

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SOUTHEAST NEIGHBORS
5 NEIGHBORHOOD ASSOCIATION,
6 *Petitioner,*

7
8 vs.

9
10 CITY OF EUGENE,
11 *Respondent,*

12
13 and

14
15 WEST CREEK LLC,
16 SOUTH PARK ASSOCIATES LLC,
17 and HOMEBUILDERS ASSOCIATION
18 OF LANE COUNTY,
19 *Intervenors-Respondents.*

20
21 LUBA No. 2013-004

22
23 FINAL OPINION
24 AND ORDER

25
26 Appeal from City of Eugene.

27
28 Daniel C. Snyder, Eugene, filed a petition for review and cross response brief and
29 argued on behalf of petitioner.

30
31 Glenn Klein, City Attorney, Eugene, filed a response brief. Emily N. Jerome,
32 Eugene, argued on behalf of respondent.

33
34 Bill Kloos, Eugene, filed a response brief and cross petition for review and argued on
35 behalf of intervenors-respondents.

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

38
39 HOLSTUN, Board Chair, did not participate in the decision.

40
41 AFFIRMED

07/12/2013

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

NATURE OF THE DECISION

Southeast Neighbors Neighborhood Association (Southeast Neighbors) appeals a decision approving a tentative planned unit development application.

REPLY BRIEFS

Southeast Neighbors and intervenors West Creek, LLC, South Park Associates, LLC and Homebuilders Association of Lane County (collectively, West Creek) each filed a response brief and each moves for permission to file a reply brief to respond to new matters raised in the other’s response brief. The reply briefs are allowed.

FACTS

West Creek applied for tentative planned unit development (PUD) approval to create 75 residential lots on an approximately 26-acre property located in the South Hills area of the city. The subject property is zoned Low Density Residential (R-1), and is within the PUD overlay zone and the Water Resources (WR) overlay zone. The property is located south of the intersection of West Amazon Drive and Martin Street. Access to the property is proposed to be provided over an existing unimproved right of way that extends the developed portion of West Amazon Drive through the property from north to south, from Martin Drive to Fox Hollow Road. The entire property is included on the city’s inventory of significant resources under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and the property is also included on the city’s inventory of buildable lands under Statewide Planning Goal 10 (Housing). Three segments of Amazon Creek are located on the property.

The property is sloped. One provision of the Eugene Code (EC) that we set out and discuss later prohibits grading on portions of a development site that meet or exceed 20 percent slope. EC 9.8325(5). The slope of the property was and is a central question in this appeal. Based on a slope map of the property provided by West Creek that measured slope

1 using 5- foot contour intervals, planning staff prepared a slope map that showed that slopes
2 on most of the eastern portion of the property exceed 20 percent. The city's planning staff
3 initially recommended denial of the application for 75 lots because the plan proposed grading
4 of slopes on the eastern portion of the property that exceed 20 percent. In the alternative,
5 planning staff recommended a condition of approval that would limit the PUD to 47 lots
6 located only on the western portion of the property where West Creek's 5-foot contour
7 interval slope map shows there are no slopes greater than 20 percent. Thereafter, prior to the
8 initial public hearing before the hearings officer, West Creek submitted an alternative site
9 plan that sought approval for 47 lots by developing only the western portion of the property.
10 West Creek requested that the city approve either the 75-lot proposal or the alternative 47-lot
11 proposal.

12 During the proceedings before the hearings officer, Southeast Neighbors' expert,
13 Matthews, submitted a slope map (the Matthews Slope Map) that measured slopes on the
14 property using 5-foot contour intervals and showed more areas of the eastern portion of the
15 property as well as some areas on the western portion of the property as meeting or exceeding
16 20 percent slope, compared to the 5-foot contour slope map prepared by staff. The hearings
17 officer relied on the Matthews Slope Map to deny West Creek's 47-lot proposal (and 75-lot
18 proposal) because he determined that both plans proposed grading of portions of the property
19 that meet or exceed 20 percent slope.

20 Southeast Neighbors and West Creek both appealed the hearings officer's decision to
21 the planning commission. The planning commission concluded, based on the slope map
22 prepared by planning staff that was based on West Creek's 5-foot contour intervals slope
23 map, that the 47-lot plan did not propose grading on slopes equal to or greater than 20
24 percent, and approved the application for 47 lots. Southeast Neighbors appealed the planning
25 commission's decision to LUBA, and West Creek filed a cross petition for review.

1 **SOUTHEAST NEIGHBORS’ FIRST ASSIGNMENT OF ERROR/WEST CREEK’S**
2 **FIRST AND SECOND CROSS ASSIGNMENTS OF ERROR**

3 Southeast Neighbors’ first assignment of error and West Creek’s first and second
4 cross assignments of error challenge various aspects of the planning commission’s decision
5 that are related to the question of the slopes on the property. We address West Creek’s first
6 and second cross assignments of error that challenge the ability of the city to apply EC
7 9.8325(5) at all to the proposal and then turn to Southeast Neighbors’ first assignment of
8 error that alleges that the planning commission committed procedural error.

9 **A. West Creek’s First and Second Cross Assignments of Error**

10 The application is for “needed housing” as that term is used in ORS 197.303(1).¹ EC
11 9.8325 provides the tentative PUD approval criteria for “needed housing.” EC 9.8325(5)
12 provides that for a PUD for needed housing “[t]here shall be no proposed grading on portions
13 of the development site that meet or exceed 20% slope.”

14 In its first and second cross assignments of error, West Creek argues that the city
15 erred in applying EC 9.8325(5) to its application for several reasons. First, according to West
16 Creek, the method for measuring slope is an application submittal requirement and failure to

¹ ORS 197.303(1) provides:

“As used in ORS 197.307, ‘needed housing’ means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least the following housing types:

- “(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
- “(b) Government assisted housing;
- “(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
- “(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
- “(e) Housing for farmworkers.”

1 provide the requested information may not be used as a basis to deny an application. West
2 Creek additionally argues that including instructions about how to measure slope on the city’s
3 application form is insufficient to make EC 9.8235(5) a “clear and objective standard[]”
4 within the meaning of ORS 197.307(4).² Finally, West Creek argues that ORS 227.173
5 prohibits the city from requiring applicants to use the city’s method for measuring slope
6 where the method is not included in EC 9.8325(5). We address each argument in turn.

