

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 BRIDGE STREET PARTNERS,  
5 YELLOW PINE, LLC, MICHAEL J. HANKS,  
6 and PLANNING RESOURCES, INC.,  
7 *Petitioners,*

8  
9 vs.

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11 CITY OF LAFAYETTE,  
12 *Respondent,*

13  
14 and

15  
16 CAROL PADDOCK,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2007-222

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from the City of Lafayette.

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26 Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf  
27 of petitioners. With him on the brief was Andrew H. Stamp, P.C.

28  
29 Timothy V. Ramis, Portland, filed a response brief and argued on behalf of  
30 respondent. With him on the brief were William A. Monahan, Robert T. Yamachika, and  
31 Jordan Schrader Ramis, P.C.

32  
33 Ty K. Wyman, Portland, filed the response brief and argued on behalf of intervenor-  
34 respondent. With him on the brief was Dunn Carney Allen Higgins & Tongue LLP.

35  
36 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
37 participated in the decision.

38  
39 REMANDED

03/27/2008

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

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**NATURE OF THE DECISION**

Petitioner appeals a decision by the city denying an application for a planned unit development.

**MOTION TO INTERVENE**

Carol Paddock moves to intervene on the side of respondent in this appeal. There is no opposition to the motion and it is granted.

**MOTION TO RECONSIDER ORDER ON REPLY BRIEF**

Petitioners previously moved to submit an 8-page reply brief that petitioners alleged responded to new matters raised in the respondents' briefs. We granted petitioners' motion in part and allowed a portion of petitioners' reply brief. *Bridge Street Partners et al v. City of Lafayette*, \_ Or LUBA \_ (LUBA No. 2007-222, Order, February 27, 2008). Petitioners then moved for reconsideration of our order denying their motion with respect to the remainder of the reply brief. Petitioners' motion for reconsideration is denied.

**FACTS**

The subject property is a 21.78-acre parcel zoned Residential (R-1). A portion of the property is located in a Restricted Development Overlay (RDO) zone. The property contains a flat ridge running north to south and is surrounded by steeply wooded slopes on the east, south and west. The north and west boundaries of the property are adjacent to the city's urban growth boundary and the city limits. The east fork of Millican Creek runs near the eastern edge of the property and Millican Creek runs near the western boundary of the property.

Petitioners initially proposed a 76-lot Planned Unit Development (PUD), and later reduced the number of proposed lots to 70. Petitioners propose to dedicate approximately seven acres of the steeply sloped areas of the property as open space. The proposed PUD would discharge storm water into Millican Creek. The proposed storm drainage system

1 would send all storm water to a large pipe that would be fitted with an energy dissipater at  
2 the point where the storm water discharges into the creek, to protect the banks of the creek  
3 from erosion.

4 The planning commission denied the application, and petitioners appealed the denial  
5 to the city council. The city council held a hearing on the application and voted to deny the  
6 application. In its decision, the city council did not adopt new findings but adopted and  
7 incorporated the planning commission's findings into its decision. This appeal followed.

8 **FIRST ASSIGNMENT OF ERROR**

9 In the first assignment of error, petitioners argue that the city misconstrued the  
10 relevant PUD standard that governs dedication of open space in denying the proposed PUD.  
11 Lafayette Zoning and Development Ordinance (LZDO) 2.302.05(D) provides:

12 "Amount of Open Space: The required amount of open space or outdoor  
13 recreational area shall be at least twenty (20) percent of the gross area. Such  
14 open space should include school access routes, bicycle trails, natural or  
15 landscaped buffer areas, covered bus stops and the like, whenever practical or  
16 appropriate."

17 As noted, petitioners propose to dedicate approximately 7 acres of the 21-acre property, or  
18 approximately 33% of the property, as open space. The proposed open space consists mainly  
19 of the steeply sloped areas located on the east and west boundaries of the property that  
20 petitioners explain is not generally suitable for walking trails or playgrounds. Petitioners  
21 also proposed a play area and access ways.

22 The city found:

23 "The PUD contains 21.78 acres. The proposed 7.12 acres of open spaces  
24 contains 33% of the gross land area, thereby exceeding the minimum  
25 requirement. In response to concerns about a lack of community recreational  
26 space, the applicant provided additional amenities. This includes a play area  
27 near Lot 29 with a connecting walkway to the access near Lot 33. There are  
28 two remaining access points, each serviced with a bench or picnic table. No  
29 other walkway connections are provided.

