

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 HOLLIE LUND and SCOTT BAKER,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF MOSIER,  
10 *Respondent,*

11 and

12  
13 JOHN GROUT,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2008-088

17  
18 FINAL OPINION  
19 AND ORDER  
20

21  
22 Appeal from City of Mosier.

23  
24 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of  
25 petitioners. With her on the brief was the Goal One Coalition.

26  
27 Daniel Kearns, Portland, filed the response brief and argued on behalf of respondent.  
28 With him on the brief was Reeve Kearns, PC.

29  
30 John Grout, Portland, represented himself.

31  
32 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

33  
34 RYAN, Board Member, did not participate in the decision.

35  
36 REMANDED

10/01/2008

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

**NATURE OF THE DECISION**

Petitioners appeal a city decision that grants approval for 44-lot subdivision named Tanawashee.

**MOTION TO INTERVENE**

John Grout (intervenor), the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is granted.

**FACTS**

The subject property is to be provided access by extending Center Street, an existing developed city street, to the south. In a single assignment of error, petitioners argue the city erred by failing to require that the applicant provide a second means of access, via an extension of Oregon Street to the south.

**MOTION TO CONSIDER EXTRA-RECORD EVIDENCE**

Oral argument in this appeal was held on September 18, 2008. Pursuant to ORS 197.830(14), the deadline for LUBA to issue its final opinion and order in this appeal is October 6, 2008. On September 25, 2008, petitioners filed a motion requesting that we consider certain extra-record evidence. As we explain below, the central issue in this appeal is whether the city erred by failing to require that Oregon Street be extended south into the Tanawashee subdivision. Apparently, all that separates Tanawashee subdivision from Oregon Street is tax lot 3900. Based on the record that the city submitted in this appeal, the owner of tax lot 3900 cannot be identified. Petitioners request that LUBA consider extra-record evidence (tax records, a deed and an assessor’s map) that collectively seem to establish that Mosier Heights, LLC, the applicant herein, is the owner of tax lot 3900. Alternatively, petitioners request that LUBA take official notice of those documents.

Under ORS 197.835(2)(a), LUBA’s review of land use decisions and limited land use decisions is generally “confined to the record.” Petitioners’ request that we consider extra-

1 record evidence is presumably is based on ORS 197.835(2)(b) and OAR 661-010-0045,  
2 which allow LUBA to consider extra record evidence in certain specified circumstances.<sup>1</sup>  
3 Petitioners make no attempt to show that their request is authorized by ORS 197.835(2)(b)  
4 and OAR 661-010-0045. The proffered extra-record evidence does not appear to be offered  
5 for one of the reasons set out in ORS 197.835(2)(b) and OAR 661-010-0045. The request to  
6 consider extra-record evidence is denied.

7 Similarly, LUBA cannot take official notice of those documents to resolve what may  
8 be a material issue of fact in this case. LUBA does not have authority to take official notice  
9 of adjudicative facts under OEC 201. As we have already noted, with three exceptions, our  
10 review is “confined to the record.” ORS 197.835(2)(a). Those exceptions are (1) the  
11 circumstances set out in ORS 197.835(2)(b) and OAR 661-010-0045, (2) to resolve  
12 challenges to our jurisdiction, and (3) to determine whether an appeal is moot. *Blatt v. City*  
13 *of Portland*, 21 Or LUBA 337, 342 (1991). Petitioners do not argue that any of those  
14 exceptions apply here.

15 Petitioners’ motion to consider extra-record evidence or to take official notice is  
16 denied.

17 **ASSIGNMENT OF ERROR**

18 In a February 6, 2008 message to the city council, petitioner Lund stated that she was  
19 concerned with the “the subdivision’s lack of integration with the existing community.”  
20 Record 176. Later in that message, petitioner Lund observed that “[t]he proposed

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<sup>1</sup> ORS 197.835(2)(b) allows LUBA to consider extra-record evidence in the following circumstances:

“In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in [ORS 197.835](10)(a)(B) \* \* \* or other procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.”

OAR 661-010-0045 does not expand the circumstances in which LUBA may consider extra-record evidence.

