

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 GLORYBEE FOODS, INC.,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF EUGENE,  
10 *Respondent.*

11  
12 LUBA No. 2008-025

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Eugene.

18  
19 Bill Kloos, Eugene, filed the petition for review. With him on the brief was the Law  
20 Office of Bill Kloos PC. Dan Terrell, Eugene, argued on behalf of petitioner.

21  
22 Emily N. Jerome, Eugene, filed the response brief and argued on behalf of  
23 respondent. With her on the brief was Harrang Long Gary Rudnick P.C.

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

27  
28 REMANDED

06/17/2008

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

**NATURE OF THE DECISION**

Petitioner appeals a city hearings official’s interpretation of a county land use regulation.

**REPLY BRIEF**

Petitioner moves for permission to file a reply brief to respond “to new matters raised in the respondent’s brief,” pursuant to OAR 661-010-0039. The motion is allowed.

**MOTION REGARDING RESPONDENT’S SUMMARY OF FACTS**

Petitioner filed a motion asking that LUBA disregard portions of the city’s summary of material facts. The parties’ factual dispute, and their dispute about how that factual dispute should be resolved, has no bearing on our resolution of this appeal, and we do not consider the motion further.

**INTRODUCTION**

Petitioner sought city approval for an industrial subdivision that would be located outside the City of Eugene, but inside its urban growth boundary (UGB). In this unincorporated but urbanizable area, Lane County has adopted the Urban Transition Code or UTC. In adopting the UTC, Lane County simply adopted portions of the Eugene Code (EC). As relevant in this appeal, EC and UTC 9.6800 through 9.6875 establish “Standards for Streets, Alleys, and other Public Ways.” Pursuant to an agreement between the city and county, the city applies the UTC in the urbanizable area inside the UGB but outside the Eugene city limits. Because the city has adopted amendments to EC 9.6800 through 9.6875 since the county adopted the UTC, and the county has not yet adopted those amendments as part of UTC 9.6800 through 9.6875, there are some textual differences between EC and UTC 9.6800 through 9.6875. In this opinion we focus on the UTC.

1 UTC 9.6815(2)(b) and (c) set out street connectivity standards.<sup>1</sup> If those street  
2 connectivity standards are applied to petitioner’s proposed subdivision, two street  
3 connections would be required that petitioner contends would require widening a bridge and  
4 crossing (1) a riparian corridor that was designated pursuant to Statewide Planning Goal 5  
5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and (2) a jurisdictional  
6 wetland that is not protected as a Goal 5 resource site but is regulated by the Oregon Division  
7 of State Lands. According to petitioner, those street connections would cost approximately  
8 one million dollars. Record 84 and 86.

9 An exception to the UTC 9.6815(2)(b) and (c) street connectivity standards is set out  
10 at UTC 9.6815(2)(f).<sup>2</sup> Petitioner took the position before the city below that UTC  
11 9.6815(2)(f) applies here and that its subdivision need not comply with the UTC

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<sup>1</sup> UTC 9.6815(2)(b) and (c) provide as follows:

- “(b) The proposed development shall include street connections in the direction of all existing or planned streets within ¼ mile of the development site. The proposed development shall also include street connections to any streets that abut, are adjacent to, or terminate at the development site. Secondary access for fire and emergency medical vehicles is required.
- “(c) The proposed development shall include streets that extend to undeveloped or partially developed land that is adjacent to the development site or that is separated from the development site by a drainage channel, transmission easement, survey gap, or similar property condition.”

<sup>2</sup> UTC 9.6815(2)(f) provides as follows:

“Except for applications proposing needed housing, the requirements of subparagraphs (b) and (c) of this subsection do not apply if it is demonstrated that a connection cannot be made because of the existence of one or more of the following conditions:

- “(1) Physical conditions preclude development of the connecting street. Such conditions may include, but are not limited to, topography or likely impact to natural resource areas such as wetlands, ponds, streams, channels, rivers, lakes or upland wildlife habitat area or a resource on the National Wetland Inventory or under protection by state or federal law.
- “(2) Buildings or other existing development on adjacent lands, including previously subdivided but vacant lots or parcels, physically preclude a connection now or in the future, considering the potential for redevelopment.”