7 **1. Information Requirement**

8 The city’s application form instructs applicants that for properties with slopes that
9 exceed ten percent, an applicant should provide slope data using 5-foot contour intervals.
10 Record 2315.³ West Creek initially submitted a slope map that measured slopes on the
11 property based on the difference in elevation between four sets of points on the property’s
12 outer boundary, a method similar to measuring the average slope between points on the
13 property. Record 1851. By measuring slope using that method, the property’s steepest slope
14 would be 15.2 percent and no grading on the plan for 75 lots would run afoul of the criterion.

15 West Creek also submitted slope measurements using 5-foot contour intervals. That
16 slope data showed that slopes on the property’s eastern side meet or exceed 20 percent, and
17 led the city’s planning staff to recommend denial of the 75-lot proposal or approval with a
18 condition limiting development to the western portion of the property. Finally, prior to the
19 close of the initial public hearing before the hearings officer, West Creek submitted a slope
20 map that measured slope using 20-foot contour intervals. Using that slope data, West

² ORS 197.307(4) provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

³ The city moves to supplement the record with West Creek’s application. No party opposes the motion and it is granted.

1 Creek’s proposal for 75 lots would satisfy EC 9.8325(5). The hearings officer declined to
2 rely on the 20-foot contour interval slope map, and the planning commission affirmed that
3 decision. Record 12.

4 We agree with West Creek that a local government may not deny an application that
5 is otherwise complete merely for failure to provide the information required by the
6 application form or by the code. *Caster v. Silverton*, 54 Or LUBA 441, 450-51 (2007). Thus,
7 the city could not have denied the application solely because petitioner failed to provide a
8 slope map with 5-foot contours, as the application form requires, because such a slope map is
9 only an informational requirement. However, that is not what occurred here. What occurred
10 here is that the city requested that West Creek provide evidence regarding slopes on the
11 property based on 5-foot contour intervals, and based on that evidence provided by West
12 Creek, the city denied the 75-lot application but approved the alternate 47-lot application.
13 The city chose not to rely on other evidence provided by West Creek that measured slopes
14 using a different method. The city has discretion to rely on the evidence it chooses in making
15 its decision. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993). That West Creek
16 desired that the city rely on different evidence to demonstrate slope on the property does not
17 provide a basis for reversal or remand of the decision. *Younger v. City of Portland*, 305 Or
18 346, 358-60 (1988).

19 **2. ORS 197.307(4)**

20 ORS 197.307(4) allows the city to apply only “clear and objective standards” to West
21 Creek’s proposed PUD. *See* n 2. West Creek argues that EC 9.8325(5) is not a “clear and
22 objective standard * * *” because nothing in EC 9.8325(5) or the city’s comprehensive plan
23 or other land use regulations specify how the applicant must demonstrate and how the city
24 determines the “portions” of a development site that exceed a 20 percent slope. According to
25 West Creek, EC 9.8325(5) is deeply ambiguous on this point. West Creek argues that while
26 the city’s application form requests that slope be demonstrated using 5-foot contours, that is

1 an arbitrary number chosen at staff’s discretion, and using any other number yields very
2 different results, as the different slope maps in the record reflect. According to West Creek,
3 it is impossible to determine slope under EC 9.8325(5) without exercising judgment about
4 what “portion[] of the development site” is evaluated using what contour intervals. For that
5 reason, West Creek argues, EC 9.8325(5) requires the kind of “subjective, value-laden
6 analyses” that are the hallmark of a non-clear and objective standard we set out in *Rogue*
7 *Valley Realtors v. City of Ashland*, 35 Or LUBA 139, 155 (1998), *aff’d* 158 Or App 1, 970
8 P2d 685 (1999).

9 In *Homebuilders Assn of Lane County v. City of Eugene*, 41 Or LUBA 370, 410-11
10 (2002), the petitioners argued that EC 9.8325(5) was not “clear and objective” on its face
11 because it did not specify how slope is measured. LUBA rejected the petitioners’ facial
12 challenge to EC 9.8325(5), concluding that the city had demonstrated that EC 9.8325(5) is
13 “capable of being imposed only in a clear and objective manner.” *Id.* at 381. We concluded
14 that “the slope of a property is an objectively determinable fact, and the absence of
15 instructions on how to determine slope does not offend ORS 197.307(6)[(2001)].” *Id.* at 411.

16 West Creek argues that our decision in *Homebuilders* is not controlling in the present
17 appeal because the present appeal is a challenge to EC 9.8325(5) as the city has applied it to
18 West Creek. However, we see no difference in the challenge to EC 9.8325(5) that we
19 rejected in *Homebuilders* and West Creek’s challenge in the present appeal. We concluded in
20 *Homebuilders* that “the absence of instructions on how to determine slope does not offend
21 ORS 197.307(4).” The city subsequently interpreted EC 9.8325(5) to require that slopes on
22 “portions of [a] development site” that have slopes that are greater than ten percent be
23 measured using 5-foot contour intervals. The city provides instructions on the application
24 form on how it will measure slope, and West Creek has not demonstrated that the city’s
25 interpretation of EC 9.8325(5) or its chosen method of measuring slope introduces
26 subjectivity into the determination of the slope of a property. In instructing applicants on

1 how to measure slope, the city is not arbitrarily applying EC 9.8325(5) or otherwise engaging
2 in “subjective, value-laden analyses” but merely giving effect to the language of EC
3 9.8325(5) that prohibits grading on “portions of the development site” that meet or exceed 20
4 percent slope. That EC 9.8325(5) requires some interpretation in order to apply the 20
5 percent slope standard does not necessarily mean that EC 9.8325(5) is not clear and
6 objective, or that it requires a subjective, value-laden analysis. *See Rudell v. City of Bandon*,
7 249 Or App 309, 319, 275 P3d 1010 (2012) (city’s interpretation of a defined term in its code
8 is sufficiently clear and objective for purposes of ORS 197.307(6)(2009)).

9 West Creek also argues that if the city is going to choose an arbitrary contour interval
10 with which to determine slope, the city must choose a contour interval that is based on and
11 consistent with the city’s adopted comprehensive plans. West Creek notes that the city’s
12 adopted refinement plan for the area, the South Hills Study, includes a US Geological Service
13 (USGS) topographic map of the area that depicts slope using 20-foot contour intervals.
14 However, EC 9.8325(5) applies in all areas of the city and there is no indication that in
15 adopting EC 9.8325(5) the city relied on the South Hills Study or any maps contained in the
16 study. Merely because a USGS map is included in the South Hills Study does not mean that
17 the city is *required* to employ the contour intervals used on that map in order to determine
18 slope under EC 9.8325(5).

