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,
Intervenors-Respondents.

LUBA No. 2010-056

FINAL OPINION
AND ORDER

Appeal from City of Ashland.

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

Megan Thornton, Ashland, filed a joint response brief and argued on behalf of respondent. With her on the brief was Richard Appicello, City of Ashland Attorney.

Mark S. Bartholomew, Medford, filed a joint response brief and argued on behalf of intervenors-respondents. With him on the brief was Hornecker, Cowling, Hassen and Heysell.

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

AFFIRMED 12/15/2010

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 planning commission decision that (1) approves a new Physical and Environmental Constraints Review (physical constraints) permit to construct a driveway in a riparian and floodplain corridor, or (2), as an alternative, modifies a similar 2007 permit.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a reply brief to respond to an observation in the response brief that, under a city code provision effective in April 2010, the permit expiration date for the permit approved in the July 2010 planning commission's decision that is before us is tolled while the decision is on appeal to LUBA. Petitioner argues in the reply brief that that new city code tolling provision is inconsistent with state law, and therefore respondents' observation about tolling is incorrect. However, the ordinance adopting that April 2010 city code provision is not before us in this appeal,[1] and petitioner does not explain what the question of whether or not the permit expiration date is tolled while on appeal to LUBA has to do with any issue in the present appeal. As far as we can tell, it has none. Accordingly, we do not consider the reply brief.

FACTS

In August 2007, the city council first approved the application of intervenors-respondents (intervenors) for a physical constraints permit to construct the disputed driveway.[2] That city council decision was appealed to LUBA, which affirmed. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007) (*Brodersen I*). We repeat the salient facts from that appeal:

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[1] Petitioner appealed the April 2010 ordinance to LUBA, but that appeal was dismissed as untimely filed. *Brodersen v. City of Ashland*, __ Or LUBA __ (LUBA No. 2010-058, August 12, 2010).

[2] The August 2007 decision was in turn prompted by earlier rounds of litigation, beginning with intervenors' October 2004 building permit application for a dwelling on tax lot 500.

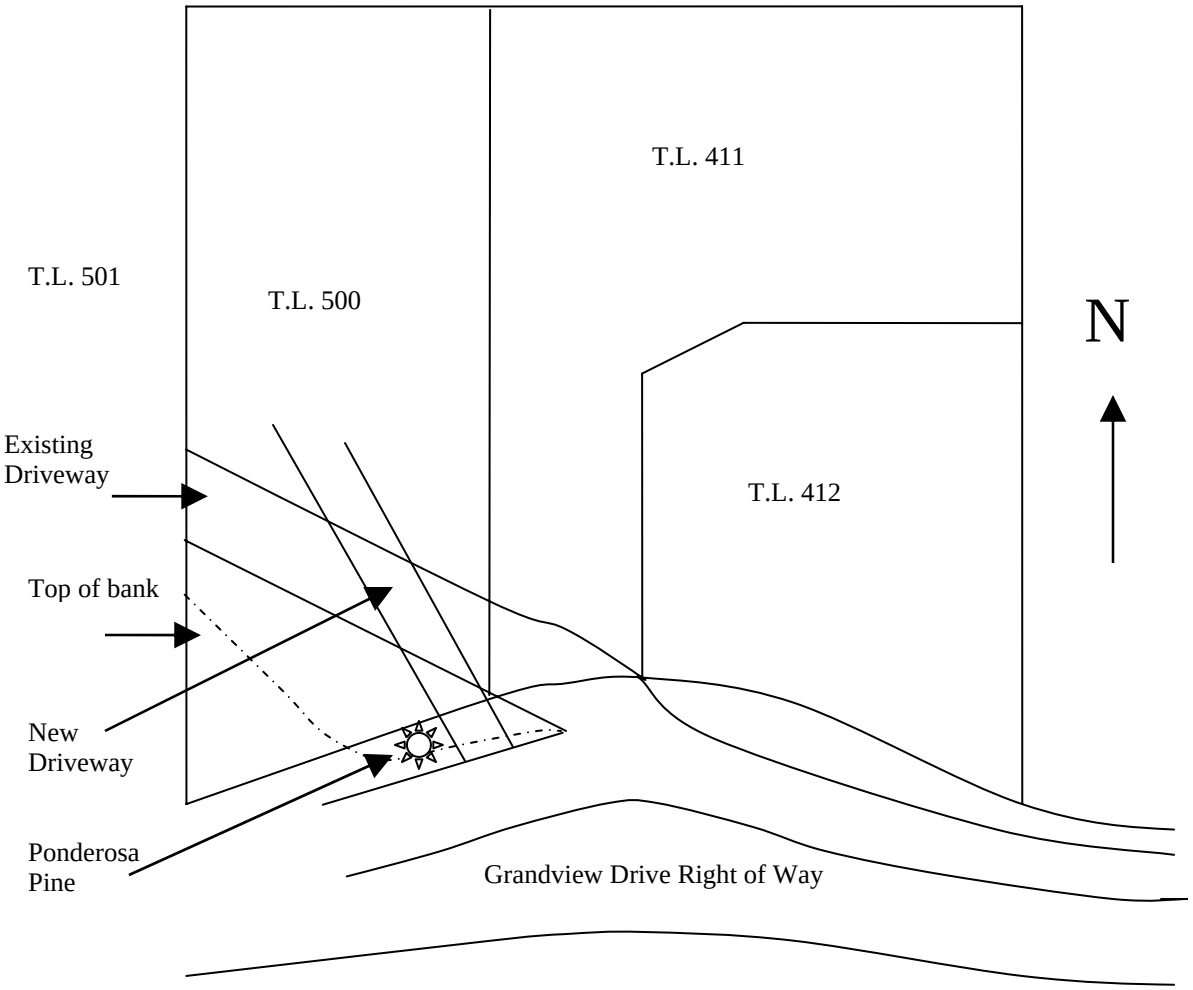
> "Intervenors own the subject property, tax lot 500, a vacant parcel zoned for low density residential use (R-1-10). The subject property is a rectangular parcel with a long north-south axis. Grandview Drive, a county road with a 47-foot right-of-way and a graveled surface that is approximately 12 feet 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.
>
> "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." *Id.* at 352-53 (footnote omitted).

The August 2007 physical constraints permit approved a paved driveway to access tax lot 500 across the flagpole of tax lot 411, in the approximate location of an existing easement and graveled driveway serving tax lot 501 further to the west. However, following LUBA's decision in *Brodersen I* affirming the issuance of that August 2007 permit, petitioner purchased tax lot 411. The existing driveway easement does not grant the owner of tax lot 500 a right to cross tax lot 411 for access and petitioner made it clear to intervenors that she would not grant an easement across tax lot 411 to allow the existing driveway to be used to access a dwelling on tax lot 500, as the previous owner had verbally agreed to do.

Accordingly, on June 15, 2009, intervenors filed an application with the city to modify the 2007 permit to move the driveway location completely off tax lot 411, and to provide direct access off Grandview Drive. A portion of the proposed driveway location is below the top of the bank of the Wrights Creek drainage and deeper within the riparian and floodplain corridor than the originally proposed driveway location.

