compliance with the applicable physical constraints permit criteria or concern issues that directly relate to those criteria. With a few exceptions noted below, most of the arguments under the third, fourth, sixth and seventh assignments of error challenge other findings that address issues not relevant to those approval criteria.

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physical constraints permit, and the city will require intervenors to submit a new building permit application for the dwelling.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the city's findings of compliance with the standards for a physical constraints permit, under Ashland Land Use Ordinance (ALUO) 18.62.

Wrights Creek is a designated riparian preservation area and a designated floodplain corridor. Generally, a riparian preservation area includes all land within the tops of the bank of a designated creek. A floodplain corridor includes all land within 20 horizontal feet of the top of the bank of a designated creek. Wrights Creek's top of the bank cuts across the southwest corner of the subject property, and the existing driveway that intervenors propose to improve is located within 20 feet of the top of the bank.[3]

ALUO 18.62.070 provides standards for development within a floodplain corridor. In relevant part, ALUO 18.62.070(A)(3) limits placement of fill in the floodplain to that "associated with approved public and private street and driveway construction."

ALUO 18.62.075(A) provides standards for development within riparian preservation areas. ALUO 18.62.075(A)(1) provides that development within a riparian preservation area is also subject to the development standards for floodplain corridor lands, at ALUO 18.62.070. In addition, ALUO 18.62.075(A)(3) provides:

> "Fill and Culverting shall be permitted only for *streets, access, or utilities*. The crossing shall be at right angles to the creek channel to the greatest extent possible. Fill shall be kept to a minimum." (Emphasis added).

A. Access

Petitioner first contends that, while the floodplain corridor standards may provide for placement of fill for a "driveway," the riparian preservation standards allow fill only for "streets, access, or utilities," and do not mention driveways. According to petitioner, a

[3] As far as we can tell from the plans and topographic maps in the record, very little if any of the existing or the proposed driveway is actually within the top of the bank of Wrights Creek, which delimits the riparian preservation area. *See, e.g.*, Record 143 (topographic survey); Oversize Exhibit E (preliminary grading and drainage plan). The southern portion of the existing and proposed driveway is within the floodplain corridor, which extends 20 feet from the top of the bank.

private driveway is neither a "street" nor "access." In support of that view, petitioner cites to ALUO 18.68.030, which is entitled "Access," and generally requires that each lot shall have at least 40 feet of frontage upon a public street.[4] Petitioner argues that nothing in ALUO 18.68.030 suggests that the code term "access" refers to a "driveway."

The city development code does not include a definition of "access," and the frontage requirements of ALUO 18.68.030 are not particularly relevant in determining whether the term "access" as used in ALUO 18.62.075(A)(3) includes driveways. However, as the city points out, ALUO 18.08.195 defines the term "driveway" as an "accessway."[5] The city council found that code references to "access" include "driveways." Record 16. Petitioner has not demonstrated that the city council's interpretation to that effect is inconsistent with the language, context or purpose of the relevant code sections. ORS 197.829(1). In addition, as the city points out, ALUO 18.62.075(A)(1) makes development within the riparian preservation area subject to the development standards within floodplain corridors at ALUO 18.62.070, which expressly authorize placing fill to construct a "driveway." Accordingly, we disagree with petitioner that the applicable ALUO provisions prohibit placing fill for a driveway or similar access to private property within the riparian preservation area. The city did not err in rejecting that argument.

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[4] ALUO 18.68.030 provides:

> "Each lot shall abut a minimum width of forty (40) feet upon a public street (other than an alley). This requirement may be decreased to twenty-five (25) feet on a cul-de-sac vehicle turn-around area. Except with an approved flag partition, no lot shall abut upon a street for a width of less than twenty-five (25) feet."

[5] ALUO 18.08.195 defines "driveway" as follows:

> "An accessway serving a single dwelling unit or parcel of land, and no greater than 50' travel distance in length. A flag drive serving a flag lot shall not be a driveway. Single dwelling or parcel accesses greater than 50' in length shall be considered as a flag drive, and subject to all of the development requirements thereof."

B. Crossing at Right Angles

Petitioner next argues that the proposed driveway violates the ALUO 18.62.075(A)(3) requirement that the "crossing shall be at right angles to the creek channel to the greatest extent possible." Petitioner contends that the driveway impermissibly parallels the creek channel rather than crossing it at a right angle.

