

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON

3  
4 OAKLEIGH-MCCLURE NEIGHBORS,  
5 BRYN THOMS, SANDY THOMS, TAMMY CRAFTON,  
6 KAREN FLEENER-GOULD, SCOTT FLEENER-GOULD,  
7 CECELIA BAXTER-HEINTZ and PAUL BAXTER-HEINTZ,  
8 *Petitioners,*

9  
10 and

11  
12 PAUL CONTE,  
13 *Intervenor-Petitioner,*

14  
15 vs.

16  
17 CITY OF EUGENE,  
18 *Respondent,*

19  
20 and

21  
22 OAKLEIGH MEADOWS CO-HOUSING, LLC,  
23 *Intervenor-Respondent.*

24  
25 LUBA No. 2014-001

26  
27 FINAL OPINION  
28 AND ORDER

29  
30 Appeal from City of Eugene.

31  
32 Lauren C. Regan, Eugene, filed a petition for review and argued on  
33 behalf of petitioners. With her on the brief was Justice Law Group.

34  
35 Paul Conte, Eugene, filed a petition for review and argued on his own  
36 behalf.

37  
38 Anne C. Davies, Assistant City Attorney, Eugene, filed the response  
39 brief and argued on behalf of respondent.

1 Zack P. Mittge, Eugene, filed response briefs and argued on behalf of  
2 intervenor-respondent. With him on the briefs were Hutchinson, Cox, Coon,  
3 Orr & Sherlock PC.

4  
5 RYAN, Board Chair; BASSHAM, Board Member, participated in the  
6 decision.

7  
8 HOLSTUN, Board Member, did not participate in the decision.

9  
10 REMANDED 08/21/2014

11  
12 You are entitled to judicial review of this Order. Judicial review is  
13 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a decision approving a tentative planned unit development application.

**MOTION TO INTERVENE**

In an order dated May 1, 2014, we previously granted intervenor-respondent Oakleigh Meadows’ (Meadows) motion to intervene on the side of the city, intervenor-petitioner Paul Conte’s (Conte’s) motion to intervene on the side of petitioners Oakleigh-McClure Neighbors *et al* (Neighbors), and intervenor-petitioner Simon Trautman’s (Trautman’s) motion to intervene on the side of Neighbors. *Oakleigh-McClure Neighbors v. City of Eugene*, \_\_ Or LUBA \_\_ (LUBA No. 2014-001, Order, May 1, 2014). In its response brief, Meadows renews its previous objection to Trautman’s motion to intervene, arguing that Trautman’s motion to intervene was not timely filed under ORS 197.830(7), which requires that “[w]ithin 21 days after a notice of intent to appeal [NITA] has been filed with [LUBA]” a person who appeared before the local government may file a motion to intervene in the appeal. ORS 197.830(7)(c) provides that failure to file a motion to intervene with LUBA within 21 days after the NITA is filed “shall result in denial of the motion to intervene.”

Neighbors filed their NITA on January 3, 2014. Under ORS 197.830(7), the deadline for intervention in the appeal expired on January 24, 2014. Trautman filed his motion to intervene on March 11, 2014, 68 days after the NITA was filed. As we explained in our May 1 order, as required by OAR 661-010-0015(2) and (3)(f)(D), on January 3, 2014, Neighbors served copies of the NITA on “[a]ny \* \* \* person to whom written notice of the land use

1 decision or limited land use decision was mailed as shown on the governing  
2 body’s records.”<sup>1</sup> However, after the NITA was filed, the city discovered that  
3 it had failed to mail notice of the decision to all persons who participated orally  
4 or in writing during the proceedings before the city, and on February 4, 2014,  
5 after the 21-day deadline for intervention had expired, the city subsequently  
6 provided a second mailed notice of the decision to the remaining persons  
7 entitled to notice of the decision. The city then presumably provided an  
8 updated list of “[a]ny \* \* \* person to whom written notice of the land use  
9 decision or limited land use decision was mailed as shown on the governing  
10 body’s records” to Neighbors. Thereafter, on February 20, 2014, Neighbors  
11 provided a certificate of service to LUBA certifying that Neighbors served a  
12 copy of their NITA on additional persons whom the city identified as being  
13 mailed written notice of the decision on February 4, 2014, and who were thus  
14 entitled to be served with a copy of the NITA under OAR 661-010-0015(2) and  
15 (3)(f)(D). One of those additional persons was Trautman. On March 11, 2014,  
16 68 days after the notice of intent to appeal was filed, and 20 days after being  
17 served with a copy of the NITA, Trautman moved to intervene on the side of  
18 Neighbors in the appeal.