1 9.6815(2)(b) and (c) street connectivity standards. During the city’s completeness review of  
2 petitioner’s proposed subdivision, it became apparent that petitioner and the city planning  
3 staff interpreted UTC 9.6815(2)(f) differently. Simply stated, petitioner took the position  
4 before the city that because complying with the UTC 9.6815(2)(b) and (c) connectivity  
5 standards would necessarily impact wetlands and a riparian area, the exception provided by  
6 UTC 9.6815(2)(f) applies. City planning staff took the position that the mere presence of or  
7 impacts to wetlands and riparian areas was not sufficient to qualify for the exception  
8 provided by UTC 9.6815(2)(f). City planning staff took the position that the applicant must  
9 also demonstrate that there is something about the wetlands and riparian area on the site that  
10 makes the street connections that would be required by UTC 9.6815(2)(b) and (c) “not  
11 feasible.” Record 95.

12 To resolve the different interpretations of UTC 9.6815(2)(f), petitioner submitted a  
13 request for a formal UTC interpretation, pursuant to UTC 9.0040(1).<sup>3</sup> Record 84-90. In that  
14 request petitioner proposed the following interpretation of UTC 9.6815(2)(f):

15 “The applicant’s requested interpretation is that, in circumstances where  
16 meeting the connectivity standard in EC or UTC 9.6815(2)(b) would require  
17 impacting a wetland, or Goal 5 Resource Site, then the applicant is entitled to  
18 an exemption under EC 9.6815(2)(g)(2) or UTC 9.6815(2)(f)(1), whichever is  
19 applicable.” Record 86 (original emphasis deleted).

20 The requested interpretation was rendered for the planning director by a senior city  
21 planner. The senior city planner rejected petitioner’s interpretation and provided the  
22 following relevant explanation for doing so:

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<sup>3</sup> UTC 9.0040(1) provides:

“The planning director is authorized to interpret this land use code and decisions issued pursuant to this land use code. Requests for interpretations shall be submitted on a written form approved by the city manager and accompanied by a fee established pursuant to EC Chapter 2. Within 10 days of receipt of the written request, the planning director shall make a written interpretation and mail or deliver a copy to the party requesting the interpretation. Appeals of these interpretations shall be heard by a hearings official in the manner set out in EC 9.7600 - 9.7635.”

1           “\* \* \* While it is correct that both the Eugene Code and the Urban Transition  
2           Code \* \* \*, provide for an exception to the street connectivity standards, this  
3           exception is not granted solely based on the existence of a natural resource.  
4           Both codes require the applicant demonstrate that the physical conditions;  
5           wetlands or Goal 5 resources in this instance, preclude development of a  
6           street. \* \* \*” Record 81.

7           As authorized by UTC 9.0040(1), petitioner appealed the planner’s interpretation to  
8           the city hearings official. The city hearings official upheld the senior planner’s  
9           interpretation, and this appeal followed.

10       **FIRST ASSIGNMENT OF ERROR**

11           All parties recognize that when interpreting statutes, LUBA and the appellate courts  
12           apply the template set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d  
13           1143 (1993). That template also applies when interpreting local laws. *City of Hillsboro v.*  
14           *Housing Devel. Corp.*, 61 Or App 484, 489, 657 P2d 726 (1983). Under the three part  
15           methodology that is required by the PGE template, the first level of analysis requires us to  
16           examine the text and context of UTC 9.6815(2)(f).<sup>4</sup>

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<sup>4</sup> The parties cite contextual UTC provisions that they believe support their respective positions concerning the meaning of UTC 9.6815(2)(f). Based on the text of UTC 9.6815(2)(f), we conclude below that the hearings official misconstrued 9.6815(2)(f). We also conclude, based on the text of UTC 9.6815(2)(f), that petitioner’s suggested interpretation of UTC 9.6815(2)(f), if possible, is certainly not the only permissible interpretation. The contextual provisions cited by the parties do not affect or change our analysis of the text of UTC 9.6815(2)(f), and we do not discuss those contextual provisions further in this opinion.