The city responds, and we agree, that ALUO 18.62.075(A)(3) does not require that streets, access and utilities cross a creek channel. Fairly read, it simply requires that when a proposed street, access or utility line crosses a creek channel, it must cross at a right angle to the maximum extent possible. The proposed accessway does not cross the creek channel. The city council rejected petitioner's contrary argument below. Record 16. Petitioner has not demonstrated that the city erred in doing so.

C. Fill Shall Be Kept to a Minimum

Petitioner next argues that intervenors presented no evidence and the city made no findings regarding the amount of fill that the proposed 20-foot wide improved driveway will require within the riparian preservation area. Absent such evidence, petitioner argues, the city is in no position to find that the amount of fill will be "kept to a minimum," as ALUO 18.62.075(A)(3) requires.

The city responds that ALUO 18.62.075(A)(3) does not require the applicants to quantify the amount of fill, or the city to adopt findings quantifying the amount of fill. The city argues that the grading plan and topographic survey include sufficient information for the city to find that the fill will be kept to a minimum. The city cites to a statement on the grading plan that "[a]ll fill material used for the driveway construction and utility installation shall be at original ground elevation (i.e. no fill will impede floodwaters)." Record 144. Further, the city notes that alternative access locations were considered, but that staff found that using the footprint of the existing driveway would minimize impacts on the floodplain. Record 425. Based on such evidence, the city found that the proposal minimizes fill. Record

13 (addressing the identical ALUO 18.62.070(A)(3) requirement that the "amount of fill in the Flood Plain Corridor shall be kept to a minimum"); Record 17 (findings addressing ALUO 18.62.075 that incorporate findings under ALUO18.62.070).

We agree with the city that ALUO 18.62.075(A)(3) does not require quantification of the amount of fill to be used. The city concluded, based on substantial evidence, that the amount of fill would be minimized. Petitioner does not cite to any evidence or indication that the driveway improvements can be constructed with less fill than proposed. Accordingly, petitioner has not demonstrated a basis for reversal or remand.

D. Feasibility of Constructing the Driveway

The existing driveway serving tax lots 500 and 501 encroaches approximately one foot onto the southwest corner of tax lot 412. The original grading plan proposed placing the improved driveway in the same location. After petitioner acquired tax lot 412 and refused permission for the encroachment, intervenors submitted a revised grading plan that proposed shifting the driveway one foot to the southwest.

ALUO 18.76.060(B) requires that a driveway serving two flag lots must be 20 feet wide, with 15–foot wide driving surface to the back of the first lot, and a 12-foot wide driving surface to the rear lot. Petitioner argues that it is not "feasible" to construct a 15-foot wide driveway without either (1) encroaching on tax lot 412 or (2) extending the driveway to the southwest further toward the top of the bank and requiring additional construction within the Grandview Drive right-of-way.[6]

The city disputes that the ALUO 18.76.060(B) driveway width standards are applicable in the context of a physical constraints permit. According to the city, the driveway width standards will apply only when intervenors file for a building permit to

[6] Petitioner advances related challenges to the entire driveway under the sixth assignment of error, and both petitioner and the city cross-reference their respective arguments under that assignment of error. We consider the arguments under the sixth assignment of error to the extent they apply to the portion of the proposed driveway within the floodplain and riparian preservation area.

construct the remainder of the shared driveway, outside the floodplain area. In any case, the city argues, the city found that the proposed driveway complies with ALUO 18.76.060(B) driveway standards, and that finding is supported by substantial evidence, including the grading and drainage plan and topographic surveys.

It is not clear to us whether the ALUO 18.76.060(B) driveway standards apply to a proposal to construct part of a driveway within a floodplain and riparian preservation area under a physical constraints permit, or whether those standards apply only when a building permit is sought for the remainder of the driveway, as the city contends. For whatever reason, intervenors have chosen to seek approval of different portions of the driveway in two separate applications, one of which is yet to be filed. Even if the driveway standards do not apply to the physical constraints permit, it would seem that, at the very least, the width and location of the proposed driveway would be relevant considerations for purposes of determining compliance with the floodplain and riparian preservation criteria.