Figure 1 from our decision was a rough, not-to-scale drawing of the subject property and environs. We have modified Figure 1 to depict the proposed new location for the driveway:

FIGURE 1



City staff approved the modification on November 9, 2009. Petitioner appealed the staff decision to the planning commission, arguing in part that the application must be evaluated as a new application rather than a modification of the 2007 permit.

In an apparent response to that argument, the planning commission decided to treat the application as one for a *new* physical constraints permit rather than, or in addition to, a modification of the 2007 permit. Petitioner submitted written testimony and evidence for the April 13, 2010 hearing, but did not appear at the hearing. Pursuant to petitioner's written request, the record was left open until April 21, 2010, and petitioner submitted additional

evidence and testimony. On May 10, 2010, the planning commission reconvened and voted to approve the application as a new permit, and alternatively as a modification of the 2007 permit, directing staff to prepare findings.[3] On June 8, 2010, the planning commission adopted the written decision approving the permit and adopted the staff findings. This appeal followed.

INTRODUCTION

As noted, the planning commission took the unusual course of characterizing its June 8, 2010 decision as an approval of a new permit or, alternatively, as a modification of the original 2007 permit. In the ninth assignment of error, petitioner argues that the city committed procedural error by failing to provide adequate notice that it intended to process the application as one for a new permit, but petitioner does not argue that the city lacked legal authority to process and approve the application as one for a new permit instead of the modification that was originally requested. In the third assignment of error, petitioner argues that the county cannot approve the application as a modification to the 2007 permit, but can approve the new driveway location only pursuant to a new physical constraints permit. Other assignments of error are directed separately at the two alternative dispositions. The first and second assignments of error assume that the June 8, 2010 decision approves a modification to the 2007 permit. The fourth and fifth assignments of error assume that the

[3] As explained in the planning commission decision:

> "* * * The proposal, whether termed a modification or a new proposal is subject to the same exact procedural review and approval criteria as a new application. They are indistinguishable. Both a modification of a Physical & Environmental Constraints Review Permit and a new Physical & Environmental Constraints Review Permit are considered to be Type I procedures, allowing for administrative approval and subject to appeal. Both are subject to the same $917 application fee, both receive the same procedural handling including the required noticing and review, and both are considered in light of the same review criteria and standards for a Physical & Environmental Constraints Review Permit found in [Ashland Land Use Ordinance (ALUO) 18.62]. In addition, and perhaps most importantly, the work proposed to be completed here remains the same regardless of whether the request is termed a modification of the previously approved Physical & Environmental Constraints Review Permit or simply approval of a new Physical & Environmental Constraints Review Permit. * * *" Record 15-16.

June 8, 2010 decision approves a new permit. The remaining assignments of error raise various challenges under the physical constraints approval criteria and other standards, which apply equally whether the decision approves a new permit or a modification.

For analytical clarity, we shall reorganize the assignments of error in this opinion, first addressing petitioner's ninth assignment of error, alleging procedural error. Because the city's primary rationale is that the June 8, 2010 decision approves a new permit, we will next turn to the fourth and fifth assignments of error, which assume a new permit. Because we deny those assignments of error, we technically do not need to address the first, second and third assignments of error, which essentially challenge the alternative disposition as a modification to the 2007 permit. However, this dispute between neighbors is in its sixth year of litigation, and in an attempt to bring finality to this matter we will also address petitioner's challenges to the city's alternative disposition. Finally, we will turn to the remaining substantive challenges under the sixth, seventh, eighth, tenth and eleventh assignments of error.

NINTH ASSIGNMENT OF ERROR

As noted, intervenors applied for, and city staff initially approved, a modification to the 2007 permit. Petitioner appealed that staff decision to a *de novo* hearing before the planning commission, arguing in relevant part that the proposed driveway cannot be approved as a modification but must be reviewed as a new application for a physical constraints permit. According to petitioner, the initial notice of hearing before the planning commission on February 9, 2010, characterized the appeal as concerning the staff decision to modify the 2007 permit. Apparently petitioner did not receive that notice of hearing, so the February 9, 2010 hearing was re-scheduled, ultimately to April 13, 2010, after intervenors agreed to extend the 120-day deadline for issuing a decision. The notice of the April 13, 2010 hearing no longer refers to modifications to the 2007 permit, but instead suggests that the application concerns a new physical constraints permit. Record 509.

In this assignment of error, petitioner argues that the city committed procedural error in the notice for the April 13, 2010 hearing, by not making it clear whether the city was treating the application as one for a modification or a new application. ORS 197.835(9)(a)(B) (LUBA shall remand a land use decision if the local government failed to follow the applicable procedures in a manner that prejudices the substantial rights of the petitioner). According to petitioner:

> "* * * The obfuscation of the notice violated Petitioner's substantive due process rights to a fair hearing, because she prepared for the hearing as if it were a hearing on the *modification* of a prior permit and not an application for a new permit. She would have prepared differently, had she known." Petition for Review 46 (emphasis in original).

As explained in the city's findings at Record 16, quoted at n 3, the procedures and substantive standards that apply to a modification of the 2007 permit or to approval of a new permit are the same. Petitioner does not dispute that finding. Since petitioner argued that the application can only be approved as a new permit, petitioner should not have been very much surprised that the city agreed and decided to treat it as an application for a new permit. Petitioner argues that she would have "prepared differently" had she realized the city had decided to treat the application as one for a new permit, but on appeal she does not specify how she would have prepared differently, what different issues she would have raised or evidence she would have submitted. We note that the city left the record open at petitioner's request following the April 13, 2010 hearing, and petitioner submitted additional testimony and evidence, including arguments that if treated as an application for a new permit, the new permit should be denied under the applicable criteria, the same criteria that would apply to a modification. Record 120.

The city's failure to provide adequate notice of its recharacterization of the application prior to the April 13, 2010 hearing might very well constitute procedural error. However, because the procedures and applicable standards were the same in either case, and petitioner had the opportunity to submit additional testimony and evidence after she learned

that the city had apparently agreed with her that the application should be treated as one for a new permit, petitioner has not demonstrated on appeal that any procedural error prejudiced her substantial rights. ORS 197.835(9)(a)(B).

Petitioner also argues under the ninth assignment of error that the planning commission committed procedural error in failing to "deliberate" on her appeal. According to petitioner, at the May 11, 2010 hearing, the planning commission deliberations consisted of entertaining a motion to deny the appeal, based on a "finding [that] it has no merit," and to direct staff to bring back findings consistent with approval. Record 57. The minutes reflect that the motion passed 7-0 without further discussion. Petitioner contends that that lack of discussion is inconsistent with ORS 192.620, which states in relevant part a policy that "[t]he Oregon form of government requires an informed public aware of deliberations and decisions of governing bodies * * *."