The city also assigns great significance to the fact that the operative text of UTC 9.6815(2)(f) was reviewed in *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 406 (2002) and found to violate the ORS 197.307 requirement that approval standards that are applied to needed housing must be “clear and objective.” The city points out that UTC 9.6815(2)(f) and other standards that LUBA found to be impermissibly unclear and subjective in that case were subsequently amended so that they no longer apply to needed housing. We understand the city to argue this supports the hearings official’s interpretation of UTC 9.6815(2)(f) to impose a subjective standard and undercuts petitioner’s argument that UTC 9.6815(2)(f) should be interpreted to impose a more objective standard. We agree with petitioner that the question presented in *Home Builders* (were the cited approval standards clear and objective) and the question presented in this appeal (has the city correctly interpreted UTC 9.6815(2)(f)) are different questions. All we decided in *Home Builders* is that the city’s equivalent of UTC 9.6815(2)(f) did not impose a clear and objective approval standard, because the operative term “preclude” is not clear and objective. We were not called upon to decide, and we did not decide, whether the city might be able to interpret the city’s equivalent of UTC 9.6815(2)(f) in a way that would result in a clear and objective standard that could be applied to requests for approval of needed housing. Under ORS 227.173 and 215.416 standards that apply to needed housing must be “clear and objective on the face of the ordinance.”

1 The text of UTC 9.6815(2)(f) is set out at n 2. We turn now to the hearings official's  
2 interpretation of UTC 9.6815(2)(f).

3 **A. The Hearings Official's Interpretation**

4 The hearings official's interpretation is set out in relevant part below:

5 "[T]he city agrees with the applicant that the site includes jurisdictional  
6 wetlands, but disagrees with the applicant that the presence of wetlands alone  
7 allows the applicant to avoid the connectivity standards of UTC 9.6815(b) and  
8 (c). *Rather, the city argues, the decision maker must draw a legal conclusion*  
9 *from the evidence that the preservation of wetlands and other natural areas*  
10 *takes precedence over the connectivity standards.* The applicant objects to  
11 this interpretation, arguing that the city council and board of county  
12 commissioners made the policy choice to protect wetlands and natural areas  
13 by adopting UTC 9.6815(2)(f) in the first place.

14 "The ambiguity of UTC 9.6815(2)(f) arises from the emphasis the city places  
15 on the word 'cannot' in the opening phrase, and the contrasting emphasis the  
16 applicant places on 'preclude' and 'likely impact' in UTC 9.6815(2)(f)(1).  
17 The city asserts that the word 'cannot' is a legal conclusion that must be made  
18 by the decision maker, based on the evidence of limiting physical conditions  
19 on the site. The city notes that EC 9.6815(2)(g), the parallel provision to UTC  
20 9.6815(2)(f), provides that the city shall grant an exception to the standards  
21 '[i]n the context of a Type II or Type III [quasi-judicial discretionary  
22 decision],' and argues that *this means that the decision maker has an*  
23 *opportunity to weigh the evidence to determine whether it is more appropriate*  
24 *to meet the connectivity standards than to preserve wetlands.*

25 "The applicant responds that if it is likely that existing physical conditions on  
26 the site will 'preclude' development of the connecting street, a street  
27 connection cannot be made. The applicant argues that this interpretation is  
28 consistent with UTC 9.6815(2)(f)(2), which allows the applicant to avoid the  
29 street connectivity standards if the layout of a previously subdivided but  
30 undeveloped property 'precludes' a connection. The applicant also argues  
31 that its interpretation logically flows from the process used to develop a  
32 subdivision—an applicant do[es] not have to undertake the costly studies  
33 needed to establish the feasibility of a street connection if such a street  
34 connection is not required by the code. Using its interpretation, the applicant  
35 argues, the applicant does not have to commission the studies just to show that  
36 the connections are not required in the first place.