19 Trautman’s late filing of his motion to intervene undoubtedly occurred  
20 because the city failed to initially mail notice of the decision to all persons who

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<sup>1</sup> ORS 197.830(9) requires the petitioner to serve copies of the NITA on the “the applicant of record, if any, in the \* \* \* proceeding.” The requirement to serve copies of the NITA on “[a]ny \* \* \* person to whom written notice of the land use decision or limited land use decision was mailed as shown on the governing body’s records” is entirely a requirement of LUBA’s rules of procedure and has no counterpart in the statutes governing LUBA’s review procedures.

1 participated orally or in writing during the proceedings, and thus provided  
2 inaccurate and incomplete information to Neighbors about who should be  
3 served with a copy of the NITA under OAR 661-010-0015(3)(f)(D).

4 In our May 1, 2014 order, we relied on our order in *Mountain West*  
5 *Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000), to  
6 conclude that we would not deny Trautman’s motion to intervene where the  
7 delay in filing the motion to intervene was attributable to the city’s failure to  
8 provide required notice of the decision to all parties entitled to notice and its  
9 corresponding failure to provide Neighbors with complete information for  
10 purposes of satisfying their service obligations under OAR 661-010-0015(2)  
11 and (3)(f)(D). In *Mountain West Investment*, the petitioner failed to serve a  
12 copy of the NITA on the applicant of record, as required by ORS 197.830(9)  
13 (and OAR 661-010-0015(2) and (3)(f)(C)). The applicant moved to intervene  
14 as soon as it became aware that the NITA was filed, and in fact, prior to being  
15 served with a copy of the NITA. With little discussion, we concluded that “in  
16 [that] circumstance we do not believe ORS 197.830(7) requires that the motion  
17 to intervene be denied.” *Id.*

18 On reconsideration of Trautman’s motion to intervene and Meadows’  
19 arguments, we conclude that ORS 197.830(7)(c) requires us to deny  
20 Trautman’s late-filed motion to intervene. Trautman failed to file his motion to  
21 intervene within 21 days after the NITA was filed, and in that circumstance  
22 ORS 197.830(7)(c) provides that such failure “shall result in a denial of the  
23 motion to intervene.” Even in the circumstances presented here, where the late  
24 filing occurred as a result of the city’s recordkeeping and mailing errors and  
25 where denying a late-filed motion to intervene in that circumstance is arguably  
26 inequitable, LUBA must strictly adhere to deadlines imposed by statute. *Lange-*

1 *Luttig v. City of Beaverton*, 38 Or LUBA 909, 910 (2000). To the extent  
2 *Mountain West Investment* recognizes an exception to the statutory deadline for  
3 intervention for a party who is the applicant of record and is not served with a  
4 copy of the NITA as required by ORS 197.830(9) and LUBA’s rules, and  
5 consequently files its motion beyond the 21-day deadline in ORS  
6 197.830(7)(c), *Mountain West Investment* provides no basis for us to grant  
7 Trautman’s late-filed motion to intervene.

8 Trautman’s motion to intervene is denied.<sup>2</sup>

9 **STANDING**

10 Meadows argues that petitioners Tammy Crofton, Karen Fleener-Gould  
11 and Scott Fleener-Gould lack standing to appeal the challenged decision to  
12 LUBA, because they participated only during the proceedings before the  
13 hearings officer, and failed to participate in the proceedings on the appeal of  
14 the hearings officer’s decision before the planning commission. According to  
15 Meadows, their failure to participate in the local appeal means that those  
16 petitioners failed to “exhaust” their administrative remedies as required by  
17 ORS 197.825(2).<sup>3</sup>

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<sup>2</sup> Because we deny Trautman’s motion to intervene, we do not consider his petition for review, Meadow’s response brief in response to his petition for review, the reply brief, or Meadows accompanying motion to take evidence and the response to it.