Even assuming ORS 192.620 applies to the city *planning commission* and is properly understood to render the lack of deliberations a procedural error warranting remand, both doubtful propositions, petitioner has not demonstrated that the planning commission failed to "deliberate." The planning commission entertained a motion to deny the appeal, based on a proposed finding that the appeal had no merit. None of the planning commission members apparently felt it necessary to discuss that motion or finding further. Petitioner does not explain why further discussion, or discussion of any particular duration or quality, is necessary to constitute "deliberations," for purposes of ORS 192.620.

The ninth assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

As explained, the fourth and fifth assignments of error are based on the premise that the planning commission erred in approving a new physical constraints permit. If so, petitioner argues, she is entitled to raise again an issue that was resolved against her in the appeal of the original 2007 physical constraints permit. In *Brodersen I*, petitioner argued to

the county that the subject property, tax lot 500, was not a legal lot, based on petitioner's allegations that city committed errors in 1979 (preliminary partition decision) and in 1981 (final plat approval) in approving the partition that created tax lot 500. For the reasons discussed below, petitioner believes that in order to approve a new physical constraints permit, or any kind of permit regarding tax lot 500, the city must find that tax lot 500 is a legal "lot." The city rejected that argument, concluding that legal lot status has nothing to do with the issuance of a physical constraints permit. On appeal to LUBA, petitioner renewed her arguments that tax lot 500 was not a legal lot, but failed to challenge the city's findings that legal lot status had nothing to do with the applicable approval criteria. Accordingly, LUBA denied that assignment of error. 55 Or LUBA at 371.

Petitioner argues that the legal lot issue in *Brodersen I* was resolved not on the merits of whether legal lot status can be challenged in approving a physical constraints permit, but rather on a pleading deficiency. Therefore, petitioner argues, the doctrine of issue preclusion does not preclude her from raising the legal lot issue in this appeal of a new permit. The city and intervenor (together, respondents) argue that all of the elements of issue preclusion set out in *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993) are met.[4] On the merits, respondents contend that the city correctly concluded in both its 2007 permit decision and the present decision that legal lot status is not a criterion for approval for a physical constraints permit. Record 43.

Whether the doctrine of issue preclusion applies to land use proceedings is a matter that is somewhat in doubt. In *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001),

[4] In *Nelson*, the Oregon Supreme Court held that when an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Nelson v. Emerald People's Utility Dist.*, 318 Or at 104.

aff'd 180 Or App 495, 43 P3d 1192 (2002), LUBA re-affirmed earlier LUBA decisions concluding that under the fifth element described in *Nelson*, the doctrine of issue preclusion does not generally apply to land use proceedings, to preclude relitigation of an issue that was resolved in one land use permit decision in the context of a subsequent land use permit decision. However, as we noted in *Kingsley v. City of Portland*, 55 Or LUBA 256, 262-63 (2007), the Court of Appeals in *Lawrence* affirmed our decision in that appeal on narrower grounds, and reserved its opinion on whether under the fifth *Nelson* element the issue preclusion doctrine categorically does not apply to land use proceedings. That uncertainty remains, but as the case law now stands, LUBA's *Lawrence* decision remains good law. Respondents does not address our reasoning in *Lawrence*, and does not offer a persuasive reason to reach a different conclusion.[5] Accordingly, we will resolve the merits of the fourth and fifth assignments of error.

Petitioner argued to the city that the definition of "lot" at ALUO 18.08.350 requires that for a unit of land to qualify as a "lot," it must comply "with all applicable laws" at the time it was created.[6] According to petitioner, the city erred in concluding that tax lot 500

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[5] We tend to agree with respondents that, if *Lawrence* is wrong and preclusive effect can be given to an issue resolved in one permit proceeding that is raised in a separate permit proceeding for purposes of the fifth *Nelson* element, the remaining four *Nelson* elements are also met in the present case. We understand petitioner to dispute that the second *Nelson* element is met, whether the issue was "actually litigated" and was essential to a final decision on the merits in the prior proceeding. According to petitioner, LUBA did not resolve the merits of the issue and therefore the issue was not "actually litigated." However, the "issue" here is whether the subject property's legal lot status is or is not a criterion or consideration for approval for a physical constraints permit. While petitioner is correct that LUBA's decision in *Brodersen I* did not resolve the merits of that issue, that is not the question. The question is whether the *city's 2007 decision* resolved the merits of that issue, and there is no dispute that it did. That issue was actually litigated in the 2007 decision and was essential to the city's final decision, as had the city resolved it in petitioner's favor the city would presumably have denied the 2007 permit.

[6] ALUO 18.08.350 defines "lot" in relevant part as:

> "A unit of land created by a partition or a subdivision, or a unit or contiguous units of land under single ownership, which complies with all applicable laws at the time such lots were created. * * *"

The subject property was created by partition and is therefore technically a parcel rather than a lot, but there is no separate code definition of "parcel" and as written the code definition of "lot" includes "parcel."

complied with all applicable laws at the time the city approved its creation, via preliminary partition approval, in 1979. Therefore, petitioner argues, tax lot 500 does not qualify as a "lot."

The city rejected that argument, citing its findings in the 2007 permit decision that tax lot 500 was legally created, which the planning commission adopted by incorporation. Record 31. Further, the planning commission interpreted the ALUO 18.08.350 language "complies with all applicable laws at the time such lots were created" to simply acknowledge that laws regarding partitioning and subdivision change over time, and not to allow a collateral attack on prior unappealed decisions that approved subdivisions or partitions in the past. Record 43. Finally, the city concluded that legal lot status is not an approval criterion or consideration for a physical constraints permit, noting that the terms "lot" or "legal lot" are nowhere found in the physical constraints approval criteria, at ALUO 18.62.040(I).[7] Record 44.

On appeal, petitioner argues that under *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002), the city must determine the legal lot status of a unit of land in connection with a current land use

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[7] The criteria for a physical constraints permit are set out in ALUO 18.62.040(I):

> "Criteria for approval. A Physical Constraints Review Permit shall be issued by the Staff Advisor when the Applicant demonstrates the following:
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> "1. Through the application of the development standards of this chapter, the potential impacts to the property and nearby areas have been considered, and adverse impacts have been minimized.
>
> "2. That the applicant has considered the potential hazards that the development may create and implemented measures to mitigate the potential hazards caused by the development.
>
> "3. That the applicant has taken all reasonable steps to reduce the adverse impact on the environment. Irreversible actions shall be considered more seriously than reversible actions. The Staff Advisor or Planning Commission shall consider the existing development of the surrounding area, and the maximum permitted development permitted by the Land Use Ordinance."

permit proceeding involving that unit of land, if required to do so by "applicable legislation." 178 Or App at 220-21. In *Maxwell*, petitioner argues, the Court of Appeals held a requirement that a permit decision maker determine whether a unit of land is a legal lot or lawfully created lot need not be expressly stated in the criteria being applied to approve the land use permit, but can be derived from the text in context or by consideration of the text's purpose or underlying policy. According to petitioner, the definition of "lot" at ALUO 18.08.350 is context for the physical constraints permit and is "applicable legislation" that expressly defines "lot" as a unit of land that "complies with all applicable laws at the time" it was created. Therefore, petitioner concludes, the city must determine whether the city erred in approving the preliminary partition plat and final plat that led to the creation of tax lot 500. Among other problems, petitioner argues that in 1979 the city erred in approving the partition with a variance from lot depth requirements, because the 1979 code provided for such a variance only for subdivisions and there was no express variance provision for partitions.