19 Finally, West Creek argues that because the subject property is included in the city’s
20 Buildable Lands Inventory (BLI), the city erred in relying on 5-foot contour intervals to
21 determine whether EC 9.8325(5) is satisfied. We understand West Creek to argue that the
22 inclusion of the subject property on the BLI requires the city to measure slope in a way that
23 will result in more development on property that is subject to the slope limit. However,
24 beyond asserting that the property is included on the city’s BLI, West Creek does not
25 otherwise explain why that fact means the city must use a different measuring method to
26 measure slope or that it erred in measuring slope based on 5-foot contour intervals.

1 West Creek’s real disagreement with the city is that measuring slope based on 5-foot
2 contour intervals precludes development of a “portion of the development site” under EC
3 9.8325(5). West Creek would prefer the city rely upon different evidence using a different
4 contour interval, if that would result in approval of its preferred 75-lot PUD. But that
5 disagreement does not convert an otherwise clear and objective standard into a standard that
6 offends ORS 197.307(4).

7 **3. ORS 227.173(1)**

8 ORS 227.173(1) provides:

9 “Approval or denial of a discretionary permit application shall be based on
10 standards and criteria, which shall be set forth in the development ordinance
11 and which shall relate approval or denial of a discretionary permit application
12 to the development ordinance and to the comprehensive plan for the area in
13 which the development would occur and to the development ordinance and
14 comprehensive plan for the city as a whole.”

15 ORS 227.173(1) requires approval standards that are “clear enough for an applicant to
16 know what [it] must show during the application process.” *Lee v. City of Portland*, 57 Or
17 App 798, 802, 646 P2d 662 (1982). As we understand West Creek’s challenge under ORS
18 227.173, it boils down to an argument that ORS 227.173(1) prohibits the city from applying
19 EC 9.8325(5) because the standard does not specify how to determine 20 percent slope, and
20 thus the standard is not clear enough to allow an applicant to determine what must be
21 demonstrated in the application. According to West Creek, directions from planning staff on
22 the application form to measure slope using a 5-foot contour interval are not sufficient to
23 avoid the lack of clarity and subjectivity contained in EC 9.8325(5). West Creek argues that
24 the necessary clarity and objectivity must exist in the city’s acknowledged code provisions.

25 In our discussion above rejecting West Creek’s argument that ORS 197.307(4)
26 prohibits the city from applying EC 9.8325(5) to its application, we concluded that the 20
27 percent slope standard in EC 9.8325(5) is clear and objective on its face. We reiterate that
28 conclusion here and conclude that EC 9.8325(5) is similarly “clear enough for an applicant to

1 know what [it] must show during the application process.” *Lee*, 57 Or App at 802. In
2 addition, we disagree that ORS 227.173(1) requires that a *method* of measuring slope must be
3 included in the development ordinance in order to determine whether the 20 percent standard
4 is met. No party disputes that the most straightforward way to determine slope, if not the
5 only way, is to compare vertical rise to horizontal distance, expressed as a fraction
6 (“rise/run”). EC 9.8325(5) does not specify the size of the vertical or horizontal distance
7 being compared. The city’s application form requests that applicants provide a slope map
8 using a 5-foot vertical rise. West Creek submitted a total of three slope maps, one based on
9 5-foot intervals, one based on the width of the entire property, and one based on 20-foot
10 contour intervals. The city chose to base its decision on the 5-foot interval slope map, and
11 West Creek disagrees with that choice. But West Creek clearly understood how to
12 demonstrate slope, and the fact that it preferred using a larger vertical or horizontal distance
13 to determine slope than the city preferred does not demonstrate that EC 9.8325(5) is
14 impermissibly vague or unclear in violation of ORS 227.173(1). *State ex Rel West Main*
15 *Townhomes v. City of Medford*, 233 Or App 41, 225 P3d 56 (2009), *modified and adhered to*
16 *on reconsideration* 234 Or App 343, 228 P3d 607 (2010).

17 West Creek’s first and second cross assignments of error are denied.

18 **B. Southeast Neighbors’ First Assignment of Error**

19 During the proceedings before the hearings officer, Southeast Neighbors submitted
20 the Matthews Slope Map into the record. The Matthews Slope Map measured the slopes on
21 the property based on a copy of the same staff map with 5-foot contour intervals, but used a
22 different measuring tool than the tool that planning staff used to measure slopes on the
23 property, also based on 5-foot contour intervals.⁴ The Matthews Slope Map showed more
24 areas of the property included within the 47-lot proposal that contain slopes equal to or

⁴ Matthews used a 25-foot diameter (at scale) circle to measure slope and the planning staff used a 25-foot (at scale) square. Record 466.

1 greater than 20 percent than the staff map showed. Prior to the close of the record, West
2 Creek argued to the hearings officer that he should not rely on the Matthews Slope Map
3 because it was less reliable than the map prepared by the planning staff, for a number of
4 reasons. Record 498. The hearings officer relied on the Matthews Slope Map to deny the
5 applications for both a 75-lot subdivision and the alternative 47-lot subdivision.⁵

6 EC 9.7655(3) provides in relevant part that an appeal of a hearings officer decision to
7 the planning commission is “* * * based on the record, and [] limited to the issues raised in
8 the record that are set out in the filed statement of issues.” EC 9.7655(2) provides that “[n]o
9 new evidence pertaining to appeal issues shall be accepted” by the planning commission.⁶
10 West Creek appealed the hearings officer’s decision to the planning commission. In its
11 appeal statement, West Creek asserted that the hearings officer erred in relying on the
12 Matthews Slope Map for a number of reasons. Record 219-225. As an insert in its appeal
13 statement, West Creek included graphics showing slopes, which it produced using the
14 methodology that it understood Matthews had used. Record 221-22.

15 In response, Southeast Neighbors argued that West Creek’s appeal statement sought
16 to appeal issues that were not raised before the hearings officer in contravention of EC

⁵ The hearings officer found:

“Mr. Matthews’ map shows that staff’s approach was remarkably accurate. Mr. Matthews’ map shows only a few large areas not included on staff’s map, but all of those are outside of the specific spots shown for development. Additionally, Mr. Matthews’ map shows slight increases in the size of the areas that staff had marked as slopes of 20 percent or greater. The hearings official believes that substantial evidence in the whole record shows that staff’s map and Mr. Matthews’ map accurately measured slope, but that Mr. Matthews’ map provides slightly [more] accurate information of slopes equal to or greater than 20 percent. His approach is essentially identical to the staff’s approach, except for the shape of the measure[ing] tool, so the hearings official concludes that Mr. Matthews’ map shows the areas that the applicant must avoid pursuant to this criterion.” Record 466.