<sup>3</sup> ORS 197.825(2) provides in relevant part:

“(2) The jurisdiction of the board:

“(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]”

1 Neighbors does not respond to Meadows' challenge to the three named  
2 petitioners, which presents a novel and complex issue regarding the meaning of  
3 the ORS 197.825(2) requirement that a petitioner must exhaust available  
4 administrative remedies. However, we conclude that we need not resolve that  
5 challenge. The petitioners whom Meadows challenges filed the same NITA as  
6 Neighbors and multiple other petitioners, all of whom filed the same petition  
7 for review and are represented by the same attorney. There is no indication that  
8 the challenged petitioners are presenting issues that are different from any of  
9 the other petitioners joining in the NITA and the appeal. Accordingly,  
10 resolving the issue would lengthen an already lengthy opinion and would have  
11 no bearing on our jurisdiction over the appeal, or the merits of the appeal, since  
12 there is no question that the other petitioners appeared before the planning  
13 commission. For those reasons, we decline to dismiss petitioners Tammy  
14 Crofton, Karen Fleener-Gould and Scott Fleener-Gould.

15 **REPLY BRIEFS**

16 Neighbors and Conte each move for permission to file a reply brief to  
17 respond to new matters raised in the response briefs. The reply briefs are  
18 allowed.

19 **FACTS**

20 Meadows applied for tentative planned unit development (PUD)  
21 approval for a 29-unit residential development on 2.3 acres of land zoned low  
22 density residential (R-1). The only access to the subject property is via  
23 Oakleigh Lane, an east/west street that runs from its western intersection with  
24 River Road approximately 850 feet to the subject property. The subject

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1 property is located adjacent and to the south of Oakleigh Lane, and is adjacent  
2 to a city park on the east, and single family dwellings and vacant land zoned  
3 residential on its north, west, and south. Oakleigh Lane terminates at  
4 approximately the mid-point of the northern boundary of the subject property.  
5 Existing Oakleigh Lane has a 19-foot wide unstriped, paved surface and lacks  
6 curbs and gutters, storm drainage, and sidewalks.

7 The PUD proposes seven buildings containing between two and five  
8 one- and two-story dwellings, for a total of 28 dwellings, and a two-story  
9 common building that also contains bedrooms and a kitchen, located in the  
10 center of the seven residential dwelling buildings. Buildings 1 and 2 are  
11 proposed to be located along the northern property boundary, and Building 1 is  
12 adjacent to Oakleigh Lane, while Building 2 is adjacent to a future proposed  
13 hammerhead turnaround at the end of Oakleigh Lane. The PUD proposes to  
14 locate on-site parking (garages and carports) and trash facilities along the  
15 western property boundary, and to screen those parking and trash facilities and  
16 the buildings containing dwellings that are located in the western and southern  
17 portions of the property with an 8-foot-tall concrete wall bordered by  
18 espaliered trees. Record 1036. A garden area is proposed for the southeastern  
19 boundary of the property.

20 As we discuss in more detail later in this opinion, the city required  
21 Meadows to dedicate a 22.5 foot strip of land for right of way purposes along  
22 Oakleigh Lane, and a 13 foot strip of land from the point at which Oakleigh  
23 Lane terminates on the property boundary to the eastern property boundary, to  
24 accommodate (1) a future hammerhead turnaround to connect to the adjoining  
25 property to the north, in the event it further develops, and (2) a bike and  
26 pedestrian path to connect to the adjacent park to the east of the property.



1 However, the city approved a temporary emergency hammerhead turnaround  
2 that is located entirely on the western portion of the subject property until the  
3 property to the north of the subject property is developed and the hammerhead  
4 turnaround can be built.

5 The hearings officer held a hearing on the application and approved it  
6 with conditions. Petitioners and others appealed the hearings officer's decision  
7 to the planning commission, and the planning commission affirmed the  
8 hearings officer's decision. This appeal followed.