30 "Most of this area is steeply sloped and part of the RD Overlay Zone. As with  
31 previous PUD approvals – Lafayette Plantation, Lafayette Estates and Haylen

1 Meadows (located directly across the Millican Creek ravine from the  
2 proposed PUD) – it may not be feasible to construct usable pathways and  
3 develop these areas for public use without destabilizing the existing steep  
4 slopes. It may well be the slope’s steepness and instability render them  
5 unusable (or marginally usable at best) for recreational open space.

6 “However, it must also be noted the only play area is on the west side of the  
7 property, approximately ¼ mile from the Lots located at the entrance of the  
8 PUD. This is a small area and the Commission finds it entirely unsuitable or  
9 sufficient for the entire development. No other significant recreational areas  
10 were provided.

11 “The Commission recognizes a PUD allows smaller lots as a means to create  
12 shared recreational space for the residents. In this particular case, however,  
13 the Commission notes the vast majority of the open space is generally  
14 unusable – even to provide walking pathways – due to steep slopes and soil  
15 conditions. For these reasons, the Commission concludes the proposed open  
16 space and improvements do not meet the intent of the open space  
17 requirements.” Record 79.

18 Petitioners argue that the city misinterpreted LZDO 2.302.05(D) as requiring at least some of  
19 the dedicated open space to consist of “outdoor recreation area.” We understand the city to  
20 have found that in order to meet the requirements of LZDO 2.302.05(D), some indeterminate  
21 proportion of the required open space must be “outdoor recreation area” that is usable for  
22 some sort of active recreation by the residents of the PUD. Petitioners argue that the text of  
23 code provision does not support that interpretation, and in fact the code permits the required  
24 20 percent of open space to consist of “open space *or* outdoor recreational area.”

25 The city responds that under ORS 197.829(1), LUBA is required to defer to the city’s  
26 interpretation of its code unless that interpretation is clearly wrong.<sup>1</sup> It is not entirely clear to

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<sup>1</sup> ORS 197.829(1) provides:

“The Land Use Board of Appeals 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:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

1 us what the city’s “interpretation” is, or what the city is purporting to interpret in the above-  
2 quoted finding. However, we agree with petitioners that there is no support in the language  
3 of LZDO 2.302.05(D) for the city’s position that the open space provided under that section  
4 must include some indeterminate quantity or quality of “outdoor recreation area.” The  
5 relevant provision requires at least 20% of the gross area to consist of “open space” *or*  
6 “outdoor recreation area.” Neither term is defined in the LZDO. However, the first sentence  
7 distinguishes between “open space” and “outdoor recreation area.” That distinction strongly  
8 suggests that the city views traditional open space differently from a type of open space it  
9 describes as “outdoor recreation area.” The use of the word “or” indicates that the city  
10 determined that either type of identified open space, i.e. traditional open space or outdoor  
11 recreation area, could be used to meet the 20% requirement. Finally, the second sentence of  
12 LZDO 2.302.05(D) identifies some types of open space that meet the requirements of the  
13 first sentence, including “natural \* \* \* buffer areas.” We conclude that the city’s  
14 interpretation of LDZO 2.302.05(D) is inconsistent with the plain text of the ordinance. If  
15 the city wishes to require that some or all of the open space that PUDs must provide under  
16 LDZO 2.302.05(D) be “outdoor recreation area,” it must amend LDZO 2.302.05(D) to  
17 impose that requirement.

18 The city also asserts that one of the bases for the city’s denial of the proposed PUD is  
19 that the proposed PUD does not meet the purpose of the PUD provisions of the LZDO found  
20 at LZDO 2.302.01, which the city argues are additional approval criteria applicable to the  
21 proposed PUD.<sup>2</sup> However, the city has not explained why the purpose statement of the PUD

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“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

<sup>2</sup> LZDO 2.302.01 provides that the purpose of the PUD is:

1 ordinance imposes mandatory approval standards on PUD applications. *See Renaissance*  
2 *Development v. City of Lake Oswego*, 45 Or LUBA 312, 323-3 (2003) (where a purpose  
3 statement is worded as a general expression of the goals and objectives that a local  
4 government hopes to achieve by adopting a regulation, it does not play a direct role in  
5 reviewing applications for permits). Notably, LZDO 2.302.01(A) through (C) are not  
6 mentioned anywhere in the decision or any staff report prepared by the city as being  
7 applicable approval criteria<sup>3</sup> As such, we are not persuaded by the city’s explanation of its  
8 rationale for denial of the PUD on the basis that the PUD failed to satisfy the provisions of  
9 LZDO 2.302.01.