37 "While the question is a close one, the hearings official concludes that the  
38 city's interpretation is correct. The applicant's interpretation, while certainly  
39 plausible, omits any consideration of 'if it is demonstrated a connection  
40 cannot be made' by reading UTC 9.6815(2)(f) to say: '[T]he requirements of

1 [UTC 9.6815(2)(b) and (c) do not apply if \* \* \* [p]hysical conditions preclude  
2 development of the connecting street.’ UTC 9.6815(2)(f) permits the  
3 applicant to make the argument that the physical conditions preclude  
4 development to such an extent that a street connection cannot be made \* \* \*.

5 “The city’s interpretation is also consistent with the definition of ‘preclude’  
6 which connotes an impediment to the connection, rather than a condition that  
7 eliminates all possibility of that connection. For these reasons, the hearing  
8 official denies the applicant’s appeal and upholds the planning director’s  
9 interpretation of UTC 6815(2)(b), (c) and (f).” Record 5-6 (footnotes omitted,  
10 emphasis added).<sup>5</sup>

11 In the emphasized language in the first and second paragraphs quoted above the  
12 hearings official describes arguments the city planning staff apparently made to her. She  
13 later embraces those arguments. The emphasized language suggests that the hearings  
14 official believes UTC 9.6815(2)(f) does not permit an exception to the referenced street  
15 connectivity standards if the city determines preservation of the wetlands should take  
16 “precedence over the connectivity standards” and that UTC 9.6815(2)(f) does allow an  
17 exception to those connectivity standards if the city decides “it is more appropriate to meet  
18 the connectivity standards than to preserve wetlands.” There is absolutely no support in the  
19 text of UTC 9.6815(2)(f) or anywhere else for either notion. Because the hearings official  
20 reads these unauthorized balancing considerations into her interpretation of UTC  
21 9.6815(2)(f), remand is required.

22 Another potential problem with the hearings official’s interpretation is present in the  
23 final two paragraphs. We are not entirely sure we understand the hearings official’s  
24 reasoning in those two paragraphs. As explained below, petitioner interprets UTC  
25 9.6815(2)(f) to grant an exception to subsections (b) and (c) of UTC 9.6815(2) simply  
26 because the street connections that would be required by those subsections would cross or

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<sup>5</sup> In one of the omitted footnotes, the hearings official provides a dictionary definition of “preclude.”

“See *Webster’s Third New Int’l Dictionary*, (2001 ed.), 1785: ‘preclude’ means: ‘\* \* \* HINDER, STOP, IMPEDE \* \* \* 2: ‘to shut out \* \* \* prevent or hinder by necessary consequence or implication, deter action of, access to, or enjoyment of \* \* \*.’” Record 6.

1 impact wetlands. The hearings official clearly does not agree with that interpretation.  
2 However, the hearings official appears to interpret the “cannot be made” language in UTC  
3 9.6815(2)(f) to impose the ultimate standard under UTC 9.6815(2)(f). In doing so she  
4 describes the “preclude development” language in UTC 9.6815(2)(f) to connote “an  
5 impediment to the connection, rather than a condition that eliminates all possibility of that  
6 connection.” Although it seems unlikely to affect the ultimate resolution of the meaning of  
7 UTC 9.6815(2)(f), as we explain below, we do not agree with the way the hearings official  
8 analyzed the interpretive question presented in this appeal. We turn now to petitioner’s  
9 argument about how it believes UTC 9.6815(2)(f) should be interpreted.

10 **B. Petitioner’s Interpretation**

11 For ease of reference, we again set out the relevant text of UTC 9.6815(2)(f).

12 “[T]he requirements of subparagraphs (b) and (c) of this subsection do not  
13 apply if it is demonstrated that a connection *cannot be made because of the*  
14 *existence of one or more of the following conditions:*”

15 “(1) Physical conditions *preclude development* of the connecting street.  
16 Such conditions may include, but are not limited to, topography or  
17 likely *impact* to natural resource areas such as wetlands, ponds,  
18 streams, channels, rivers, lakes or upland wildlife habitat area, or a  
19 resource on the National Wetland Inventory or under protection by  
20 state or federal law.

21 “(2) Buildings or other existing development on adjacent lands, including  
22 previously subdivided but vacant lots or parcels, physically *preclude* a  
23 connection now or in the future, considering the potential for  
24 redevelopment.” (Emphasis added.)