⁶ EC 9.0500 defines “evidence” to mean “[f]acts, documents, data, or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision.”

1 9.7655(3), and to consider “new evidence” in contravention of EC 9.7655(2), where West
2 Creek asserted that the hearings officer erred in relying on the Matthews Slope Map. The
3 parties then engaged in a lengthy battle of motions, responses to motions, replies to
4 responses, sur-replies to responses, etc. about whether the planning commission could
5 consider the issues and whether West Creek improperly submitted new “evidence.” Record
6 157-58; 179-181; 182-86. Additionally, during the single public hearing before the planning
7 commission, Matthews testified and used an enlarged 2 foot by 3 foot version of West
8 Creek’s 47-lot site plan and measured slopes on the property with a ruler and a red pen to
9 demonstrate slopes on the property.

10 In its final decision, the planning commission concluded that the issues presented in
11 West Creek’s appeal statement that challenged the Matthews Slope Map had been raised
12 before the hearings officer. Record 7-8. The planning commission rejected as “new
13 evidence” the two graphics that West Creek had included in its appeal statement and struck
14 all references to the graphics contained in West Creek’s appeal statement. The planning
15 commission also determined that the Matthews demonstrative exhibit from his testimony at
16 the planning commission hearing was “new evidence” under EC 9.7655(2) and rejected it.
17 The planning commission then reversed the hearings officer’s decision and concluded that
18 the map prepared by the city’s planning staff based on the map provided by West Creek was
19 more reliable than the Matthews Slope Map, and approved the 47-lot PUD. Record 15-18.

20 ORS 197.835(9)(a)(B) provides that LUBA will reverse or remand a decision if the
21 local government “[f]ailed to follow the procedures applicable to the matter before it in a
22 manner that prejudiced the substantial rights of the petitioner[.]” In its first subassignment of
23 error under the first assignment of error, Southeast Neighbors argues that the planning
24 commission committed a procedural error that prejudiced its substantial rights when it
25 allowed West Creek to challenge the Matthews Slope Map in the appeal of the hearings

1 officer's decision, and that it erred in accepting and relying on new evidence relating to those
2 appeal issues in contravention of EC 9.7655(2).

3 West Creek responds that the issues that it raised in its appeal statement regarding the
4 Matthews Slope Map were raised before the hearings officer at Record 498 and that the
5 planning commission did not err in correctly concluding that West Creek had raised the
6 issues below. West Creek argues that the planning commission correctly interpreted EC
7 9.7655(3) as allowing the planning commission to consider West Creek's additional
8 arguments related to issues that were properly raised below. Finally, West Creek responds
9 that the planning commission correctly concluded that, except for the material that the
10 planning commission struck as new "evidence," no new evidence was included in West
11 Creek's submissions.

12 We agree with West Creek. First, Southeast Neighbors' arguments in the first
13 subassignment of error conflate the "issues" that it alleges were not raised with the more
14 detailed arguments on the issues that West Creek made to the planning commission. The
15 planning commission interpreted the requirement in EC 9.7655(3) that an "issue" have been
16 raised not to require that an appealing party must have raised all arguments in connection
17 with that issue in order to make those arguments to the planning commission. Southeast
18 Neighbors does not challenge that interpretation or otherwise explain why it is not correct.
19 *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995).

20 Second, Southeast Neighbors does not identify in the petition for review with any
21 specificity the "new evidence" that it alleges was introduced before the planning
22 commission.⁷ The planning commission adopted detailed findings that identify the evidence
23 it determined was "new evidence" contained in West Creek's and Southeast

⁷ The petition for review refers to a chart at Record 328-29, but that chart does not identify with any specificity new "evidence" that Southeast Neighbors believes was introduced. Southeast Neighbors' Petition for Review 26.

1 Neighbors’/Matthews’ submissions, and rejected that evidence. Southeast Neighbors does
2 not challenge those findings or otherwise explain why those findings regarding new evidence
3 are incorrect.

4 In its second subassignment of error, we understand Southeast Neighbors to argue that
5 the planning commission erred in rejecting as “new evidence” under EC 9.7655(2) the
6 Matthews demonstrative exhibit created at the planning commission hearing. Petition for
7 Review 30. We understand Southeast Neighbors to argue that the Matthews demonstrative
8 exhibit should not have been rejected because the planning commission allowed West Creek
9 to introduce new evidence, and the demonstrative exhibit was merely Southeast Neighbors’
10 response to that improperly introduced new evidence. We reject that argument. First, we
11 have already determined above that the planning commission did not improperly accept any
12 new evidence from West Creek. More to the point, EC 9.7655(2) is clear that “no new
13 evidence * * * shall be accepted.” Given such a prohibition, the remedy for correcting a
14 planning commission error in accepting new evidence in contravention of EC 9.7655(2) is
15 not to allow an evidentiary free-for-all in the form of more new evidence to be introduced
16 before the planning commission in violation of EC 9.7655(2), but to remand the decision for
17 the planning commission to make its decision without relying on *any* new evidence.

18 Southeast Neighbors’ first assignment of error is denied.

19 **SOUTHEAST NEIGHBORS’ SECOND ASSIGNMENT OF ERROR/WEST**
20 **CREEK’S SEVENTH CROSS ASSIGNMENT OF ERROR**

21 EC 9.8325(13) requires an applicant for a planned unit development to show that:

22 “[s]tormwater runoff from the PUD will not damage natural drainage courses
23 either on-site or downstream by eroding or scouring the natural drainage
24 courses or by causing turbidity, or the transport of sediment due to increased
25 peak flows or velocity.”

1 A. **West Creek’s Seventh Cross Assignment of Error**

2 In West Creek’s seventh cross assignment of error, it argues that EC 9.8325(13) may
3 not be applied to the proposal because it is not a “clear and objective standard[]” within the
4 meaning of ORS 197.307(4). According to West Creek, EC 9.8325(13) is a subjective
5 standard because the city must determine what a “natural drainage course” is, since that term
6 is not defined in the EC, and determine what constitutes “damage” to that natural drainage
7 course.