We assume, without deciding, that the ALUO 18.76.060(B) driveway standards apply to that portion of the proposed driveway within the floodplain and riparian preservation areas. However, we agree with the city that petitioner has not identified any reason to believe that it is infeasible to construct a 15-foot wide driving surface within those areas without encroaching onto tax lot 412. Exhibit G is the original grading plan, showing a 15-foot wide driving surface that encroaches slightly onto tax lot 412. Exhibit E is the revised plan, showing a 15-foot wide driving surface that does not encroach onto tax lot 412. If there is some physical or practical impediment to constructing the driveway as depicted on Exhibit E, petitioner does not identify the impediment. Nothing in ALUO 18.76.060(B) or any other code provision cited to us requires a finding that it is "feasible" to construct the driveway. If the petitioner or another party sufficiently raises some issue below that physical or other impediments make it infeasible to construct the driveway required by applicable approval criteria, the city is obligated to adopt findings addressing that issue. However, petitioner

identifies no such impediments. Accordingly, the failure of the city to find that it is "feasible" to construct the driveway is not a basis for reversal or remand.

E. Reliance on the Existing Driveway

Petitioner argues that the city erred in relying on the impacts caused by the existing driveway to conclude that the proposed widened driveway complies with applicable floodplain and riparian preservation area standards. Petitioner's point seems to be that the existing driveway was constructed prior to adoption of the city's floodplain and riparian preservation provisions, has never been approved under those provisions, and therefore its existence is "irrelevant." Petition for Review 11.

The city responds that petitioner does not identify any code provision that bars the city from considering the existence or impacts of the existing driveway, in considering whether an improved driveway in much the same location complies with applicable criteria. We agree with the city. It seems entirely relevant, in determining whether a proposed driveway complies with standards that require an assessment of impacts on the floodplain or riparian area, to consider that the new driveway will be placed over the footprint of an existing driveway that predates adoption of those standards. As the city found, the existing driveway has already impacted the floodplain to some extent, and the new driveway will not create significantly different impacts than those that have already occurred. Record 19. Petitioner does not challenge those findings, and her arguments under this subassignment of error do not provide a basis for reversal or remand.

F. Placement of Utilities

ALUO 18.62.070(M) provides that "[l]ocal streets and utility connections to developments in and adjacent to the Floodplain Corridor shall be located outside the Floodplain Corridor, except for crossing the Corridor * * *." Intervenors proposed placing a utility trench down the middle of the new driveway, and then east along the Grandview Drive right-of-way. As proposed, approximately 100 lineal feet of the trench would be located

within 20 feet of the top of the bank, and therefore within the floodplain corridor. Almost all of the 100 lineal feet of trench would be within the Grandview Drive right-of-way. The planning commission imposed a condition requiring that intervenors place the trench more than 20 feet from the top of the bank, thereby avoiding the floodplain corridor.

The city council noted that the planning commission's condition would require removing a number of trees along the north side of Grandview Drive. To avoid that impact, the city council interpreted ALUO 18.62.070(M) to govern only location of *new* streets and associated utilities. Because Grandview Drive is an *existing* street already located within the floodplain corridor, the city concluded, ALUO 18.62.070(M) does not prohibit placing utilities within the existing right-of-way. Record 15-16. The city modified the condition, however, to require that the utility trench be located as far to the north as possible without impacting the existing trees.

Petitioner argues that the city erred in allowing the utility trench to be placed within the floodplain corridor. However, petitioner does not acknowledge, much less challenge, the city's interpretation of ALUO 18.62.070(M) at Record 15-16. Absent a focused challenge to that interpretation, petitioner's arguments under this subassignment of error do not provide a basis for reversal or remand.

G. Toe of the Fill

ALUO 18.62.070(A)(2) requires that the "toe of the fill shall be kept at least ten feet outside of floodway channels, as defined in Section 15.10, and the fill shall not exceed the angle of repose of the material used for fill." Petitioner argues that the city did not make a finding locating the toe of the fill and, citing to a letter at Record 135 from intervenors' topographer, petitioner argues that it appears the toe of the fill for the new driveway may be located in the creek itself.