9 **NEIGHBORS' FIRST ASSIGNMENT OF ERROR**

10 EC 9.8320(11)(a)(2009) requires the PUD to comply with density  
11 requirements for the R-1 zone that are set out in EC Table 9.2750.<sup>4</sup> Table  
12 9.2750 specifies a maximum net density of 14 units per acre. EC 9.2751(1)(b)  
13 defines "net density" to mean "the number of dwelling units per acre of land in  
14 actual residential use and reserved for the exclusive use of the residents in the  
15 development, such as common open space or recreation facilities." EC  
16 9.2751(1)(c)(1) further provides that "[t]he acreage of land considered part of  
17 the residential use shall exclude public and private streets and alleys, public  
18 parks, and other public facilities."

19 In their first assignment of error, we understand Neighbors to argue that  
20 the city's finding that the density requirement in EC Table 9.2750 is met is not

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<sup>4</sup> Ordinance 20521, which took effect on March 1, 2014, renumbered EC 9.8320 sections (10) through (16) to sections (9) through (15). Therefore, the numbering scheme in the on-line version of EC 9.8320 is not the numbering scheme that applied at the time the decision was rendered. For example, EC 9.8320(11)(a)(2009) is now numbered EC 9.8230(10)(a)(2014). The two provisions are identical aside from the numbering.

1 supported by substantial evidence in the record and is inadequate. ORS  
2 197.835(9)(a)(C); ORS 227.173(3).

3 **A. Motion to Strike/Waiver**

4 Neighbors include in Appendices 2 and 3 to the petition for review a  
5 number of documents that are not included in the record. The petition for  
6 review relies on those extra-record documents to support Neighbors' argument  
7 that the planning commission's decision that the PUD meets the net density  
8 requirements is not supported by substantial evidence in the record.

9 The city moves to strike the portions of Appendices 2 and 3 that are not  
10 included in the record, and any argument that relies on those appendices. The  
11 city also argues that an issue that Neighbors raise in their first assignment of  
12 error that alleges that the total acreage of the subject property is less than 2.3  
13 acres was not raised in the appeal statement to the planning commission, as  
14 required by Eugene Code (EC) 9.7655(3), and therefore Neighbors are  
15 precluded from raising that issue for the first time at LUBA.<sup>5</sup>

16 Neighbors do not really dispute that the documents included in  
17 Appendices 2 and 3 are not included in the record but respond that the  
18 documents are "based upon the actual record (with references included) and

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<sup>5</sup> EC 9.7655(3) provides that for an appeal of a hearings officer's decision:

"The appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how and hearings official or historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The basis of the appeal is limited to the issues raised during the review of the original application."

1 were compiled to assist the decision-maker with regard to detailed  
2 measurements and data that are critical to determine the accurate net density.”  
3 Neighbors’ Reply Brief 1.

4 LUBA’s review is limited to the record filed by the local government.  
5 ORS 197.835(2). Portions of the two appendices are not included in the  
6 record, and based on Neighbors’ reply, they appear to be offered for their  
7 evidentiary value. The city’s motion to strike the portions of Appendices 2 and  
8 3 not included in the record is granted. With regard to striking the portions of  
9 the petition for review that the city contends relies on those appendices, LUBA  
10 disregards any allegations of material fact that are not supported by the record.  
11 However, a lack of evidentiary support for arguments and factual allegations in  
12 a response brief is not a basis for striking those portions of the brief. *Hammack*  
13 *& Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff’d* 89 Or App  
14 40, 747 P2d 373 (1987).

15 Where EC 9.7655(3) requires that the issues to be raised in a local appeal  
16 must be stated in the notice of local appeal, those issues must be identified in  
17 the local notice of appeal or the issues are not preserved for review. *Miles v.*  
18 *City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003) (a party may not  
19 raise an issue at LUBA if no party specified the issue as a basis for appeal  
20 before the local appeal body). Neighbors do not respond to the city’s  
21 exhaustion waiver argument. We agree with the city that absent any showing  
22 that Neighbors raised the issue of the accuracy of the city’s calculation of the  
23 total acreage included in the subject property in their appeal statement to the  
24 planning commission, that issue may not be raised for the first time at LUBA.