8 Southeast Neighbors responds initially by arguing that West Creek is prohibited under
9 *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) from asserting the issue raised
10 in its seventh cross assignment of error, because West Creek failed to raise the issue in its
11 appeal before the planning commission. West Creek responds that the issue is merely raised
12 as a “backup defense” in its cross-petition for review. West Creek also cites *Olstedt v.*
13 *Clatsop County*, 62 Or LUBA 131, 139-40 (2012), for the proposition that *Miles* is inapposite
14 because West Creek prevailed on the issue before the hearings officer, and therefore there
15 was no “issue” to appeal to the planning commission in order to preserve the right to raise the
16 issue at LUBA. Finally, West Creek also cites to the pages in the record where the issue was
17 raised before the hearings officer.

18 We do not understand West Creek to contend that it raised the issue in its appeal or in
19 any response to Southeast Neighbors’ appeal. Where the issue of whether the city may apply
20 EC 9.8325(13) at all to a proposal is raised as an assignment of error in West Creek’s cross
21 petition for review, the issue is not a “backup defense” as West Creek suggests. In that
22 circumstance, we agree with Southeast Neighbors that West Creek may not assign error to the
23 planning commission’s decision on the basis that EC 9.8325(13) does not apply at all to the
24 proposal, where the issue was not raised in West Creek’s appeal to the planning commission
25 or in any response to Southeast Neighbors’ appeal to the planning commission. That differs
26 from the situation in *Olstedt* that West Creek relies on. In *Olstedt*, the petitioners at LUBA

1 prevailed in the initial decision, and the applicants filed the local appeal, where they
2 ultimately gained approval of their application. The petitioners at LUBA, therefore, had no
3 reason to appeal the initial decision and we determined that *Miles* was inapplicable in those
4 circumstances.

5 In contrast, here, West Creek and Southeast Neighbors both filed local appeals of the
6 hearings officer's decision, and Southeast Neighbors assigned error to the hearings officer's
7 determination that EC 9.8325(13) was met.⁸ In that circumstance, we think that *Miles*
8 requires West Creek to alert the planning commission, the final decision maker, that one of
9 West Creek's positions is that EC 9.8235(13) violates the needed housing statute and that it
10 may not be applied at all, in order to give the planning commission the opportunity to
11 consider that issue. *Miles*, 190 Or App at 510. Having failed to do so, West Creek is
12 precluded under ORS 197.825(1) and *Miles* from assigning error to the planning
13 commission's decision on the basis that a criterion does not apply to the proposal, where the
14 response amounts to an allegation that the city made a different error in applying EC
15 9.8325(13). That is the case whether the issue is raised in a cross petition for review or in a
16 response brief.

17 West Creek's seventh cross assignment of error is denied.

18 **B. Southeast Neighbors' Second Assignment of Error**

19 In 2003 the city adopted the current version of EC 9.8235(13). Three years later, in
20 2006, the city adopted its stormwater standards at EC 9.6790 through 9.6797. EC
21 9.8325(7)(j) requires an applicant to show compliance with the city's stormwater standards,
22 as relevant, "regarding * * * flow control for headwaters area [EC 9.6793] * * *."⁹

⁸ During the proceedings before the hearings officer, West Creek also took the position that EC 9.8325(13) is not a clear and objective standard, but West Creek did not take that position before the planning commission.

⁹ EC 9.6793 Stormwater Flow Control (Headwaters) provides in relevant part:

1 To address stormwater runoff from the proposed development, West Creek proposes
2 to transmit stormwater from the streets and individual lots in underground pipes that will
3 connect to the existing piped stormwater system in Martin Street located north of the subject
4 property. That existing system is piped until it eventually outfalls to the Amazon Canal in an
5 open drainage system some distance to the north of Martin Street. During the proceedings
6 below, West Creek took the position that EC 9.8325(13) is satisfied by its agreement to
7 satisfy EC 9.6793, Stormwater Flow Control (Headwaters), which does not otherwise apply
8 to the proposed PUD because the open portion of the natural drainage course, the Amazon
9 Canal, is located below 500 feet in elevation. EC 9.6793(3)(a). See n 10. The planning
10 commission imposed a condition of approval that requires West Creek to include on the final
11 PUD plans and final subdivision plat a requirement that each lot in the subdivision must have
12 its own filtration stormwater system that meets EC 9.6793, and a condition that requires the

“(1) Purpose. The purpose of EC 9.6793 is to protect waterways in the headwaters area from the erosive effects [sic] of increases in stormwater runoff peak flow rates and volumes resulting from development.

“ * * * * *

“(3) Standards.

“(a) Applications shall demonstrate, using methodology in the Stormwater Management Manual, that peak rates of flow delivered to an existing open waterway at a point above 500 feet in elevation will not increase during storms larger than the water quality design storm and smaller than the flood control design storm as a result of the development that is the subject of the application;

“(b) For purposes of designing the system as required by the standards in this section, the amount of impervious surface per lot is assumed to be the maximum lot coverage allowed for the use in the zone in which it is located, unless the applicant demonstrates otherwise.

“(c) All facilities to control the rate of stormwater runoff shall be sited, designed and constructed according to the flow control provisions and the facility design requirements set forth in the Stormwater Management Manual. Flow control facilities must be designed using one of the methodologies outlined in the Stormwater Management Manual.

“(d) The standards in EC 9.6793(3) may be adjusted pursuant to EC 9.8030(24).”

1 piped stormwater system located within the public streets to meet EC 9.6793. The planning
2 commission concluded that the onsite detention of all stormwater runoff from the
3 development in pipes “will not increase peak flows or velocity in such a manner as to cause
4 damage to the open drainage system.” Record 32. The planning commission concluded that
5 with the conditions of approval that require onsite detention stormwater management systems
6 on the subject property, the proposal demonstrated compliance with EC 9.8325(13):

7 “The [planning commission] rejects [Southeast Neighbors’] arguments and
8 finds that the [hearings officer] did make an independent evaluation of the
9 criteria at EC 9.8325(7)(j) and EC 9.8325(13), which both relate to stormwater
10 runoff from the proposed development. Although EC 9.8325(7)(j) does not
11 require the development to meet EC 9.6793 Stormwater Flow Control
12 (Headwaters), the [planning commission] endorses the hearings officer’s
13 imposition of this standard to ensure that the development provides onsite
14 stormwater management facilities that detain post-development peak flows to
15 pre-development levels, which is necessary to ensure compliance with EC
16 9.8325(13). The flow control standards * * * provide this detention and are
17 the standards that city staff can readily implement during the building permit
18 process. The [planning commission] finds that the [hearings officer] did not
19 [err] by correlating the detention requirements of EC 9.8325(7)(j) to address
20 the * * * ‘increased peak flow or velocity’ test of criterion EC 9.8325(13).”
21 Record 33 (underlining in original).