The city found that the floodway channel is located well below the top of the bank and that the proposed driveway improvements are located more than 10 feet from the

channel. Record 12-13. Petitioner does not challenge, or acknowledge, that finding. With respect to the letter at Record 135, the city argues, and we agree, that petitioner appears to misunderstand the letter, which simply states that the topographer obtained the permission of the property owners to the south of Grandview Drive "to locate the toe of the road embankment and the creek where it crosses their property." The "toe of the road embankment" is clearly a reference to the existing south embankment of Grandview Drive, not the proposed driveway. *See Exhibit G* (identifying the "toe of road slope" for Grandview Drive). Further, fairly read the letter does not suggest that toe of the road embankment is in or at the same location as the creek, only that the topographer identified the location of both the toe of the road and the creek.

H. Missing Information

ALUO 18.62.040(H)(1) requires that the applicant for a physical constraints permit submit plans that show, among other things:

> "m. * * * * Natural features on adjacent properties potentially impacted by the proposed development * * *, such as trees with driplines extending across property lines. * * *
>
> "n. The proposed method of erosion control, water runoff control, and tree protection for the development as required by this chapter.
>
> "* * * * *
>
> "q. Location of all areas of land disturbance, including cuts, fills, driveways, building sites and other construction areas. Indicate total area of disturbance, total percentage of project site proposed for disturbance, and maximum depths and heights of cuts and fills."

Petitioner argues that the plans that intervenors submitted to support the application failed to depict a row of trees on the adjacent tax lot 501 that, petitioner contends, have driplines that extend across the driveway where it runs along the western border of tax lot 500, near the proposed dwelling. In addition, petitioner argues that the plans include no information on tree protection, especially with respect to a large pine tree located within the

Grandview Drive right-of-way, near the proposed driveway. Finally, petitioner argues that the plans do not include information on the "total area of disturbance," and "maximum depths and heights of cuts and fills." Absent this information, petitioner contends, the city is in no position to determine whether the "applicant has taken all reasonable steps to reduce the adverse impact on the environment," as ALUO 18.62.040(I)(3) requires.

The city responds that any omission from the plans intervenors submitted is immaterial, because the record as a whole includes sufficient information for the city to conclude, as it did, that the proposed driveway complies with all criteria applicable to a physical constraints permit. According to the city, petitioner fails to relate any of the alleged omissions to any particular approval standard.

Failure to submit required information in the application materials may be a basis to remand a permit approval, if the record as a whole does not include information sufficient to support a finding of compliance with applicable approval criteria. *Save Oregon's Cape Kiwanda v. Tillamook Cty.*, 177 Or App 347, 362, 34 P3d 745 (2001). However, it is incumbent on the city to identify something in the record that includes the information required by ALUO 18.62.040(H)(1)(m), (n) and (q), or at least an explanation for why that information need not be in the record. The city does neither.

Nonetheless, we decline to remand the city's decision under this subassignment of error. As explained earlier, the city's decision approves only a physical constraints permit for development within the floodplain and riparian preservation areas, not the ultimate development of the subject property. With respect to the trees on tax lot 501 under ALUO 18.62.040(H)(1)(m), petitioner does not allege, and it does not appear to be the case, that the identified trees on tax lot 501 are located in or near the floodplain and riparian preservation areas. Whether the proposed driveway runs under the driplines of those trees may be an issue in a future building permit that approves the dwelling and the remainder of

the driveway outside the floodplain and riparian preservation areas, but petitioner does not explain why ALUO 18.62.040(H)(1)(m) requires such information in the present application.

Second, with respect to protection of the large pine located within the Grandview Drive right-of-way, we understand petitioner to argue that a description of tree protection measures is required when development extends under the driplines of the tree. However, petitioner does not allege that the proposed driveway extends under the dripline of the pine tree and, based on the topographic and grading plans in the record, it does not appear that it does. *Compare* Exhibit F (topographic map showing the pine's dripline) and Exhibit E (revised site plan showing location of driveway).