10 The first assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 As noted, the subject property is located within a Restricted Development Overlay  
13 (RDO) Zone. The city based its denial of the proposed PUD in part on a finding that the  
14 proposed PUD does not satisfy the intent of the RDO zone.<sup>4</sup> Petitioners argue that the city’s

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- “A. To produce a development which would be as good as, or better than one resulting from traditional lot-by-lot development.
  - “B. To allow flexibility which will encourage a more creative approach in the development of land, and will result in a more efficient, aesthetic and desirable use of open area, while substantially maintaining the same population density and area coverage permitted in the district in which the project is located.
  - “C. To allow flexibility in design, placement of buildings, use of open spaces, circulation facilities, off-street parking areas, and to best utilize the site potential characterized by special features of geography, topography, size and shape.”

<sup>3</sup> Presumably LZDO 2.302.01(A) through (C) function as context for the LZDO 2.302.05(D) open space requirement. However, we do not think any language in the purpose statement particularly supports the city’s view of the LZDO 2.302.05(D) open space requirement, which, as explained above includes text that unambiguously provides that the required 20 percent of open space may include open space *or* outdoor recreational areas.

<sup>4</sup> LZDO 2.111.01 provides:

“The purpose of the Restricted Development Overlay District is to protect the natural, scenic, and recreational qualities of lands along streams and drainage corridors identified within the City of Lafayette’s Comprehensive Plan ‘Open Space Overlay’ designation. Further, it is the

1 findings regarding that basis for denial are inadequate and are not supported by substantial  
2 evidence in the record. Petitioners argue that the evidence in the record indicates that  
3 applicant’s proposed storm drainage system is adequate to address erosion concerns along  
4 Millican Creek and that there is no substantial evidence in the record that the applicants’  
5 proposed storm drainage system would not mitigate erosion or storm-drainage impacts.  
6 Petitioners also point out that the city engineer advised petitioners prior to application being  
7 submitted that a separate on-site storm detention system was not required. Record 257.

8 The city’s findings addressing the storm drainage system are found in various parts of  
9 the decision, as follows:

10 “As designed, the project does not develop any land located within the [RDO]  
11 zone. No vegetation will be removed or altered. However, as noted, the [city]  
12 is concerned the drainage will impact land along Millican Creek.” Record 76.

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intent of this Section to implement goals and policies of the Comprehensive Plan relating to  
the Open Space designation by establishing standards and requirements for the use of lands  
within the implementing R-D District.”

LZDO 2.111.05 provides the standards and requirements for the RDO zone:

“In addition to the Conditional Use criteria in Section 3.103, a conditional use permit within  
the R-D Overlay District shall indicate how: (a) the proposal will not affect the following  
factors; (b) the proposal can be mitigated in some manner to minimize or eliminate potential  
harmful impacts regarding the following factors; or, (3) the factors do not apply to the  
request. The factors include:

- “A. Development shall be directed away from adjacent streams and drainage corridors to  
the greatest possible extent.
- “B. The development, change, or intensification of use shall provide the maximum  
possible landscaped area, open space, or vegetation between the activity and  
adjacent streams or drainage corridors.
- “C. The fringe along streams and drainage corridors shall be maintained to the maximum  
extent practical in order to assure scenic quality, protection of wildlife habitat, and  
protection from erosion. Management of the natural vegeta[tion], including trees or  
forest cover, shall be subject to the requirements of Section 2.111.06.
- “D. Areas of annual flooding, flood plains, and wetlands shall be preserved in their  
natural state to the maximum possible extent to protect water retention, overflow and  
other natural functions. The development shall comply with the flood plain or  
floodway development requirements of the Lafayette Zoning and Development  
Ordinance.”

1           “\* \* \* \* \*

2           “Storm Sewer – Based upon the elevation contours and the preliminary utility  
3 layout, storm drainage from the subdivision property currently drains to the  
4 south and into the Millican Creek. However, [the city] previously expressed  
5 concern regarding directing drainage to the Creek.” Record 81.

6           “\* \* \* \* \*

7           “\* \* \* There is little alternative to directing drainage from the project to the  
8 adjacent Millican Creek. Again, the steep slopes and soil conditions suggest  
9 erosion problems and impacts on the landscape, which is contrary to the intent  
10 of the [RDO] zone.” Record 83-84.

11           The city responds by pointing to evidence in the record regarding concerns raised by  
12 neighbors about erosion and landslides on properties in the vicinity of the subject property,  
13 and argues that that evidence constitutes substantial evidence that supports the city’s denial.