Respondents argue, and we agree, that petitioner reads far too much into the holding in *Maxwell*. The actual holding in *Maxwell* is quite limited: the Court overruled an earlier Court of Appeals' decision, in *McKay Creek Valley Assoc. v. Washington County*, 118 Or App 543, 848 P2d 624 (1993), to the extent it was understood to hold that a local government is required to evaluate the legal lot status of property as part of an application to develop that property only if the development approval criteria being directly applied *expressly* require a "legal" or "lawfully created" lot or parcel.[8] *Maxwell* held simply that an *implicit*

[8] The Court in *Maxwell* concluded:

> "In summary, a local government entity must determine the legal status of a unit of land in connection with a current proceeding involving that unit of land if required to do so by applicable legislation. Applicable legislation includes not only the local enactment governing the particular proceeding at issue, but also other related enactments. In addition, the requirement that the local government determine the legal status of a unit of land in connection with a particular proceeding need not be expressly stated in the relevant

requirement to evaluate the "legal lot" status of property can be derived from the applicable criteria, read in context. Even assuming that the city's legislation in the present case can be read to imply a requirement for a "legal" or "lawfully created" lot or parcel, petitioner misunderstands what such a requirement means.

In LUBA's decision in *McKay Creek Valley Assoc.*, LUBA reviewed a number of earlier decisions, and held that

> "under a local standard requiring that a lot or parcel be shown to have been legally or properly created, it must be established that, at the time the lot or parcel was created, any local government *approvals* required at that time were given. * * * Such a local standard does not require a complete re-examination of compliance with every approval standard that may have applied at the time the lot or parcel was created." 24 Or LUBA 187, 193 (1992).

Subsequently, on review of LUBA's decision, the Court of Appeals noted the above distinction drawn by LUBA, but affirmed on the narrower ground that a local government must inquire into the legal or lawfully created status of a property only if the approval criteria *expressly* require it. 118 Or App at 548-49. It was that narrower holding that the Court of Appeals rejected in *Maxwell*. However, the Court in *Maxwell* did not address the scope of the inquiry required under an express or implied requirement for a legal or lawfully created lot or parcel and, as far as we are aware, the distinction drawn by LUBA in its *McKay Creek* decision remains good law. Under LUBA's *McKay Creek* decision, where there is a requirement for a legal or lawfully created parcel, whether express or implied, the relevant question is whether any local government approvals required at the time were given, not whether the local government approval was substantively correct or the local government correctly applied the applicable approval criteria. In other words, turning briefly to the present case, even if petitioner is correct that the applicable city legislation requires an

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enactment, but may be derived from its text in context or by consideration of its purpose or policy. To the extent *McKay Creek* holds otherwise, we now disavow it." 178 Or App at 230.

evaluation of whether tax lot 500 is a legal lot or was lawfully created, the city is not required to demonstrate that it correctly applied the substantive approval criteria in 1979 when it approved the preliminary partition plat that led to creation of tax lot 500, such as the variance criteria petitioner challenges. At most, the city would have to demonstrate that the partition that created tax lot 500 received whatever approval or approvals were required by city legislation in effect at the time of partition approval.

Nothing cited in us in the holding in *Maxwell* or elsewhere undercuts the distinction LUBA drew in *McKay Creek*. To understand why, it is useful to take a brief look at the facts and approval criteria at issue in *Maxwell*. In *Maxwell*, the applicable approval criteria for the requested rezoning required the county to evaluate the number and density of "parcels" surrounding the subject property, in order to determine which rural residential zone to apply. The county code defined "parcel" as a unit of land created in one of three ways: (1) by "partitioning land" as that term was defined under the county code, (2) in compliance with applicable planning, zoning and partitioning regulations, or (3) by deed or land sales contract, if there were no applicable planning, zoning or partitioning regulations. Under that definition, units of land created in any other way were not "parcels." As applied to the facts in *Maxwell*, which rural residential zone should apply ultimately depended on whether two neighboring tax lots, 905A and 905B, were counted as two separate "parcels." The particular facts in *Maxwell* were exceedingly complex, but the salient point for our purposes is that there appears to have been no dispute that tax lots 905A and 905B had not been created as separate units of land in any of the three ways listed in the code definition of "parcel."[9]

[9] As explained in LUBA's opinion in *Maxwell*, the applicant's argument that tax lots 905A and 905B were two separate parcels was based on a non-binding and tentative determination from county staff issued in 1999 that an unimproved county road easement had the legal effect of separating the parent parcel into two separate parcels. *Maxwell v. Lane County*, 39 Or LUBA 556, 559-60 (2001). In the decision before LUBA, the hearings officer rejected staff's understanding regarding the legal effect of the county road easement, but ultimately concluded that the legal status of tax lots 905A and 905B as separate units of land could not be challenged in making the rezoning decision because the rezoning criteria included no express "legal lot" requirement, under the reasoning in the Court of Appeals' *McKay Creek* decision. LUBA affirmed that

The Court of Appeals interpreted the rezoning criteria, considered in the context of the code definition of "parcel" and other relevant text, to require the county to determine which residential zone should apply based on the number of "parcels" in the area. That in turn necessitated an inquiry into how the surrounding units of land were "created" and thus whether they constituted "parcels" under the county definition. The Court remanded the decision for the county to consider "the legal status of the relevant parcels." 178 Or App at 231. However, the Court did not need to address whether the county must determine whether prior county decisions approving "creation" of Tax lots 905A and 905B as separate units of land had been correctly decided, because there was no contention that Tax lots 905A and 905B had been created by a county-approved partition or other county approval process.

Similarly, in *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006), the county approved a forest template dwelling under ORS 215.750, which requires a finding that at least 11 lots or parcels exist within a one-square mile area. There was no dispute that some of the qualifying units of land within the template had not been created in any of the ways specified in the relevant definitions of "parcel" in ORS 215.010 and ORS 92.010, and were therefore not lawfully-created "parcels."[10] Applying *Maxwell*, LUBA reversed the decision.

McKay Creek Valley Assoc., *Maxwell* and *Reeves* all involved circumstances where applicable legislation made the legal status of some unit of land an issue, and the ultimate legal and factual question was whether that unit of land had been created in one of the ways specified under the relevant definitions of "lot" or "parcel," and thus qualified as a "lot" or "parcel" for purposes of the approval standards at issue. In no case cited to us has LUBA or

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conclusion, also in reliance on *McKay Creek.* As explained above, in *Maxwell*, the Court of Appeals partially overruled its *McKay Creek* decision, and held that the requirement to evaluate "legal lot" status can be derived from other "applicable legislation," and is not limited to the express language of the rezoning approval standard being directly applied.