Third, with respect to the ALUO 18.62.040(H)(1)(q) requirement for information regarding the "total area of disturbance," and "maximum depths and heights of cuts and fills," petitioner does not explain why the grading plan at Exhibit E is insufficient to indicate the total area of disturbance. The decision recites that the proposed driveway includes 324 square feet of development within the floodplain and riparian preservation area, and there seems to be no uncertainty about what areas will be disturbed. Record 10. With respect to the height of the proposed fills, as the city noted previously, the grading plan states that all fill material will be at the original ground elevation. Petitioner does not explain why more specific information in the plan is necessary, for purposes of any particular approval criteria.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The city imposed a condition of approval that requires intervenors to obtain an "encroachment permit" to authorize construction of that part of the proposed private driveway within the publicly-owned Grandview Drive right-of-way.[7] Petitioner advances

[7] Condition 7 states that "an encroachment permit from the Ashland Public Works Department for driveway improvements in the Grandview Dr. right-of-way shall be obtained prior to site disturbance and construction in the Grandview Dr. right-of-way." Record 32.

several subassignments of error challenging the decision to allow construction of a private driveway in the Grandview Drive right-of-way.

A. Takings

Petitioner first argues that the city exceeded its jurisdiction and engaged in a "taking" of her property without just compensation, contrary to state and federal constitutional requirements. According to petitioner, her predecessor-in-interest dedicated the Grandview Drive right-of-way to the city as an exaction for a partition in 1979 that created several parcels, including petitioner's. Petitioner argues that that right-of-way was dedicated for public use, but the city's decision essentially transfers the right to use part of the right-of-way to intervenors' private use. As a result, petitioner argues, she is deprived of the beneficial use of that portion of the right-of-way, which she currently uses to pick blackberries and to access a gate at the southwestern corner of tax lot 412. Petitioner advances a similar argument against the proposal to place utilities serving intervenors' parcel within the public utility easement along the north side of Grandview Drive. According to petitioner, allowing private individuals to place utilities within the easement is a taking of petitioner's property.

A key premise to petitioner's takings claim is that the encroachment permit that the city's decision requires intervenors to obtain will grant intervenors the exclusive right to use the public right-of-way over which the driveway improvements will be constructed. Petitioner cites nothing to support that premise, and it seems an unlikely outcome. Nothing in the decision cited to us suggests that the city intends to exclude the public from the right-of-way over which the driveway is constructed. Even if that in fact happens, petitioner fails to demonstrate how granting intervenors the exclusive right to use a public right-of-way could possibly be a taking of petitioner's property. To state the obvious, petitioner does not own the right-of-way. Petitioner also argues that the city would exceed its jurisdiction if it transferred beneficial use of the right-of-way to intervenors for their private use. However,

petitioner cites no authority for the proposition that a city lacks the authority to transfer the right to use public property to a private party. As the city notes, local governments generally have wide authority to restrict public use of public rights of way. Absent a more developed argument, petitioner's assertion that the city would exceed its authority to grant intervenors an encroachment permit does not provide a basis for reversal or remand.

With respect to the public utility easement, petitioner does not own the easement, which is entirely within the Grandview Drive right-of-way, so allowing intervenors to place utilities within the easement cannot possibly be a taking of petitioner's property. Petitioner cites no authority that would prohibit the city from allowing intervenors to place utilities serving their property within the public utility easement.

B. Access to Tax Lot 412

Petitioner next argues that the driveway will block access to a gate at the southwestern corner of tax lot 412, a vacant parcel that petitioner owns. This argument is also premised on petitioner's unsubstantiated belief that the encroachment permit will grant intervenors an exclusive right to use the public right-of-way. The city responds that nothing in the record supports that belief, and agrees that the city cannot block petitioner's access to tax lot 412. We agree with the city that nothing in the record cited to us suggests that the city intends to grant intervenors exclusive use of the public right-of-way, or to block petitioner's access to tax lot 412.

C. Deferred Decision

Petitioner contends that the city impermissibly deferred a decision over whether to allow intervenors to construct improvements in the public right-of-way to the encroachment permit process, which will be decided by the city engineer. According to petitioner, the encroachment permit will be a discretionary decision, made as part of an informal process that does not provide petitioner an opportunity to participate.

The city responds that condition 7 simply advises intervenors that they must obtain an encroachment permit prior to any site disturbance or construction in the Grandview Dr. right-of-way, and that the city did not "defer" any determination of compliance with approval criteria applicable to the challenged physical constraints permit.