14           We agree with petitioners that the city’s findings are inadequate to explain the basis  
15 for its denial. In denying an application for land use approval based on a finding that the  
16 application does not comply with applicable criteria, the local government’s findings must be  
17 sufficient to inform the applicant either what steps are necessary to obtain approval or that it  
18 is unlikely that the application will be approved. *Commonwealth Properties v. Washington*  
19 *County*, 35 Or App 387, 400, 582 P2d 1384 (1978); *Rogue Valley Manor v. City of Medford*,  
20 38 Or LUBA 266, 272 (2000). The findings must provide a coherent explanation for why the  
21 city believes the proposal does not comply with the criteria. *Caster v. City of Silverton*, 54  
22 Or LUBA 441, 457 (2007). The findings adopted by the city in the present case merely  
23 express “concern” over drainage into the creek and note that the slopes and soil conditions  
24 “suggest” erosion problems. Other than a general reference to the slopes and soil conditions  
25 “suggesting” erosion and a reference to the intent of the RDO zone, the city’s findings do not  
26 explain which criteria the application fails to meet or otherwise inform the applicant what  
27 steps are necessary to obtain approval under the relevant criteria. Such findings are  
28 inadequate to explain the city’s basis for denying the proposed PUD based on concerns about  
29 storm drainage. While we tend to agree with petitioners that the evidence submitted by



1 petitioners indicates that erosion concerns can be mitigated by the use of an energy  
2 dissipater, and that the neighbor’s testimony cited by the city to support the city’s decision is  
3 not particularly strong, we will not address petitioners’ evidentiary arguments until the city  
4 has adopted findings that adequately explain why it believes the PUD does not comply with  
5 relevant criteria and what facts the city believes are essential to those findings. *DLCD v.*  
6 *Columbia County*, 15 Or LUBA 302, 305 (1987).

7 The second assignment of error is sustained.<sup>5</sup>

8 **THIRD ASSIGNMENT OF ERROR**

9 In the third assignment of error, petitioners argue that the city erred in denying the  
10 proposed PUD on the basis that the proposed streets serving the PUD are not adequate.  
11 LZDO 2.302.05(G) provides:

12 “Circulation:

- 13 “1. Streets within a PUD shall comply with the applicable standards of  
14 Section 2.204.
- 15 “2. Roads, pedestrian and bikeway paths shall be an integrated system  
16 designed to provide efficient and safe circulation to all users.  
17 Developments should be designed to minimize the length of roadway.
- 18 “3. Pedestrian/bikeways shall be clearly signed and have adequate  
19 crossing facilities where warranted.”

20 Access to the lots within the PUD is proposed to be via a new street, 17<sup>th</sup> Street, a local street  
21 that would connect to Haylen Drive, a local street that is 34 feet wide. LZDO 2.202.04  
22 establishes a “minimum” curb-to-curb width for local streets of 34 feet and a 48-foot right of  
23 way.<sup>6</sup> During the proceedings below, the city engineer recommended that the width of 17<sup>th</sup>

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<sup>5</sup> Because we agree with petitioners that the city’s findings are inadequate, we need not address petitioners’ alternative argument that the city was required, under ORS 197.522, to impose a reasonable condition of approval to address the perceived deficiencies in the application, rather than denying the application outright.

<sup>6</sup> That section provides that the standards set forth in that section “\* \* \* shall be the minimum requirements for all streets, except where modifications are permitted under subsection 2.202.05.”

1 Street from its intersection with Haylen Drive to its intersection with the cul-de-sac known as  
2 Bridgeport Street be increased to 36 feet within a 50-foot right of way and that Haylen Drive  
3 be widened to a 36-foot curb-to-curb width. At the October 11, 2007 city council hearing,  
4 the applicant expressed a willingness to accept a condition of approval requiring construction  
5 of 17th Street to those standards and widening Haylen Drive by two feet. Record 24.

6 In denying the proposed PUD, the planning commission found in relevant part:

7 “The Development Ordinance requires a 48-foot right-of-way with a 34-foot  
8 curb-to-curb improvement. However, both the fire chief and the school  
9 district verbally expressed concern regarding access (by fire trucks and school  
10 buses, respectively) due to the excessive length of what is essentially a dead-  
11 end street. To address these issues, City staff recommended 17<sup>th</sup> Street from  
12 Haylen Drive to Bridgeport Street be constructed as a 36 foot street within a  
13 50 foot right-of-way.