1 development plan for Tanawashee \* \* \* actually eliminates an existing right-of-way  
2 connection that currently extends south from Oregon Street into the Tanawashee subdivision  
3 (see photos 1 & 2 below).”<sup>2</sup> Record 177. That position apparently was based on a Google  
4 map that shows Oregon Street extending south into the disputed subdivision and intersecting  
5 with Center Street. Record 176.

6 Presumably in an attempt to respond to petitioner Lund’s concern, the city adopted  
7 the following findings in addressing City of Mosier Land Development Ordinance (MLDO)  
8 2.050:<sup>3</sup>

9 “\* \* \* The estimated slope of the proposed Oregon Street access way is 22%  
10 without allowance for level landing at the base and acceptable vertical curve  
11 at the top of the slope where it would intersect [with] Center Street. These  
12 allowances would make the street steeper, in fact, too steep for a public  
13 roadway and therefore no roadway connection to Oregon Street is required.”  
14 Record 20.

15 In other findings the city explained that a pedestrian access was being required to connect the  
16 Tanawashee subdivision to the Oregon Street right of way to the north:

17 “A pedestrian path is required south of the existing Oregon Street from 4<sup>th</sup>  
18 Avenue to the proposed Center Street extension. It may follow the water line  
19 easement. The applicant may need to obtain easements for this pathway.  
20 \* \* \*” Record 25.

21 The city council also imposed a condition of approval that requires the applicant to provide  
22 the pedestrian path connection to Oregon Street that is discussed in the above-quoted  
23 findings.

24 On appeal, petitioners do not assign error to the city’s findings concerning MLDO  
25 2.050. Instead petitioners argue the city’s findings are inadequate to demonstrate that the  
26 subdivision complies with MLDO 2.020, which is set out below:

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<sup>2</sup> The referenced photos show an unimproved roadway descending steeply from the subject property into a developed part of the city to the north where the improved portion of Oregon Street now ends.

<sup>3</sup> MLDO 2.050 requires, in part, that “[a]s far as is practicable, streets other than local or constrained streets shall be aligned with existing streets by continuation of the center lines.”

1            *2.020 Street design – generally. The location, width and grade of streets shall*  
2            *be considered in relation to: existing and planned streets, topographical*  
3            *conditions, public convenience and safety for all modes of travel, existing and*  
4            *identified future transit routes and pedestrian/bicycle accessways, and the*  
5            *proposed use of land to be served by the streets. The street system shall*  
6            *assure an adequate traffic circulation system with intersection angles, grades,*  
7            *tangents and curves appropriate for the traffic to be carried considering the*  
8            *terrain. Streets shall connect to all existing or approved stub streets which*  
9            *abut the development site. \* \* \** (Italics and underling added.)

10          In its decision, the city quotes only the italicized part of MLDO 2.020 and omits the balance  
11          of MLDO 2.020. The city’s findings addressing MLDO 2.020 do not address the underlined  
12          requirement of MLDO 2.020 that the subdivision streets “shall connect to all existing or  
13          approved stub streets which abut the development site.” The city’s decision takes no  
14          position regarding whether Oregon Street is a “stub street,” or, if it is, whether Oregon Street  
15          “abut[s] the development site” (tax lots 4100, 4000, and 2200).

16                We understand petitioners to interpret the underlined language of MLDO 2.020 to  
17          require that Oregon Street must be extended south into the subdivision. As approved by the  
18          city, Oregon Street is not extended south into the Tanawashee subdivision. Although not  
19          clearly stated in the petition for review, we understand petitioners to take the position that the  
20          Oregon Street right of way is a stub street that abuts tax lots 4100, 4000, and 2200.  
21          Petitioners also seem to take the position that because photos of Oregon Street in the record  
22          and an aerial photograph show there is an existing unimproved road that extends south into  
23          the subject property from where the Oregon Street right of way appears to end, that  
24          unimproved road qualifies as a “street” within the meaning of MLDO 2.020.