22 In its second assignment of error, we understand Southeast Neighbors to argue that
23 the planning commission misconstrued the applicable law when it determined that EC
24 9.8325(13) is satisfied because the planning commission imposed conditions that require EC
25 9.6793 to be satisfied for each lot and for the public stormwater system within streets and
26 utility easements.¹⁰ We understand Southeast Neighbors to argue that EC 9.8325(13) is
27 concerned with ensuring that the proposed PUD will not “erod[e] or scour the natural
28 drainage courses [either on-site or downstream] * * * or [] caus[e] turbidity, or the transport
29 of sediment due to increased flows or velocity” and that EC 9.6793 does not address those
30 issues. According to Southeast Neighbors, the city’s stormwater standard at EC 9.6793 does

¹⁰ Apparently EC 9.6793 does not apply to development of the western portion of the property because the open portion of the Amazon Canal is not above 500 feet in elevation. EC 9.6793(3).

1 not address eroding or scouring of the Amazon Canal, or turbidity in that open waterway due
2 to increased flows or velocity.

3 Although the hearings officer's findings are not particularly clear, and the planning
4 commission's attempt to clarify the hearings officer's findings is of limited value, we agree
5 with West Creek that the planning commission correctly concluded that EC 9.8325(13) is
6 satisfied by requiring compliance with EC 9.6793, Stormwater Flow Control (Headwaters).
7 Record 32-33. EC 9.6793(1) provides that the purpose of the stormwater standards is "to
8 protect waterways in the headwaters area from *the erosive effects* of increases in stormwater
9 runoff peak flow rates and volumes resulting from development." (Emphasis added.)
10 Southeast Neighbors does not explain why the purpose statement at EC 9.6793(1) and the
11 provisions that follow in EC 9.6793 that require an applicant to demonstrate that "peak rates
12 of flow delivered to an existing open waterway * * * will not increase during storms larger
13 than the water quality design storm and smaller than the flood control design storm as a result
14 of the development that is the subject of the application" do not also protect the downstream,
15 open portion of the Amazon Canal from the "erosive effects" of increases in stormwater
16 runoff, such as "* * * eroding or scouring of the natural drainage courses or * * * turbidity, or
17 the transport of sediment due to increased peak flows or velocity." Given these overlapping
18 concerns, the planning commission could reasonably conclude that preventing *any* increase in
19 stormwater flows pursuant to EC 9.6793 is sufficient to ensure compliance with the EC
20 9.8325(13) requirement to prevent "eroding or scouring the natural drainage courses or by
21 causing turbidity, or the transport of sediment due to increased peak flows or velocity."

22 Southeast Neighbors' second assignment of error is denied.

23 **SOUTHEAST NEIGHBORS' THIRD ASSIGNMENT OF ERROR**

24 As explained above, an unimproved portion of West Amazon Drive bisects the
25 property from its intersection with Martin Street to the north to its intersection with Fox

1 Hollow Road to the south. The proposed development proposes multiple new streets within
2 the PUD that directly or indirectly connect to West Amazon Drive.

3 EC 9.8325(6)(c) provides that “[t]he street layout of the proposed PUD shall disperse
4 motor vehicle traffic onto more than one public local street when the PUD exceeds 19 lots or
5 when the sum of proposed PUD lots and the existing lots utilizing a local street as the single
6 means of ingress and egress exceeds 19.” The hearings officer concluded that West Creek’s
7 proposal satisfied EC 9.8325(6)(c):

8 “The street layout disperses motor vehicle traffic onto more than one public
9 local street, as all streets proposed within the development connect with West
10 Amazon Drive, which extends beyond the development site to the north
11 (connecting with Martin Street) and south (connecting with Fox Hollow
12 Road). The applicant proposes to improve West Amazon Drive to provide
13 this traffic dispersal; the PUD proposes no phasing of the development, which
14 means that the street improvements will be in place prior to development of
15 the lots, rather than on an incremental basis that would bring the 19-lot rule
16 * * * into question.

17 “The applicant additionally notes that there are two dispersion points—one to
18 the north, which sends traffic onto the portion of the Eugene Street network
19 leading to the 30th Ave./Hilyard grid, and one to the south connecting the
20 portion of the Eugene street network comprised of Fox
21 Hollow/Donald/Willamette Street. The applicant states that the two street
22 networks are sufficiently separated that if a blockage occurred on one, the
23 other would not be affected.” Record 473.

24 The planning commission adopted findings that agree with the hearings officer’s conclusion
25 and further explain:

26 “This standard stems from Fire Code about isolated access. The concern
27 would be if West Amazon Drive dead-ended at the site. Instead, the Applicant
28 proposes to improve West Amazon Drive between the existing street
29 improvements at the north and south ends of the site. * * * Fire staff has
30 confirmed that this meets their requirements for providing two points of
31 access.” Record 35.

32 In its third assignment of error, Southeast Neighbors argues that the planning
33 commission erred in concluding that EC 9.8325(6)(c) is satisfied because West Amazon
34 Drive, as it is proposed to be improved, is the single public street onto which traffic from the

1 subdivision will disperse. West Creek responds, and we agree, that the planning commission
2 correctly concluded that EC 9.8325(6)(c) is met where West Amazon Drive will connect the
3 street layout of the PUD with both of the existing street systems to the north and the south.
4 Essentially, the planning commission concluded that the proposed street layout will result in
5 the connection of the proposed development to “North” West Amazon Drive for the northern
6 part of the development and to “South” West Amazon Drive for the southern part of the
7 development, without creating two streets out of the existing unimproved West Amazon
8 Drive right of way.

9 Southeast Neighbors’ third assignment of error is denied.

10 **SOUTHEAST NEIGHBORS’ FOURTH ASSIGNMENT OF ERROR**

11 EC 9.8325(7)(a) provides lot dimension standards and prohibits new lots where more
12 than 33percent of the lot occupies the combined area of the Water Resources conservation
13 setback and any portion of a Goal 5 water resource that extends beyond the setback. EC
14 9.8325(10) requires the PUD to comply with the solar lot standards at EC 9.2790. EC 9.2790
15 in turn provides that 70 percent of the lots in a proposed PUD must have a minimum north-
16 south dimension of 75 feet and a front lot line orientation that is within 30 degrees of the true
17 east-west axis.