1           **B.     The City’s Decision**

2           We understand Neighbors to argue that the city improperly construed EC  
3 9.2751(1)(b) and EC 9.2751(1)(c)(1) by including acreage that is encumbered  
4 by easements for sewer and water lines in calculating the net density of the  
5 development.<sup>6</sup> ORS 197.835(9)(a)(D). According to Neighbors, the easements  
6 are “other public facilities” that EC 9.2751(1)(c)(1) requires be excluded from  
7 the acreage that is considered part of the residential use, and are also not  
8 “reserved for the exclusive use of the residents in the development” and for that  
9 reason should not be included in the acreage of land considered part of the  
10 residential use.

11           The staff report calculated the net density of the proposed PUD by taking  
12 the total square feet included in 2.3 acres (102,808), and subtracting (1) the  
13 square footage of the right of way dedications being required (4,024) and (2)  
14 the square footage of the area encumbered by the sewer easement along the east  
15 property line (3,230), to conclude that the property contains 95,554 square feet  
16 of net area and an allowable density of 30 units per acre. Record 1007-08.

17           The hearings officer disagreed with the staff’s exclusion of the sewer  
18 easement area from the acreage of land considered part of the residential use,  
19 and concluded that areas encumbered by easements are not “other public  
20 facilities” that must be excluded from the calculation of net density within the  
21 meaning of EC 9.2751(1)(c)(1):

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<sup>6</sup> As far as we can tell, Meadows agreed to grant an easement to the Eugene Water and Electric Board (EWEB) for construction of a water line on the property, but that easement had not been granted at the time the decision was rendered.

1 “EC 9.2751(1)(c) sets forth areas that must be excluded from the  
2 net density calculation. Those exclusions include ‘public and  
3 private streets and alleys, public parks and other public facilities.’  
4 The neighbors assert that easements that might accommodate  
5 public facilities like water and sewer lines must be excluded. The  
6 applicant argues that easements are not the same as ‘public  
7 facilities’ and are not required to be excluded.

8 “The Hearings Official agrees with the applicant. EC  
9 9.2751(1)(c)(1) uses the specific language ‘public facilities.’ The  
10 provision does not include the word ‘easements.’ If the provision  
11 was intended to exclude easements it would so state. Adding that  
12 concept to the provision would violate ORS 174.010. Public  
13 facilities are not defined in EC 9.0500. However, ‘public facility  
14 projects’ are defined in the Metro Plan. Those definitions  
15 contemplate above ground physical structures such as water  
16 reservoirs, pump stations, and drainage or detention ponds. The  
17 Hearings Official has not been directed to information in the  
18 record that would necessitate removing the land area associated  
19 with easements where the infrastructure that utilizes the easement  
20 is below ground. Therefore, none of the easements identified by  
21 the opponents must be excluded from the net density calculation –  
22 including the sewer easement on the eastern boundary.” Record  
23 381.

24 The planning commission affirmed the hearings officer’s conclusion that EC  
25 9.2751(1)(c)(1) does not require the area encumbered by the sewer easement to  
26 be excluded, but also pointed out that staff excluded the sewer easement area  
27 and found that even without the sewer easement area the PUD still complies  
28 with the net density requirement of 14 units per acre. Record 14.

29 We understand Neighbors to rely on the definition of “net density” in EC  
30 9.2751(1)(b) to argue that the city erred in failing to exclude areas of the  
31 property that are encumbered by the sewer easement, because those areas  
32 encumbered by easements are not “in actual residential use and reserved for the  
33 exclusive use of the residents in the development[.]” Neighbors’ Petition for

1 Review 15-16. The city and Meadows (together respondents) respond that the  
2 hearings officer’s interpretation of the relevant EC provisions is correct, and  
3 nothing in EC 9.2751(1)(c) or EC 9.2751(1)(b) supports Neighbors’  
4 interpretation that areas subject to an easement must be excluded from the  
5 calculation of net density.