[10] Interestingly, some or all of the qualifying lots at issue in *Reeves* were lots in the same unapproved subdivision at issue in *Yamhill County v. Ludwick*, 294 Or 778, 663 P2d 398 (1983), the seminal case in the line of cases leading up to *Maxwell*.

the Court of Appeals held that a determination of the legal status of a unit of land that was created by local government approval in a final partition or subdivision decision requires the local government to go further and consider, or reconsider, whether the substantive approval criteria were correctly applied in that prior decision.

In sum, petitioner misunderstands *Maxwell* to require the city to evaluate whether the city *correctly* approved the 1979 partition that created tax lot 500, under the applicable approval criteria. At most, if the "applicable legislation" required it, the city would have to confirm that tax lot 500 was in fact created in one of the ways specified in the applicable definitions, as opposed to some other way, as was the case in *McKay Creek*, *Maxwell* and *Reeves*.

In the present case, the physical constraints permit criteria in ALUO Chapter 18.62.040(I), unlike the rezoning criteria in *Maxwell*, are not concerned with whether the subject property or other property is a "lot," and in fact do not even mention "lot" or "parcel." *See* n 7. Petitioner points out that other criteria applicable to development within the floodplain corridor do include references to "the lot." For example, ALUO 18.62.070(A)(3) requires that "[f]ill and other material imported from off the lot that could displace floodwater shall be limited" in specified ways.[11] From that springboard petitioner leaps to the definition of "lot" at ALUO 18.08.350. As noted, ALUO 18.08.350 defines "lot" in relevant part as "[a] unit of land created by a partition or a subdivision, or a unit or contiguous units of land under single ownership, which complies with all applicable laws at the time such lots were created. * * *" Evidently, petitioner reads the phrase "which complies with all applicable laws at the time such lots were created" to modify all of the preceding phrases, including "[a] unit of land created by a partition or a subdivision[.]" The

[11] However, it is worth noting that only a very small portion of tax lot 500 is subject to the floodplain development standards. The majority of the driveway that requires approval under the floodplain development standards is actually in the Grandview Drive right-of-way, which presumably is not a "lot" at all.

syntax of ALUO 18.08.350 is unclear, and that interpretation is possible. However, it is more probable that the "complies with" phrase is intended to modify the immediately preceding phrase, "a unit or contiguous units of land under single ownership." If so, the structure of ALUO 18.08.350 is consistent with the code definitions at issue in *McKay Creek* and *Maxwell*, as well as current relevant statutory definitions, such as that for "lawfully established units of land" at ORS 92.010(3)(a).[12]

In other words, the better understanding of the syntactic structure of ALUO 18.08.350 is that it defines "lot" as either (1) a unit of land created by a partition or subdivision, or (2) a unit of land that complied with all applicable laws at the time that unit of land was created. As the planning commission noted, the "complies with all applicable" regulations language simply acknowledges that prior to the early 1970s, when amendments to ORS chapter 92 required local government approval for all partitions and subdivisions, it was lawful to create lots and parcels by processes other than a local government-approved "partition" or "subdivision" as those and related terms were used in ORS chapter 92. Thus, even under petitioner's expansive view of *Maxwell*, the dispositive question under ALUO 18.08.350 would be whether tax lot 500 was created by a partition or subdivision, not whether it is a unit of land that complied with all applicable laws at the time it was created.

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[12] ORS 92.010(3)(a) provides:

> "'Lawfully established unit of land' means:
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> "(A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or
>
> "(B) Another unit of land created:
>
> "(i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
>
> "(ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations."

With one possible exception, we do not understand petitioner to dispute that tax lot 500 was created in 1981 when the city approved the final partition plat, consistent with the 1979 preliminary plat approval, although petitioner disputes that that approval was legally correct and consistent with all applicable approval criteria. Under our understanding of *McKay Creek*, *Maxwell* and ALUO 18.08.350, the city's partition approval is sufficient to confirm that tax lot 500 is a legal "lot," to the extent such a finding is necessary for purposes of approving a physical constraints permit The one possible exception involves a brief argument petitioner makes that the 1981 final partition approval automatically became "null and void" because the final plat was not recorded within 30 days after it was approved, as required by ALUO 17.24.080 (1962). We understand petitioner to argue that if the final plat became "null and void" 30 days after the final plat was approved pursuant to ALUO 17.24.080 (1962), then tax lot 500 was actually created (illegally) as a separate unit of land when it was subsequently sold by deed, was therefore not created by "partition," and hence is not a "lot" under either the first or second prong of the definition at ALUO 18.08.350. However, respondents point out that ALUO 17.24.80 (1962) was replaced in 1979 by a different provision allowing recordation within 60 days, and cite to evidence that the final partition plat was timely recorded under that 1979 provision.

The fourth and fifth assignments of error are denied.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner challenges the city's alternative disposition approving a modification to the 2007 physical constraints permit.

A. First Assignment of Error: 2008 Extension

Petitioner first argues that the city erred in approving a modification of the 2007 physical constraints permit, because previous extensions of that permit were erroneously granted, and therefore the 2007 permit had expired and became void long before intervenors

filed the application in 2009. Petitioner contends that a void permit cannot be resurrected and modified.

The original physical constraints permit approved by the city council on August 7, 2007, was subject to ALUO 18.112.030, which provides that a permit is "deemed revoked if not used within one year from date of approval," unless extended.[13] Prior to August 7, 2008, intervenors applied to the city for an extension, pursuant to ALUO 18.112.030 (2008), which provides for a one-time extension no longer than 18 months, based on several criteria.[14] On August 20, 2008, city staff granted intervenors an 18-month extension, until February 7, 2010 (exactly 18 months after the date intervenors applied for the extension).

Petitioner argues that the August 20, 2008 decision granting intervenor an 18-month extension was erroneous, for several reasons, with the result that the August 2007 permit was automatically revoked and become void as of August 7, 2008. None of the reasons petitioner cites for asserting that the August 20, 2008 extension decision was erroneous have any merit, as far as we can tell. However, even if petitioner is correct that the city had erred in 2008 in granting the 18-month extension, respondents argue, and we agree, that any such error cannot be challenged in the present appeal. Petitioner cites no approval criterion governing the application to modify the 2007 permit or any other authority that would allow petitioner to challenge the 2008 extension of the 2007 permit, in the context of an appeal of a decision modifying the 2007 permit. The first assignment of error is denied.

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[13] City staff originally approved the physical constraints permit in November 2006, which was then appealed to the planning commission and ultimately to the city council, which approved it on August 7, 2007, after which the city council decision was appealed to LUBA, and ultimately affirmed. Petitioner appears to argue that the one-year period to use the permit in ALUO 18.112.030 began running when city staff *initially* approved the permit in November 2006. According to petitioner, the city first "extended" the permit for one year from the date that the city council issued its final decision, on August 7, 2007, to August 7, 2008. However, we do not understand this argument. As a matter of law, the original physical constraints permit became a *final* decision for the first time when the city council approved it on August 7, 2007, and under ALUO 18.112.030 intervenors had until August 8, 2008 to use the permit.