25 In its brief, petitioner offers the following interpretation of UTC 9.6815(2)(f):

26 “Petitioner reads the language to call for a decision that is factually based and  
27 that applies clear and objective criteria, not a discretionary weighing process.  
28 The code provides for a black and white decision based on whether the  
29 proposal’s compliance with the connectivity would *impact*, for example, a  
30 wetland. See UTC 9.6815(2)(f)(1). If it does, then the exception language  
31 applies and subparagraphs (b) and (c) do not apply to the proposal.” Petition  
32 for Review 9 (emphasis added).



1 “When [the first part of UTC 9.6815(2)(f) is read together with the two  
2 specified conditions] when an applicant has made the demonstration that one  
3 of the specified physical conditions exists such that it impedes compliance  
4 with street connectivity requirements of subparagraphs (b) and/or (c), the  
5 applicant has met her burden of demonstrating that a connection cannot be  
6 made. Nothing in the plain language of the exception requires more than a  
7 demonstration of the existence of \* \* \* physical condition or buildings/other  
8 development that *impedes* (*precludes*) the development of the connecting  
9 street. The ‘cannot be met’ standard is met by a factual showing by the  
10 applicant that a natural resource, such as a wetlands or a pond, or other  
11 existing development exists that will *impede* a street connector at that  
12 location. When those conditions exist, the requirements of subparagraph (b)  
13 and (c) do not apply.” Petition for Review 13 (underlining in original; italics  
14 added).

15 Petitioner appears to interpret UTC 9.6816(2)(f)(1) such that the condition specified  
16 therein—that wetlands “preclude development” of the street—will always be present if a  
17 wetland will be *impacted* in any way. In the arguments quoted above petitioner also seems  
18 to assume the need to cross a wetland will always *impede* construction of a street and  
19 therefore in all cases the wetland will *preclude* development of the street:

20 We agree with petitioner that it is a showing of the *existence* of one of the specified  
21 *conditions* that triggers the exception provided by UTC 9.6815(2)(f). The way UTC  
22 9.6815(2)(f) is structured the relevant question is not whether the required connection can or  
23 cannot be made; the relevant question is whether one of the two conditions specified in UTC  
24 9.6815(2)(f) exists. If so, the connection cannot be made and subparagraphs (b) and (c) do  
25 not apply. A separate showing that the connection “cannot be made” is not required by UTC  
26 9.6815(2)(f).

27 However, the conditions must be such that they “preclude development” of the street  
28 connection. The flaw in petitioner’s argument is its apparent position that the city *must*  
29 interpret the “preclude development” standard that is embodied in UTC 9.6815(2)(f)(1) to be  
30 met if the required street connection will be required to cross a wetland or will impact a  
31 wetland in any way. That argument appears to be based on the appearance of the word  
32 “impact” in UTC 9.6815(2)(f)(1) and the dictionary definition of the word “preclude” that is

1 quoted in the hearings official's decision. See n 5. It is possible if one relies solely on  
2 particular meanings set out in that dictionary definition of "preclude" to say that a street  
3 connection that will cross or impact a wetland will be *impeded* or *deterred* and therefore  
4 satisfy two of the meanings *Webster's* gives for the word "preclude." However, *Webster's*  
5 also uses other words and phrases in defining the word "preclude," including "stop," "shut  
6 out," and "prevent." Not all wetlands are of an extent or nature that necessarily will "stop,"  
7 "shut out" or "prevent" a street crossing. Under those meanings, we see no reason why the  
8 city could not interpret UTC 9.6815(2)(f) to require that an applicant do more than show that  
9 a required street connection would cross or impact a wetland in some way.