6 We review the planning commission’s interpretation to determine  
7 whether it is correct. *McCoy v. Linn County*, 90 Or App 271, 275, 752 P2d 323  
8 (1988). We agree with respondents that the planning commission’s  
9 interpretation of EC 9.2751(1)(b) and (1)(c) is correct and gives effect to the  
10 entire provision and each of its parts. The planning commission’s interpretation  
11 is consistent with the express language of EC 9.2751(1)(c)(1), which does not  
12 include “easements” in the list of areas to be excluded. Neighbors’ proffered  
13 interpretation, on the contrary, reads the phrase “reserved for the exclusive use  
14 of the residents in the development” in isolation without harmonizing the entire  
15 provision.

16 Neighbors’ first assignment of error is denied.

17 **NEIGHBORS’ SECOND AND THIRD ASSIGNMENTS OF**  
18 **ERROR/CONTE’S SECOND AND THIRD ASSIGNMENTS OF ERROR**

19 Neighbors’ second and third assignments of error and Conte’s second  
20 and third assignments of error challenge the city’s decision that the PUD  
21 complies with EC 9.8320(3), (4)(b), (11)(a), (12) and (13). Neighbors’ second  
22 and third assignments of error include a number of overlapping and poorly  
23 developed or undeveloped arguments. We address each assignment of error  
24 and each argument in each assignment of error below to the extent the  
25 assignment of error sets out a cognizable argument.

1           **A.     Setbacks (EC 9.8320(11)(a))**

2           EC 9.8320(11)(a)(2009) requires the PUD to comply with various  
3 development standards, including setbacks. EC Table 9.2750 specifies a  
4 minimum front yard setback for buildings of 10 feet from the property line, and  
5 a minimum interior yard setback for buildings of 5 feet from the property line.

6           Under the EC, an applicant for a PUD can request relief from compliance  
7 with applicable development standards, where the applicant shows that  
8 proposed noncompliance is consistent with the purposes of the PUD provisions  
9 set out in EC 9.8300, Purpose of Planned Development Standards.<sup>7</sup> EC

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<sup>7</sup> EC 9.8300 provides:

“Purpose of Planned Unit Development. The planned unit development (PUD) provisions are designed to provide a high degree of flexibility in the design of the site and the mix of land uses, potential environmental impacts, and are intended to:

- “(1) Create a sustainable environment that includes:
  - “(a) Shared use of services and facilities.
  - “(b) A compatible mix of land uses that encourage alternatives to the use of the automobile.
  - “(c) A variety of dwelling types that help meet the needs of all income groups in the community.
  - “(d) Preservation of existing natural resources and the opportunity to enhance habitat areas.
  - “(e) Clustering of residential dwellings to achieve energy and resource conservation while also achieving the planned density for the site.
- “(2) Create comprehensive site plans for` geographic areas of sufficient size to provide developments at least equal in

1 9.8320(11)(k)(2009). In its application, Meadows proposed noncompliance  
2 with the setback standards for the north, south, and west property lines and  
3 argued that the proposed noncompliance was consistent with EC 9.8300(1)(e),  
4 which specifically provides that the Planned Development provisions are  
5 intended to provide flexibility in designing the PUD and are intended to, in  
6 relevant part “create a sustainable environment that includes \* \* \* clustering of  
7 residential dwellings to achieve energy and resource conservation while also  
8 achieving planned density for a site.” *See* n 5. Along the north property line,  
9 for Building 1, rather than the 10 foot front yard setback that would apply,  
10 Meadows proposed setbacks that varied from 6” to 8 feet after 22.5 feet of the  
11 property is dedicated as right of way for future improvement and widening of  
12 Oakleigh Lane for 50 feet along the northern property boundary, and 13 feet of  
13 the property for a length of 117 feet is dedicated as a future hammerhead  
14 turnaround and sidewalk to enable development of the property to the north of  
15 the subject property.