18 The hearings officer found that West Creek’s 47-lot proposal failed to satisfy EC
19 9.8325(7)(a) or EC 9.8325(10), and also denied West Creek’s request for a modification of
20 the lot dimension standards under EC 9.8325(11).¹¹ West Creek appealed the hearings
21 officer’s decision on the criteria and the modification to the planning commission, and the
22 planning commission granted modifications to both standards. Record 21-25.

¹¹ EC 9.8325(11) allows a modification to applicable lot standards if consistent with the purposes of the standard. EC 9.2790 provides exceptions to the solar lot standards.

1 In its fourth assignment of error, we understand Southeast Neighbors to argue that the
2 planning commission’s approval of modifications to the lot dimension and solar lot standards
3 misconstrues ORS 197.307(4)’s mandate that the city may only apply “clear and objective
4 standards” to a proposal for needed housing, because the factors that the city must consider in
5 a request for a modification under EC 9.8325(11) or a request for an exception to the solar lot
6 standards under EC 9.2790 require the city to apply standards that are not “clear and
7 objective.” In essence, Southeast Neighbors seeks to use the needed housing statute’s
8 mandate to apply only “clear and objective standards” as a sword to prevent applicants for
9 needed housing from gaining approval of needed housing projects under discretionary
10 standards.

11 West Creek responds that nothing in the language of the needed housing statute
12 prohibits the city from offering a discretionary process for approval of a proposal for needed
13 housing as long as the non-discretionary process remains available to an applicant. In
14 essence, West Creek argues that the needed housing statute is a shield for applicants to
15 choose to use or not to use according to project demands. In *Homebuilders*, we concluded
16 that “the city may provide a needed housing applicant with a choice between meeting a clear
17 and objective standard by complying with its terms or by obtaining a discretionary variance
18 or adjustment to that standard without offending ORS 197.307(6)[(2001)].” *Homebuilders*,
19 41 Or LUBA at 400. We agree with West Creek that the needed housing statute protects an
20 applicant for a permit for needed housing from the city’s imposition of discretionary
21 standards without its agreement, but that an applicant may agree to be bound by discretionary
22 standards without running afoul of the statute. See *Linstromberg v. City of Veneta*, 47 Or
23 LUBA 99, 108-09 (2004) (ORS 197.307(4) does not require that a variance standard to an
24 approval criterion for needed housing be clear and objective).

25 Southeast Neighbors’ fourth assignment of error is denied.

1 **SOUTHEAST NEIGHBORS' FIFTH ASSIGNMENT OF ERROR**

2 EC 9.7007(2) requires an applicant to hold a meeting for surrounding property owners
3 “prior to the submittal of an application.” EC 9.7007(12) provides that “if the site plan
4 submitted with an application does not substantially conform to the site plan provided at the
5 meeting, the applicant shall be required to hold a new neighborhood/applicant meeting.”
6 Prior to submitting its application, West Creek met with surrounding property owners. As
7 described above, during the proceedings before the hearings officer West Creek submitted an
8 alternative site plan seeking a 47-lot PUD and that site plan was ultimately approved.

9 In its appeal to the planning commission, Southeast Neighbors argued that the
10 planning commission should require West Creek to hold a new neighborhood meeting based
11 on the modified site plan seeking a 47-lot PUD. The planning commission concluded that
12 EC 9.7007(2) is an application requirement rather than an approval criterion, and that because
13 West Creek’s initial application was deemed complete, the planning commission had no
14 authority to require West Creek to meet again with the neighborhood and surrounding
15 property owners. Record 28-9. In its fifth assignment of error, Southeast Neighbors argues
16 that the planning commission misconstrued EC 9.7007(2) in refusing to deny the application
17 based on West Creek’s failure to hold a new neighborhood meeting.

18 West Creek responds, and we agree, that the planning commission correctly
19 concluded that it did not have the authority to deny the application based on EC 9.7007(2),
20 where there was no dispute that West Creek held a neighborhood meeting prior to submitting
21 its application, or that the site plan submitted with the application was the same site plan
22 provided at the meeting. EC 9.7007(2) is concerned with ensuring that an applicant meets
23 with the neighborhood and surrounding property owners prior to submitting its application
24 and that the site plan submitted *with the application* does not differ significantly from the site
25 plan provided at the meeting. EC 9.7007(2) plays no further role after the application is
26 submitted.

1 Southeast Neighbors’ fifth assignment of error is denied.

2 **WEST CREEK’S FOURTH CROSS ASSIGNMENT OF ERROR**

3 During the proceedings before the planning commission, West Creek argued that the
4 planning commission should reject Southeast Neighbors’ appeal because Southeast
5 Neighbors’ board of directors did not authorize the appeal prior to its being filed. Record
6 271-72. In its fourth cross assignment of error, we understand West Creek to argue that the
7 planning commission misconstrued applicable law when it concluded that it lacked authority
8 to consider whether Southeast Neighbors’ appeal was authorized by the association’s board
9 of directors when it was filed. West Creek argues that the planning commission has
10 “inherent authority” to consider whether an appeal is validly filed. West Creek Cross Petition
11 for Review 38. West Creek also argues that “LUBA should find, based on uncontroverted
12 evidence, that there was not a valid appeal filed by [Southeast Neighbors] within the deadline
13 set by the code. To the extent issues raised by [Southeast Neighbors] in their appeal depend
14 on * * * having been raised * * * in a local appeal, those issues were not raised. *Miles v. City*
15 *of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003).” West Creek Cross Petition for
16 Review 39.¹²

17 In response, Southeast Neighbors moves to take evidence not in the record under
18 OAR 661-010-0045, in order to demonstrate that the appeal of the hearings officer’s decision
19 was authorized by its board of directors.¹³ West Creek responds, and we agree, that

¹² We understand West Creek to argue that if the planning commission had rejected Southeast Neighbors’ appeal, then Southeast Neighbors would be barred from raising its assignments of error in the appeal to LUBA under *Miles*, and LUBA would be required to deny those assignments of error.

¹³ OAR 661-010-0045(1) provides in relevant part:

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence

1 Southeast Neighbors has not demonstrated a basis under OAR 661-010-0045 for LUBA to
2 grant its motion to take evidence not in the record. While OAR 661-010-0045(1) allows a
3 motion to take evidence in order to resolve “disputed factual allegations * * * concerning * *
4 * standing,” the reference in the rule to disputes over “standing” refers to standing to appeal a
5 decision to LUBA, not to standing disputes that arise during the proceedings before the local
6 government. Accordingly, Southeast Neighbors’ motion to take evidence is denied.