[14] In 2008, ALUO 18.112.030 was amended to limit extensions to a one-time extension no longer than 18 months, subject to certain criteria. Prior to 2008, ALUO 18.112.030 apparently did not limit the duration or number of extensions.

B. Second Assignment of Error: 2010 Recession Extension

Under the 18-month extension granted in 2008, the 2007 permit would have expired on February 7, 2010. As noted, on June 15, 2009, intervenors applied to the city to modify the 2007 permit to move the location of the proposed driveway, and city staff administratively approved the application on November 9, 2009. Petitioner appealed that staff decision to the planning commission, but due to various delays the hearing was not held until April 13, 2010, and the planning commission's final decision was not rendered until June 8, 2010.

Petitioner argues that the 2007 permit expired on February 7, 2010, during her appeal to the planning commission, and therefore the planning commission lost "jurisdiction" to hear the appeal of the November 9, 2009 decision. The planning commission rejected this argument, concluding that because it approved intervenor's application as an application for a new physical constraints permit, any issue regarding the expiration date of the 2007 permit was moot. Alternatively, if the application is treated as a modification of the 2007 permit, the planning commission noted that on April 8, 2010, the city granted intervenors a retroactive "recession" extension of the 2007 permit, pursuant to Ordinance 3007. Under Ordinance 3007, which became effective on April 3, 2010, the expiration date of permits issued before July 1, 2009, that were current as of January 1, 2010, can be extended for one year, in addition to any previous extensions. Because the 2007 permit had been retroactively extended on April 8, 2010, the planning commission concluded, it had authority to consider the appeal at the hearing on April 13, 2010, and approve modifications to the 2007 permit.

On appeal, petitioner argues that the city erred in extending the 2007 permit under Ordinance 3007, because that ordinance applies only to permits issued *before* July 1, 2009. Petitioner contends that city staff initially approved the modifications on November 9, 2009, after July 1, 2009, and that the city could not have lawfully granted a recession extension to the *modified* 2007 permit.

Respondents note that petitioner appealed the April 8, 2010 recession extension decision to LUBA, but that appeal was dismissed. *Brodersen v. City of Ashland*, __ Or LUBA __ (LUBA No. 2010-038, August 12, 2010). Respondents argue that petitioner cannot challenge the merits of the April 8, 2010 recession extension decision, in the course of the present appeal. We generally agree. The April 8, 2010 recession extension decision had the clear effect of extending the 2007 physical constraint permit for an additional year, and petitioner does not explain why the legal effect of that April 8, 2010 decision can be challenged in an appeal of the decision before us. In any case, petitioner is simply wrong that Ordinance 3007 extended the tentative staff decision to approve the modified permit that was issued on November 9, 2009. Because that tentative staff decision was appealed to the planning commission, it never became a final decision and could not have been extended. The April 8, 2010 recession extension decision extended the unmodified 2007 permit, not the tentative staff decision. That 2007 permit was thus a live, valid permit when the planning commission held a hearing on petitioner's appeal on April 13, 2010.

Petitioner argues nonetheless that the planning commission had lost "jurisdiction" to hear the appeal because between February 7, 2010, and April 8, 2010, the 2007 permit was expired. As explained under the ninth assignment of error, the initial hearing on petitioner's appeal was scheduled for February 9, 2010 hearing, but was rescheduled to April 13, 2010, apparently because petitioner failed to receive notice of the February 9, 2010 hearing. Petitioner notes that ALUO 18.108.070(B)(2)(c)(iii), governing appeal of Type I decisions, provides that "[t]he appeal shall be considered *at the next regular* Planning Commission or Hearings Board meeting[.]"[15] (Emphasis added). According to petitioner, the next regular

[15] ALUO 18.108.070(B)(2)(c) provides:

> "i. Within twelve (12) days of the date of the mailing of the Staff Advisor' s final decision, including any approved reconsideration request, the decision may be appealed to the Planning Commission by any party entitled to receive notice of the planning action. The appeal shall be submitted to the Planning Commission

planning commission meeting following February 9, 2010, was on March 9, 2010. Had the city rescheduled the hearing to March 9, 2010, during the two-month window when the 2007 permit was expired, petitioner argues, the planning commission would not have had "jurisdiction" to hear the appeal on a modification of the expired permit.[16] Petitioner notes that ALUO 18.108.070(B)(2)(c)(iv) provides that "[t]he appeal requirements of this section must be fully met or the appeal will be considered by the city as a jurisdictional defect and will not be heard or considered." The city's failure to hold a hearing "at the next regular" planning commission meeting, petitioner argues, means that the "appeal requirements" of ALUO 18.108.070(B)(2)(c) were not met, and thus the city lost jurisdiction to hear the appeal.

However, we disagree that the ALUO 18.108.070(B)(2)(c)(iii) requirement to hold an appeal hearing at the next regular planning commission meeting is properly viewed as an "appeal requirement" as that phrase is used in ALUO 18.108.070(B)(2)(c)(iv). That phrase refers to the requirements for the *appellant* to perfect an appeal, which are set out in ALUO

> Secretary on a form approved by the City Administrator, be accompanied by a fee established pursuant to City Council action, and be received by the city no later than 4:30 p.m. on the 12th day after the notice of decision is mailed.
>
> "ii. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee required in this section shall not apply to appeals made by neighborhood or community organizations recognized by the city and whose boundaries include the site.
>
> "iii. The appeal shall be considered at the next regular Planning Commission or Hearings Board meeting. The appeal shall be a de novo hearing and shall be considered the initial evidentiary hearing required under ALUO 18.108.050 and ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. The Planning Commission or Hearings Board decision on appeal shall be effective 13 days after the findings adopted by the Commission or Board are signed by the Chair of the Commission or Board and mailed to the parties.
>
> "iv. The appeal requirements of this section must be fully met or the appeal will be considered by the city as a jurisdictional defect and will not be heard or considered."

[16] Petitioner speculates that the city deliberately rescheduled the appeal hearing to April 13, 2010 instead of March 9, 2010, in order to allow intervenor to seek a recession extension under Ordinance 3007, which did not become effective until April 3, 2010. However, we are cited to no evidence supporting that speculation, and even if true petitioner does not explain how it would provide a basis for reversal or remand.

18.108.070(B)(2)(c)(i). It would be nonsensical to treat as a jurisdictional "appeal" requirement every requirement that ALUO 18.108.070(B)(2)(c) imposes on the city, such as scheduling hearings, refunding fees, signing decisions, etc. Accordingly, petitioner's arguments that the planning commission lost "jurisdiction" to hear the appeal do not provide a basis for reversal or remand. The second assignment of error is denied.

C. Third Assignment of Error: Modify Conditions of Approval

Petitioner argues that the city erred in approving a modification of the 2007 permit. ALUO 18.108.040(A)(2)(a) authorizes the city to approve, under a Type I procedure "[a]mendments or modifications to conditions of approval for Type I planning actions." The 2007 permit included eight conditions of approval. Petitioner argues, however, that the proposed "modification" is only to the location of the proposed driveway, not to any of the eight conditions of approval, and that nothing in the ALUO authorizes the city to "modify" the permit itself, as distinct from the conditions of approval. The only way to modify the location of the proposed driveway, petitioner argued to the city below and again on appeal, is to approve a new physical constraints permit.