16 For Building 2, Meadows proposed a setback of 12 feet from the  
17 property line, which would place the northwest corner of Building 2 within the  
18 setback after 13 feet is dedicated for right of way purposes for the future  
19 hammerhead turnaround. On appeal of the hearings officer’s decision, the  
20 planning commission imposed a condition of approval that requires a building  
21 setback of 5 feet (less than the 10 foot minimum setback) from the newly  
22 dedicated right of way boundary for Oakleigh Lane for a distance of 199 feet,

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quality to those that are achieved through the traditional lot  
by lot development and that are reasonably compatible with  
the surrounding area.”



1 and a 10 foot building setback along the remainder of the right of way  
2 boundary for the newly dedicated right of way for a bike/pedestrian path for a  
3 distance of 24 feet. Record 12.

4 For the west and south property lines, rather than the 5 foot setback that  
5 would apply to the concrete walls, garages, carports along the western  
6 boundary line and Building 6 along the south property line, Meadows proposed  
7 noncompliance with a zero setback. However, during the proceedings before  
8 the hearings officer, Meadows agreed to shift the concrete wall and buildings  
9 along the western and southern property line 5 feet to the east and north,  
10 respectively, to satisfy the applicable setbacks.

11 To summarize, when the dust settled on the planning commission's  
12 decision, all buildings and the concrete wall met the required minimum  
13 setbacks from the future post-dedication property lines, except that the  
14 planning commission included a condition of approval that allows a 5-foot  
15 setback from Oakleigh Lane for Buildings 1 and 2, and allows Building 6 to  
16 have a zero setback if a maintenance access easement is obtained from the  
17 adjacent property owner to the south. We understand the planning commission  
18 to have concluded, under EC 9.8320(11)(k)(2009), that the proposed  
19 noncompliance of a 5-foot setback for Buildings 1 and 2 and a zero setback for  
20 Building 6 is consistent with the purpose of the Planned Development  
21 Standards at EC 9.8300(1)(e).

22 In their second assignment of error, we understand Neighbors to argue  
23 that the buildings on the north property line and the south property line do not  
24 meet the required setbacks and that the city's findings are inadequate to explain  
25 why the city concluded that the proposed PUD meets the required setbacks.  
26 Neighbors also challenge the city's reliance on the PUD's proposal for

1 clustering the residential development on the property to justify “proposed  
2 noncompliance” with setback requirements as allowed under EC 9.8320(11)(k).

3 With regard to the north property line setbacks, petitioners argue:

4 “[T]he proposed conditions and modifications appear to permit the  
5 developer to build a condo without any setback at all once right of  
6 way is designated and/or is in conflict with other conditions  
7 imposed. A condo directly adjacent to a ROW does not satisfy the  
8 code requirements and the findings do not address the grave  
9 detrimental impacts to adjacent land owners, nor does it address  
10 the incompatibility with proposed bike/ped path to city park land,  
11 and are in conflict with the public interest mandating 10 foot  
12 setbacks \* \* \*.” Neighbors’ Petition for Review 19-20.

13 With regard to the South property line setbacks, petitioners argue:

14 “The record does not contain substantial evidence and the findings  
15 are inadequate to demonstrate that the South property line  
16 development complies with the required setback standards. \* \* \*  
17 Buildings 5 and 6 are within inches from the south property line at  
18 worst, and within 7’ at best and thus fail to comply with the 10’  
19 setback standards as well as the screening requirements. The fact  
20 that one of the developers \* \* \* currently owns the adjacent south  
21 property does not negate the setback requirements because of  
22 course property ownership can change in the future. \* \* \*”  
23 Neighbors’ Petition for Review 21-22.

24 Neighbors’ arguments reflect a couple of points of misunderstanding of the  
25 planning commission’s decision. First, the planning commission’s decision  
26 requires compliance with all setbacks except that it conditionally allows  
27 proposed noncompliance with setbacks for Buildings 1 and 2, which have a 5  
28 foot setback, and Building 6, which can be built with a zero setback only if an  
29 easement is obtained. Second, EC 9.8320(11)(k) and EC 9.8300 specifically  
30 allow proposed noncompliance with an otherwise applicable setback if the  
31 PUD meets the purpose of the planned development standards, one of which is  
32 to promote clustering of residential development while achieving the required

1 density. The planning commission found that the PUD meets the purpose of  
2 the planned development standards with reduced setbacks. Record 14, 392.  
3 Accordingly, the planning commission did not err in relying on the clustering  
4 aspect of the development to conditionally allow proposed noncompliance for  
5 Buildings 1, 2 and 6.