7 However, we agree with Southeast Neighbors that West Creek’s assignment of error
8 provides no basis for reversal or remand. West Creek does not argue that Southeast
9 Neighbors failed to satisfy the requirements of EC 9.7655(1) – (3) governing appeals of
10 hearings officer decisions to the planning commission, and it appears that it did. West Creek
11 does not point to any requirement in the EC or anywhere else that an organization must
12 provide documentation that an appeal was authorized by the organization’s officers or
13 directors prior to the appeal being filed or that requires the local governing body to
14 independently verify the validity of an appeal. Absent such a code requirement, LUBA will
15 not require the local government to independently verify that an entity that files an appeal of a
16 local decision is authorized to do so by its governing body.

17 West Creek’s fourth cross assignment of error is denied.

18 **WEST CREEK’S FIFTH CROSS ASSIGNMENT OF ERROR**

19 EC 9.8325(3) requires the proposed PUD to provide a “buffer area between the
20 proposed development and surrounding properties by providing at least a 30 foot wide
21 landscape area along the perimeter of the PUD * * *.” West Creek proposed to place a fence
22 along the perimeter of the PUD so that the landscape buffer will be enclosed within the fence.

to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.”

1 The hearings officer concluded that West Creek’s proposal satisfied EC 9.8325(3).¹⁴

2 Southeast Neighbors appealed that issue to the planning commission, and the
3 planning commission concluded that the fence is not allowed within the landscaped buffer
4 area under EC 9.8325(3). The planning commission imposed a condition of approval that
5 “fencing is not allowed on the perimeter of the PUD or within the required 30’ landscape
6 buffer under the provisions of EC 9.8325(3) and EC 9.6210(7).” Record 34.

7 In its fifth cross assignment of error, West Creek argues that the planning commission
8 erred in prohibiting the fence and that the plain language of EC 9.8325(3) does not support
9 the planning commission’s interpretation. We review the planning commission’s
10 interpretation of the relevant EC provisions to determine whether it is correct. *Gage*, 133 Or
11 App 346, 349-50. We disagree with West Creek that the planning commission
12 misinterpreted the plain language of EC 9.8325(3) when it prohibited a fence on the
13 perimeter of the PUD or within the landscape buffer area. The planning commission’s
14 interpretation of EC 9.8325(3) is more consistent with the presumed purpose of the buffer
15 requirement to provide a *landscape* buffer for the surrounding properties from the visual
16 impacts of the PUD. If the landscaping is located behind a fence, then the fence, not the
17 landscaping, is providing the buffer. Accordingly, the planning commission properly
18 construed EC 9.8325(3) in prohibiting West Creek’s proposed perimeter fence.

19 West Creek’s fifth cross assignment of error is denied.

¹⁴ The hearings officer found that the text of EC 9.8325(3) supports West Creek’s proposal to place a fence on the perimeter of the property:

“The hearings [officer] believes that the text of this criterion does not require [Southeast Neighbors’] proposed interpretation. This provision specifies a landscaped area between the proposed PUD and surrounding properties, and along, but not ‘on’ the perimeter. Here, where the applicant is proposing a 30-foot landscaped buffer up to the fence and the fence is on the perimeter, the landscaped buffer is ‘between the proposed development and surrounding properties’ and is ‘along the perimeter.’ Further, EC 9.6210(7)(a) lists ‘Required Materials’ for the landscaped area, but does not purport to exclude all other materials. For example, EC 9.6210(7)(a) does not use the phrase ‘Allowable Materials,’ which would suggest a list of only those materials allowed.” Record 464.

1 **WEST CREEK’S SIXTH CROSS ASSIGNMENT OF ERROR**

2 As described above, the hearings officer denied West Creek’s original proposal to
3 develop 75 lots on the property, including on the steeply sloped eastern portion. West
4 Creek’s appeal challenged the hearings officer’s denial of the 75-lot proposal. In this
5 assignment of error we understand West Creek to attempt to keep the 75-lot proposal under
6 consideration by the planning commission if the decision is remanded.

7 In various places in the decision the planning commission concluded that West
8 Creek’s application to develop 75 lots, including several on the steeply sloped eastern portion
9 of the property, failed to comply with the stormwater standards that apply to development on
10 the property. Record 12, 16, 30, 32, 33. In its sixth cross assignment of error, West Creek
11 argues that the planning commission erred in concluding that the proposal to develop 75 lots
12 fails to satisfy the stormwater standards with respect to the eastern portion of the property.
13 According to West Creek, no party raised an issue regarding the eastern portion of the
14 property’s compliance with the stormwater standards in the appeals of the hearings officer’s
15 decision.

16 Initially, we note that West Creek cites “EC 9.8325(7)(b)” in its assignment of error
17 and characterizes that provision as “the stormwater standards incorporated into EC
18 9.8325(7)(b).” However, EC 9.8325(7)(b) requires an applicant to show compliance with
19 “EC 9.6500 through 9.6505 Public Improvement Standards” and there is no reference to
20 stormwater standards in any of those sections. It is EC 9.8325(7)(j) that requires an applicant
21 to demonstrate compliance with EC 9.6791 through 9.6797.

22 The planning commission findings that West Creek challenges in its petition for
23 review at 45 and 46 address compliance with the standards at EC 9.6791 through 9.6797 as
24 required by EC 9.8325(7)(j). Those standards were clearly at issue in the appeals of the
25 planning commission’s decision, as evidenced by our discussion and resolution of Southeast
26 Neighbors’ second assignment of error and West Creek’s seventh assignment of error.

1 Moreover, West Creek appealed the hearings officer's decision to deny the 75-lot proposal
2 and argued to the planning commission that it should be approved. The planning commission
3 committed no error in finding as additional bases to deny the 75-lot proposal failure to satisfy
4 the stormwater standards at EC 9.8325(7)(j).

5 West Creek's sixth cross assignment of error is denied.

6 The city's decision is affirmed.¹⁵

¹⁵ West Creek's third contingent assignment of error is related to the EC's geotechnical standards at EC 9.6710 et seq. Southeast Neighbors did not challenge the city's conclusion that the geotechnical standards are satisfied, and accordingly we need not resolve the third cross assignment of error.