We agree with the city that, as far as petitioner has established, an encroachment permit is not required to obtain a physical constraints permit, and whatever criteria govern an encroachment permit are not applicable to a physical constraints permit. Therefore, the city did not "defer" a determination of compliance with any approval criteria that governs the physical constraints permit application. Condition 7 simply prohibits intervenors from engaging in any driveway construction within the right-of-way until an encroachment permit is obtained. We agree with the city that condition 7 does not defer any determination that must be made in the context of the present decision. Petitioner does not cite to any authority that requires the city to process the physical constraints permit and the encroachment permit together.

D. The City's Established Practice

Petitioner finally contends that, based apparently on conversations petitioner has had with the city engineer, the city's practice is to allow private use of public right-of-ways under an encroachment permit only for unopened or unused rights of way. According to petitioner, the Grandview Drive right-of-way is used by the neighbors to pick blackberries, to allow petitioner to access tax lot 412, etc. Thus, petitioner argues, it would be inconsistent with the city's established practices to grant intervenors an encroachment permit for the driveway.

The city responds that the alleged conversations with the city engineer are not in the record and cannot be considered by LUBA. The city also argues that any potential challenge to a future encroachment permit may not be presented in this appeal of the city's physical constraints permit. We agree with both responses.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argued in her appeal of the 2004 building permit decision, and repeated the argument during the proceedings on the physical constraints permit, that tax lot 500 is not a legal lot. According to petitioner, the minor land partition that created tax lot 500 in 1979 did not comply with all applicable procedures and requirements.

The city's findings respond to this issue, as one of the issues petitioner raised that do not relate to approval criteria applicable to a physical constraints permit. The city concluded that a determination of legal lot status is not an approval criterion for issuance of a physical constraints permit. Record 22. The city went on to conclude that, if legal lot status is a legitimate issue in the context of a physical constraints permit, tax lot 500 is a legal lot.

Petitioner challenges the city's conclusion that tax lot 500 is a legal lot, but does not challenge the city's initial conclusion that legal lot status has nothing to do with issuance of a physical constraints permit. Absent some challenge to that finding, petitioner's arguments under this assignment of error provide no basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioner argues that the city committed procedural error in failing to apply Site Design and Use Standards to approve a dwelling on tax lot 500.

As explained above, the challenged decision does not approve a dwelling. Petitioner does not argue that the Site Design and Use Standards apply to the improvements authorized under the challenged physical constraints permit. Accordingly, this assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As part of the physical constraints permit, intervenors sought and the city approved permission to construct a portion of a storm drainage facility within the floodplain and riparian preservation area, designed to serve the ultimate development of tax lot 500 with a

dwelling. The proposed storm drainage facility within the floodplain or the riparian preservation area includes 40 lineal feet of trench, and 25 square feet of storm drain outlet, which ultimately drains to a nearby branch of Wrights Creek. The city concluded that the proposed facilities comply with all applicable floodplain and riparian preservation criteria. To address water quality issues raised below, the city also imposed a condition requiring that any storm drainage from the driveway and roof of the dwelling be directed to a retention and treatment system, such as a vegetative swale, prior to release into the storm drainage facility.

Petitioner challenges the proposed storm drainage system, on several grounds. First, petitioner notes that the Ashland Municipal Code (AMC) lists Wrights Creek among a number of city creeks that are excluded from the code definition of storm drainage facility.[8] We understand petitioner to argue that the AMC definition implicitly prohibits discharging storm water into Wrights Creek.

Second, petitioner cites to provisions of the city's Stormwater and Drainage Master Plan indicating that future development in the Wrights Creek watershed should be viewed carefully to avoid erosion and flooding problems.

Third, petitioner argues that site design standards that apply to construction of homes over 2,500 square feet in size require a finding that there is "adequate capacity of city facilities for urban storm drainage," implying that storm drainage must be routed to a "city facility."

Fourth, petitioner argues that discharging storm drainage into the creek is inconsistent with the city's municipal stormwater discharge permit and Oregon water quality statutes.

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[8] AMC 4.27.020(O) states in relevant part that:

> "Storm drainage facilities shall mean any structure(s) or configuration of the ground that is used or by its location becomes a place where storm water flows or is accumulated including, but not limited to, pipes, sewers, gutters, manholes, catch basins, ponds, open drainage-ways and their appurtenances. Ashland Creek, Bear Creek, Wrights Creek * * * are not storm drainage facilities."