14 “Although not part of the design criteria in a PUD, the proposed cul-de-sac  
15 exceeds the maximum number of lots allowed by the Public Works Standards.  
16 For this reason, it was recommended that the street be constructed as a full 34-  
17 foot street with parking on both sides.

18 “The Oregon Fire Code requires at least two separate access roads for  
19 developments with more than 30 dwelling units. The layout includes a  
20 secondary emergency-only access on the property to the north.  
21 Communication with Yamhill County indicates a conditional use permit may  
22 be required to install this access roadway.

23 “While this secondary access may assist emergency vehicles, this does not  
24 address the Commission’s larger concern regarding a secondary access for  
25 residents. Existing land in the City is primarily served through a grid street  
26 pattern allowing the diffusion of traffic. There will be only a single access to  
27 the project, in this case a street designed to local street standards (Haylen  
28 Drive). However, previous comments by the school district and fire chief  
29 prefer a wider road for safety reasons. This is not possible given current  
30 improvements to Haylen Drive. For this reason, and although improvements  
31 within the development meet standards, the Commission finds the vehicle  
32 access in not acceptable for the project.” Record 80.

33 Petitioners argue that the city’s findings are inadequate and that the city’s determination that  
34 the proposed street system is unsafe is not supported by substantial evidence in the record.

35 In response, the city explains that the findings indicate that the proposed PUD did not contain  
36 “\* \* \* an integrated system designed to provide efficient and safe circulation to all users” as

1 required by LZDO 2.302.05(G)(2). The city points to evidence in the record that the fire  
2 chief and the school district expressed concern regarding access by fire trucks and school  
3 buses due to the excessive length of 17th Street. The city also points to testimony from  
4 neighbors expressing generalized concerns about increased traffic.

5 We agree with petitioners that the city’s findings explaining its denial of the proposed  
6 PUD based on LZDO 2.302.05(G) are inadequate. Here, the city appears to have determined  
7 that a local street that is wider than the 34-foot width prescribed by the city’s code was  
8 necessary to address safety concerns raised by the fire and school districts, and the applicants  
9 agreed to construct a wider street within the proposed PUD and also agreed to widen a street  
10 that is not located within the proposed PUD. However, the city determined that “[a wider  
11 street] is not possible given current improvements to Haylen Drive.” We understand this  
12 finding to refer to the portion of Haylen Drive that is 34 feet wide that is located outside of  
13 the proposed PUD. However, that finding does not explain what PUD approval criterion is  
14 violated because a local street outside the proposed PUD was constructed to the standards set  
15 forth in LZDO 2.202.04. LZDO 2.302.05(G) appears to be concerned with internal  
16 circulation, not the adequacy of roads outside the PUD. Even if some violation is presumed,  
17 the findings do not adequately explain why the city rejected petitioners’ offer to widen  
18 Haylen Drive. The findings do not explain why “current improvements,” meaning apparently  
19 the existing 34-foot paved width, make widening Haylen Street “impossible.” That  
20 petitioners offered to widen the street suggest that there is no technical or financial  
21 impediment for doing so.

22 The third assignment of error is sustained.<sup>7</sup>

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<sup>7</sup> Because we sustain petitioners’ argument that the city’s findings are inadequate, we need not decide petitioners’ other bases for challenging the city’s decision.

1 **REMEDY**

2           Petitioners argue that LUBA should reverse the city’s denial of the proposed PUD  
3 and order the city to approve the PUD under ORS 197.835(10)(a)(A). ORS  
4 197.835(10)(a)(A) requires LUBA to reverse a local government decision and order the local  
5 government to grant approval of an application for development denied by the local  
6 government if the board finds:

7           “Based on the evidence in the record, that the local government decision is  
8 outside the range of discretion allowed the local government under its  
9 comprehensive plan and implementing ordinances[.]”

10 The Court of Appeals has interpreted this language to mean that LUBA must reverse a denial  
11 of a permit if the record establishes, as a matter of law, that the application must be  
12 approved. *Smith v. Douglas County*, 93 Or App 503, 508, 763 P2d 169 (1988), *aff’d* 308 Or  
13 191, 777 P2d 1377 (1989). We sustained the first assignment of error because we agreed  
14 with petitioners that the city misconstrued LZDO 2.302.05(D) in determining that the  
15 proposed PUD did not provide sufficient open space. We sustained the second and third  
16 assignments of error because we agreed with petitioners that the city’s findings were  
17 insufficient to support the decision. However, petitioners have not established as a matter of  
18 the law that the application meets all of the requirements of the city’s PUD ordinance. Thus  
19 remand is the appropriate remedy.

20           The city’s decision is remanded.