Respondents argue that the first condition of approval to the 2007 permit stated that "all proposals of the Applicant are conditions of approval unless modified here." 2007 Record 31. According to respondents, this condition incorporated the applicant's proposals, including the location of the proposed driveway, as conditions of approval. Therefore, respondents argue, a modification to the proposed driveway location would necessarily require and constitute a modification to the conditions of approval.

We agree with respondents that, even if the city lacks express authority under its code to approve modifications to a permit that are not embodied in a condition of approval, a proposal to modify the driveway location is a modification to the first condition of approval, which treated the applicant's proposals, including the initially proposed driveway location, as a condition of approval. Therefore, petitioner has not established that the city exceeded its

authority in approving modifications to the 2007 permit. The third assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner argues that the city's findings with respect to the physical constraints and floodplain corridor criteria are inadequate and not supported by substantial evidence.

A. ORS 227.178(3) Fixed Goal Post Rule

The arguments under this sub-assignment of error are particularly confused. Petitioner and respondents appear to agree that under ORS 227.178(3) the application is subject to standards and criteria in effect on June 5, 2009, the date the application to modify the 2007 physical constraints permit was submitted. Petitioner argues that the application is therefore not subject to Ordinance 2951, which petitioner asserts became effective July 1, 2009, after the application date. Ordinance 2951 amended ALUO 18.108.040(A)(2), discussed under the third assignment of error, to authorize the city to approve, "[a]mendments *or modifications* to conditions of approval for Type I planning actions." (amended language emphasized) Because Ordinance 2951 post-dated the application, petitioner argues, the city therefore erred in approving "modifications" to the conditions of approval.

Respondents argue that Ordinance 2951 became effective July 1, 2008, not July 1, 2009, and therefore ALUO 18.108.040(A)(2) as amended was properly applied to intervenor's application. Respondents are correct. Response Brief App 12. This sub-assignment of error is denied.[17]

[17] Prior to its modification ALUO18.108.040(A)(2) allowed an "amendment" to a condition of approval to be processed under a Type I procedure. It is not clear to us that there is any meaningful difference between an "amendment" to a condition of approval and a "modification" to a condition of approval.

B. ALUO 18.62.040(I)(3) Reduce Adverse Impacts on the Environment

ALUO 18.62.040(I)(3) requires that the applicant for a physical constraints permit demonstrate that all "reasonable steps" have been taken "to reduce the adverse impact on the environment." Petitioner argues that a reasonable step to reduce adverse impacts would be to obtain access to tax lot 500 across parcels to the north or west and not from Grandview Drive at all. Respondents argue, and we agree, that it is not a "reasonable step" to request a lengthy driveway easement over adjoining property when the subject property abuts a public right-of-way. ALUO 18.62.040(I)(3) is evidently concerned with steps to *mitigate* impacts of development in an area subject to physical constraints criteria, but does not require the applicant or city to consider alternatives such as not developing at all in the area subject to physical constraints criteria.

Petitioner also argues that the planning commission members questioned the applicants regarding how the paved driveway would transition to the unpaved surface of Grandview Drive. Petitioner contends that an uneven transition could constitute an "adverse impact on the environment," but does not explain how the driveway/road transition could have an "adverse impact on the environment."

Finally, petitioner notes that in a 2006 staff report city staff suggested that the city explore relocating the existing Grandview Drive right-of-way out of the floodplain corridor to avoid impacts on the riparian area. Petitioner argues that by now approving construction of a paved driveway within a portion of the Grandview Drive right-of-way that is within the riparian area, the city has foreclosed the option of relocating the right-of-way and thus failed to take reasonable steps to reduce adverse impacts on the environment. However, petitioner does not explain why relocating the Grandview Drive right-of-way is a "reasonable step" to reduce adverse impacts of the *proposed driveway*, and we do not see that it is. The city did not err in failing to consider relocating the Grandview Drive right-of-way. This sub-assignment of error is denied.

C. Comprehensive Plan Goals and Policies

Petitioner cites to several city comprehensive plan goals and policies regarding protection of riparian lands, and argues that approval of the proposed driveway within the riparian corridor is inconsistent with those plan goals and policies. Respondents argue that petitioner has raised the issue of consistency with the cited plan goals and policies for the first time on appeal, and thus that issue is waived, under ORS 197.763(1). Petitioner does not respond to the waiver challenge. This sub-assignment of error is denied.

D. Topography of Riparian Area

ALUO 18.62.075(A)(4) requires that the "general topography of Riparian Preservation lands shall be retained." The city found that all fill material used for driveway construction will be placed at original ground elevation, except near a Ponderosa pine tree that must be preserved, and concluded that the proposal "generally" retains the existing topography. Record 26.

Petitioner argues that ALUO 18.62.075(A)(4) does not permit any significant deviation from the "general topography," but rather that the general topography "shall be retained." Petitioner disputes the finding that fill material will be placed at the original ground elevation, and cites to evidence that the driveway will climb a steep bank up from Grandview Drive onto tax lot 500, and may require flattening the slope of the bank.

Respondents argue, and we agree, that approving *some* modification to the original topography is not inconsistent with the requirement in ALUO 18.62.075 that the "general topography" be retained. As the city noted, the original topography has already been altered by the existing improved right-of-way and existing driveways, and the need to preserve the root system of the existing Ponderosa pine, which petitioner does not dispute, dictates some alteration to the original topography. Based on the evidence cited to us, petitioner has not demonstrated that the city's findings of compliance with ALUO 18.62.075 are inadequate or not supported by substantial evidence. This sub-assignment of error is denied.

E. Location of Utilities in the Floodplain Corridor

ALUO 18.62.070(M) provides that "[l]ocal streets and utility connections to developments in or adjacent to the Flood plain Corridor shall be located outside the Flood plain Corridor, except for crossing the Corridor * * *." The city deemed the "floodplain corridor" to extend 20 feet horizontal distance from the "top of the bank" of Wright Creek. In both the 2007 permit and the 2009 application, intervenors proposed running utilities from existing city connections down a trench in the middle of the Grandview Drive right-of-way, up the proposed driveway to the contemplated dwelling site. A portion of the trench within the right-of-way and driveway is within the floodplain corridor.

Petitioner argues that the utility trench violates ALUO 18.62.070(M), because it does not "cross" the floodplain corridor but largely runs parallel to the corridor. The planning commission interpreted ALUO 18.62.070(M) to apply only to new streets and associated utilities, not to placing utilities in existing streets within the floodplain corridor. Record 22. Petitioner does not acknowledge or challenge that interpretation.[18] Accordingly, petitioner's arguments do not provide a basis for reversal or remand.