Finally, petitioner argues that a private storm drain is not a "utility" that is allowed in the riparian preservation area under ALUO 18.62.075. According to petitioner, only public utilities are allowed in the riparian area.

The city responds that the AMC definition of storm drainage facility, the city's stormwater and drainage master plan, the site design standards, the city's discharge permit and the cited water quality statutes are not approval criteria applicable to a physical constraints permit application. We agree with the city that petitioner has not established that any of the cited provisions or permits operate as approval criteria for the challenged decision. The city found that the stormwater and drainage master plan does not include applicable approval criteria, and petitioner does not challenge that finding. Record 30. With respect to the AMC definition of storm drainage facility, the inference that petitioner reads into the definition—that no storm drainage may be directed into Wrights Creek—is simply not there. As explained above, the Site Design and Use Standards do not apply to the challenged physical constraints permit. And, petitioner makes no effort to explain why the city's discharge permit or the cited water quality statutes function as approval criteria for the physical constraints permit.

Finally, with respect to petitioner's argument that a private stormwater drainage facility is not a "utility" allowed in the riparian preservation area, the city responds that ALUO 18.62.075 does not distinguish between public and private utilities or between public and private stormwater facilities. The city notes that AMC 4.27 governs "Storm Drainage Utility," and broadly defines "storm drainage facilities" to include "pipes, sewers, gutters, manholes, catch basins, ponds, open drainage-ways and their appurtenances," without reference to whether the facility is public or private. We agree with the city that petitioner has not established that a private drainage facility is not a "utility" for purposes of ALUO 18.62.075.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In the sixth assignment of error, petitioner argues that the entire driveway, including a turnaround contemplated near the proposed dwelling, does not comply with ALUO 18.76.060 standards. As explained under the first assignment of error, only the portion of the driveway within the floodplain and riparian preservation area subject to the physical constraints permit approved in the decision under appeal may be challenged in this appeal. We have already rejected petitioner's arguments under this assignment of error directed at that portion of the driveway approved by the physical constraints permit. Arguments directed at development that the challenged decision does not approve and that the city has not yet approved do not provide a basis for reversing or remanding the decision on appeal.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

This assignment of error concerns whether construction of the contemplated dwelling and garage on tax lot 500 will comply with lot coverage requirements. Because the challenged decision does not approve any dwelling or garage, this assignment of error is misdirected and premature.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

Petitioner argues that, at the time of petitioner's appeal of the 2004 building permit, the city's riparian preservation regulations at ALUO 18.62 had not yet been acknowledged to comply with the statewide planning goals. According to petitioner, when the city adopted ALUO 18.62 in 1997 the city inadvertently failed to provide notice to the director of the Department of Land Conservation and Development (DLCD), with the consequence that the ordinance was not acknowledged. ORS 197.625(1). Petitioner argued in the 2004 appeal

that city must apply Goal 5 directly to development proposed within the riparian preservation area, rather than ALUO 18.62, which petitioner contends is inconsistent with Goal 5.

In the current proceeding, petitioner renewed those arguments. The city rejected them, explaining that following remand of petitioner's appeal of the 2004 building permit, the city submitted the ordinance adopting ALUO 18.62 to DLCD, no person appealed that ordinance, and therefore the ordinance is deemed acknowledged at the end of the appeal period, in this case December 23, 2005. Record 27 (citing to ORS 197.625(1)).

Under the eighth assignment of error, petitioner argues that DLCD's acknowledgment was in error, and as a consequence ALUO 18.62 remains unacknowledged. Therefore, petitioner argues, the city is required to apply Goal 5 directly to development within the riparian area, and erred in failing to do so.

The city responds, and we agree, that petitioner's arguments are essentially a collateral attack on the DLCD acknowledgment of the ordinance adopting ALUO 18.62, and that such arguments cannot be advanced in this appeal. By operation of ORS 197.625(1), the ordinance adopting ALUO 18.62 is acknowledged to comply with Goal 5. The physical constraints permit application was filed after December 23, 2005, and is subject to the acknowledged ordinance. The city did not err in concluding that it is not obligated to apply Goal 5.

The eighth assignment of error is denied.

The city's decision is affirmed.