25                The city responds in two ways. First, the city contends that Oregon Street does not  
26          “abut the development site.” Despite petitioner Lund’s Google map showing Oregon Street  
27          extending south into the disputed subdivision, the city takes the position that Oregon Street  
28          terminates at a point north of the disputed subdivision. According to the city tax lot 3900 lies  
29          immediately south of Oregon Street and separates Oregon Street from the proposed

1 development on tax lots 4100, 4000, and 2200.<sup>4</sup> Although the city does not argue that  
2 Oregon Street is not an “existing or approved stub street,” and the MLDO does not appear to  
3 include a definition of “stub street,” such streets are generally streets that are specifically  
4 designed for extension into adjoining properties at a later date and are only required where  
5 such future extensions are feasible and expected to occur in the future. It may also be that  
6 Oregon Street is not a “stub street,” within the meaning of MLDO 2.020.

7 The city’s second response is that while the underlined language in MLDO 2.020  
8 appears to impose an absolute street extension requirement, MLDO 2.050 is not absolute and  
9 does not require a continuation of existing streets unless it is “practicable” to do so. *See* n 2.  
10 As we note above, in unchallenged findings the city found that an extension of Oregon Street  
11 south into the proposed subdivision is impracticable because it would not comply with city  
12 road grade standards. Citing *Langford v. City of Eugene*, 126 Or App 52, 867 P2d 535  
13 (1994), the city contends that the city is entitled to choose between these conflicting MLDO  
14 requirements.<sup>5</sup>

15 The city’s arguments may well have merit. In particular, if the Oregon Street right of  
16 way terminates at tax lot 3900 so that the Oregon Street right of way is separated from tax  
17 lots 4100, 4000, and 2200 by tax lot 3900, the city would likely be within its interpretive  
18 discretion under ORS 197.829(1) to say that MLDO 2.020 does not apply because the  
19 Oregon Street right of way does not “abut the development site,” within the meaning of  
20 MLDO 2.020. That appears to be the case, but the necessary facts to make that finding

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<sup>4</sup> Although several maps in the record seem to show a rectangular lot at the point where Oregon Street would enter the proposed subdivision, none of those maps identifies that lot as tax lot 3900. The city attaches to its brief a copy of an assessor’s map that identifies that lot as tax lot 3900.

<sup>5</sup> In *Langford*, the Court of Appeals held “where the local interpretation consists of a decision about which of two or more arguably applicable approval criteria in its legislation applies to a use, the local interpretation will seldom be reversible under the *Clark [v. Jackson County]*, 313 Or 508, 836 P2d 710 (1992)] standard.” 126 Or App at 57.

1 cannot be confirmed based on the current record.<sup>6</sup> As we have already noted it is not clear to  
2 us that Oregon Street is accurately described as a “stub street,” and there may also be other  
3 reasons why the underlined language does not apply in the way petitioners argue it does.  
4 However, we conclude that there are simply too many unanswered questions and agree with  
5 petitioners that the challenged decision must be remanded based on the city’s failure to adopt  
6 findings addressing the underlined language in MLDO 2.020.

7         On remand, the city should first consider whether Oregon Street qualifies as a  
8 “existing or approved stub street[] which abut[s] the development site.” That may require  
9 that the city expand the evidentiary record, depending on how the city interprets the terms  
10 “stub street” and “abut.” In addition, petitioners’ suggestion that Oregon Street may  
11 currently extend past the apparent end of the Oregon Street right of way at tax lot 3900,  
12 simply by virtue of the existing unimproved roadway that continues across tax lot 3900 and  
13 onto the tax lots 4100, 4000, and 2200, seems highly suspect. However, the city should  
14 address that contention on remand as well. Finally, we are unwilling at this point to agree  
15 with the city that there is an actual conflict between MLDO 2.020 and 2.050, such that the  
16 city may elect to apply MLDO 2.050 and not apply the underlined language in MLDO 2.020.  
17 The city’s decision does not find that MLDO 2.020 and 2.050 conflict. The city is, however,  
18 free to adopt and further explain its interpretation of MLDO 2.020 and 2.050 on remand, if it  
19 wishes.

20         The city’s decision is remanded.

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<sup>6</sup> We are not sure whether petitioners take the position that the ownership of tax lot 3900 has a material bearing on the application of MLDO 2.020 in this case. We specifically do not consider that question.