F. Floodplain Boundary

ALUO 18.62.070(A)(2) provides that the "[t]he toe of the fill shall be kept at least ten feet outside of floodway channels, as defined in [ALUO] 15.10 * * *." Petitioner faults the city for failing to locate the edge of the "floodway channel," and thus ensure that the fill for the proposed driveway is at least 10 feet from the floodway channel. Intervenors submitted an engineered drawing depicting the northern boundary of the Wrights Creek 100-year floodplain, at least 20 feet from the proposed driveway, on which the planning commission relied to conclude that ALUO 18.62.070(A)(2) is satisfied. Record 37. Petitioner criticizes

[18] The city council adopted a similar interpretation of ALUO 18.62.070(M) in approving the 2007 permit, and petitioner also failed to challenge that interpretation in that appeal. *Brodersen I*, 55 Or LUBA at 364.

the floodplain boundary map, arguing that it is unreliable and does not identify the location of the "floodway channels."

Petitioner is correct that neither the floodplain boundary map nor the city findings identify the precise location of Wrights Creek's "floodway channels." However, as the relevant terms are defined in ALUO 15.10.050, the "floodway channel" is by definition located within the 100-year floodplain that it must be reserved to discharge.[19] Petitioner cites no authority or evidence to the contrary. We agree with respondents that the floodplain boundary map, which locates the 100-year floodplain boundary at least 20 feet from the driveway, is substantial evidence supporting the city's conclusion that the toe of the fill is at least 10 feet outside the floodway channels. This sub-assignment of error is denied.

G. Tree Protection Zone

ALUO 18.61.200(B) provides that "[e]xcept as otherwise determined by the Staff Advisor," a permit applicant must comply with several measures designed to protect significant trees, including a requirement that "[n]o construction activity shall occur within the tree protection zone[.]" The tree protection zone is defined as "the area reserved around a tree or group of trees in which no grading, access, stockpiling or other construction activity shall occur as determined by the Staff Advisor based on review of the tree and site conditions." ALUO 18.061.020(P). Intervenors' arborist and the city's Tree Commission recommended various measures to protect a 28-inch diameter Ponderosa pine tree located close to the proposed driveway, and the city imposed the recommended conditions to protect

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[19] ALUO 15.10.050 defines "floodway" with reference to the "base flood," which is a 100-year flood.

> "D. Base Flood means the flood having a one percent (1%) chance of being equaled or exceeded in any given year. Also referred to as the '100-year flood.'
>
> "* * * * *
>
> "I. Flood-way means that channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one (1) foot."

the tree. One condition is to install the driveway at surface grade within the dripline of the tree. However, petitioner argues that the Tree Commission actually recommended that the driveway be installed at surface grade within the "tree protection zone," which petitioner argues is a larger area than the dripline.

Petitioner does not substantiate her assertion that the "tree protection zone" as determined by the staff advisor is larger than the tree's dripline. We are cited to no evidence to that effect, and therefore petitioner's arguments do not provide a basis for reversal or remand. This subassignment of error is denied.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

Petitioner argues that the extreme southwestern corner of tax lot 500 is within the floodway channel/100-year floodplain as delineated by intervenors' engineer, and thus fits within the category of Severe Constraint Land, which includes all lands within the floodway channel and lands with slopes that exceed 35 percent. While the proposed driveway approved under the physical constraints permit is nowhere near the southwestern corner of tax lot 500, petitioner notes that utility plans for the dwelling intervenors hope someday to build on tax lot 500 show a storm drainage pipe and outfall near the southwestern corner. Petitioner contends that development of the pipe and outfall in Severe Constraint Land is prohibited.

The city found that the application for a physical constraints permit for the driveway proposes no development within the floodplain boundary or land designated as Severe Constraints Land. Record 33-34. That unchallenged finding adequately disposes of this assignment of error.[20]

The seventh assignment of error is denied.

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[20] In any case, based on the plans cited to us, it is not clear that the outfall is actually located within the 100-year floodplain boundary.

EIGHTH ASSIGNMENT OF ERROR

One of the physical constraints permit criteria in ALUO 18.62.040(I) requires a finding that the "potential impacts to the property and nearby areas have been considered, and adverse impacts have been minimized." Petitioner contends that among the "adverse impacts" to nearby areas that must be considered are alleged safety and vision clearance issues arising from vehicles exiting the new driveway and their impacts on vehicles using the driveway to tax lot 411, an undeveloped lot purchased by petitioner in 2007 or 2008. According to petitioner, the proposed driveway will be located in a "blind spot" with respect to the driveway to tax lot 411.

Respondents argue that as relevant here the physical constraints criteria in ALUO 18.62.040(I) are concerned with adverse environmental impacts from development within the floodplain corridor, not safety issues arising from driveway design. Respondents note that the city found that driveway design standards are not approval criteria for a physical constraints permit and, alternatively, that the proposed driveway complies with driveway standards. Record 45. Petitioner does not acknowledge or challenge those findings. We agree with respondents that petitioner has not demonstrated that "adverse impacts" for purposes of ALUO 18.62.040(I) includes alleged safety and vision clearance conflicts between driveways.

The eighth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

The planning commission imposed Condition of Approval 5, requiring that prior to issuance of a certificate of occupancy, presumably for a dwelling, the requirements of the fire department must be addressed, including "angle of approach" and a "turnaround" for the driveway. Record 48. Petitioner argues that this condition impermissibly defers the issue of compliance with fire department requirements regarding access to the property to a later review proceeding that will not provide notice to petitioner or opportunity to participate.

Petitioner argues that the presently improved width of Grandview Drive is too narrow to allow the proper turning radius for fire trucks to turn into the proposed driveway, and that the turnaround located on the property outside the floodplain corridor is not strong enough to support fire department vehicles.

The city found, with respect to the turnaround, that because it is located on a portion of tax lot 500 not subject to the requirements of a physical constraints permit, the city need not consider challenges directed at the turnaround. Record 46. Petitioner offers no challenge to that finding. With respect to the turning radius from Grandview Drive onto the driveway, petitioner cites to nothing in the ALUO that requires the applicant for a physical constraints permit to demonstrate that a driveway turning radius complies with fire department standards, in the course of obtaining a physical constraints permit. Absent some requirement to that effect, the city did not "defer" a finding of compliance with applicable approval criteria to a later review proceeding.

The tenth assignment of error is denied.

ELEVENTH ASSIGNMENT OF ERROR

Petitioner argues that approving a driveway within the Wrights Creek floodplain corridor is inconsistent with ORS 509.585(1), which provides in relevant part that "fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present," and ORS 509.585(2), which prohibits placing an "artificial obstruction" across any waters of the state historically inhabited by native migratory fish, without providing alternative passage. According to petitioner, some portions of Wright Creek have historically supported migratory fish.

Petitioner fails to explain, much less establish, how placing a driveway within a public right-of-way improved with a city street, that is located outside the 100-year floodplain of a partially culverted creek, could possibly constitute placing an "artificial obstruction" across the "waters" of Wrights Creek, or in any way obstructing fish passage.

The eleventh assignment of error is denied.

The city's decision is affirmed.