10 The real problem of course is that the meaning of the term "preclude" is ambiguous  
11 and the dictionary definition is not particularly helpful, because parts of that definition  
12 support petitioner's view and parts of the definition do not. It is one thing for topography or  
13 wetlands to "hinder" or "impede" a street connection; it is quite another for topography or  
14 wetlands to "stop," "prevent" or "shut out" such a connection. For example a slight change  
15 in topography might not even "impede" a required street connection, much less "stop,"  
16 "prevent" or "shut out" such a connection. Similarly a wetland that has been inventoried as  
17 significant under Goal 5 protected under the city's comprehensive plan might very well  
18 "stop," "prevent" or "shut out" such a connection, whereas a small, insignificant wetland that  
19 has not been designated as significant and has not been protected under the city's  
20 comprehensive plan and land use regulations might merely "impede" the connection, at most.  
21 *Webster's* uses all those words to give meaning to the word "preclude."

22 Neither the text of UTC 9.6815(2)(f) nor any of the contextual provisions that the  
23 parties cite clearly resolve the interpretive question presented in this appeal. We do note,  
24 however, that there is context that seems to support an interpretation that is at odds with  
25 petitioner's interpretation. First, as we have noted the two conditions with their "preclude  
26 development" standard were adopted as the *way* an applicant is to show that a connection

1 “cannot be made.” The “cannot be made” language, while not the ultimate standard imposed  
2 by UTC 9.6815(2)(f), is relevant context for the intended meaning of “preclude  
3 development,” and it suggests that something more than the mere presence of or need to  
4 cross wetlands is required. Also, we note that UTC 9.6815(1), which sets out the “Purpose  
5 and Intent” of the street connectivity standards, does not seem to support petitioner’s  
6 contention that the drafters of the street connectivity standards intended to waive those  
7 standards in all circumstances where wetlands would be impacted or crossed by the street  
8 connections required by UTC 9.6815(1)(b) and (c). UTC 9.6815(1)(g) provides that one of  
9 the reasons for the street connectivity standards is to ensure that:

10 “Street design is responsive to topography and other natural features and  
11 avoids or minimizes impacts to water-related resources and wildlife  
12 corridors.”

13 Clearly, it is not necessary to waive street connectivity standards whenever wetlands are  
14 encountered to “avoid[] or minimize[] impacts” to wetlands.

15 Under *PGE*, because the text and context analysis does not answer the interpretive  
16 question, it would be appropriate to consider legislative history (second level) or maxims of  
17 statutory construction (third level). The parties have provided no legislative history that  
18 might have some bearing on the meaning of the word “precluded” in UTC 9.6815(2)(f), and  
19 we can think of no maxims of statutory construction that would assist us in the intended  
20 meaning of “precluded.” Therefore, the meaning of “preclude development” appears to turn  
21 on which of the dictionary meanings is most consistent with the other parts of UTC 9.6815  
22 and any other relevant contextual provisions. We remand for the hearings official to make  
23 that determination.

24 The first assignment of error is sustained, in part.

25 **SECOND ASSIGNMENT OF ERROR**

26 Petitioner assigns error to the hearings official’s failure to interpret EC 9.6815(2)(g),  
27 which is the city’s version of the exception that is provided by UTC 9.6815(2)(f). While it

1 may be that the hearings official believes the similarly worded code sections should be  
2 interpreted in the same way, the hearings official makes no mention of similarly worded EC  
3 9.6815(2)(g).

4           Petitioner urges LUBA adopt its own interpretation of EC 9.6815(2)(g). We decline  
5 to do so. On remand the hearings official will be required to revisit her interpretation of  
6 UTC 9.6815(2)(f). Under UTC and EC 9.0040(1), “[t]he planning director is authorized to  
7 interpret” the UTC and EC. *See* n 3. EC 9.0040(1) provides that “[w]ithin 10 days of receipt  
8 of [a written request for interpretation], the planning director shall make a written  
9 interpretation \* \* \*.” While EC 9.0040(1) merely *authorizes* interpretations, it also seems to  
10 obligate the planning director to respond to any requests for interpretation that are filed in  
11 writing. Petitioner sought an interpretation of both UTC 9.6815(2)(f) and the similarly  
12 worded EC 9.6815(2)(g). The hearings official offered no explanation for her failure to  
13 include an interpretation of EC 9.6815(2)(g). On remand the hearings official must include  
14 an interpretation of EC 9.6815(2)(g) or explain why such an interpretation is not required.

15           The second assignment of error is sustained.

16           The city’s decision is remanded.