6 In their second assignment of error, Neighbors additionally include an  
7 argument that “there is no substantial evidence in the record demonstrating that  
8 construction of Building 2 without setbacks can meet the proposed condition”  
9 that requires Meadows to provide a report from an arborist that certifies that the  
10 construction of Building 2 where it is approved will not destroy cedars located  
11 on the adjacent property to the north of the subject property. Neighbors’  
12 Petition for Review 20; Record 409. Meadows responds that Neighbors failed  
13 to raise the issue in its appeal statement and having failed to do so, may not  
14 raise the issue in an appeal to LUBA. Neighbors responds with citations to  
15 pages in the record that contain “significant references to cedar trees \* \* \*:  
16 206, 207 [.]” Neighbors’ Reply Brief 3. Record 206-207 are two pages of the  
17 appeal statement, but the issue that is raised on those pages asserts that reliance  
18 on the cedar trees to meet the “adequate screening” requirement at EC  
19 9.8320(3), discussed below, is improper because the trees are not under  
20 Meadows’ control.

21 We agree with Meadows that the issue presented in Neighbors’ second  
22 assignment of error that argues that the effect of construction of Building 2  
23 with an approved 5-foot setback rather than the required 10-foot setback is not  
24 preserved under the doctrine of exhaustion waiver. However, even if the issue  
25 was preserved, the condition of approval imposed by the hearings officer  
26 requires Meadows to demonstrate that the cedars can survive construction

1 impacts of the development and include any necessary protection measures to  
2 ensure their survival. Record 409. Those protection measures could include  
3 moving Building 2 farther back than the approved 5-foot setback.  
4 Accordingly, Neighbors’ argument provides no basis for reversal or remand of  
5 the decision. This portion of the second assignment of error is denied.

6 **B. Adequate Screening (EC 9.8320(3))**

7 EC 9.8320(3) requires the city to find that “[t]he PUD will provide  
8 adequate screening from surrounding properties including, but not limited to,  
9 anticipated building locations, bulk, and height.”

10 **1. Eastern Boundary**

11 In portions of their second and third assignments of error, Neighbors  
12 argue that the city erred in concluding that the PUD will provide adequate  
13 screening from the park located to the east of the proposed PUD.<sup>8</sup> In order to  
14 satisfy EC 9.8320(3) along the eastern property boundary, Meadows proposed  
15 open space along the northern portion of the eastern property line and proposed  
16 to rely on an existing filbert cluster and fruit trees along the southern portion of  
17 the eastern property line for screening. The hearings officer concluded that  
18 Meadows’ proposed screening on the east property line that essentially  
19 maintained open space on the eastern portion of the property did not comply  
20 with EC 9.8320(3). Record 360. The hearings officer imposed a condition of  
21 approval that required Meadows to revise the final site plan prior to final PUD  
22 approval to provide landscaping along the eastern property line. Record 410.

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<sup>8</sup> As noted, the petition for review is not well organized with respect to Neighbors’ challenges to the city’s decision that the screening requirement is met.

1           However, the planning commission found that Meadows’ proposal to  
2 “maintain open space for views and connectivity towards adjacent park  
3 property and natural areas along the river [was] preferable” to the hearings  
4 officer’s condition of approval requiring landscape screening, and eliminated  
5 that condition of approval requiring landscaping along the east boundary.  
6 Record 13. The planning commission relied in part on Meadows’ proposal to  
7 cluster buildings and found that the clustering of the buildings minimizes the  
8 overall impact of the density because it creates more open space than would  
9 otherwise be available.<sup>9</sup>

10           One of Neighbors’ arguments included in the second assignment of error  
11 is directed at the city’s finding that the proposed PUD meets the screening  
12 requirements at EC 9.8320(3) on the eastern boundary of the property.  
13 Neighbors’ Petition for Review 21. Additionally, a portion of Neighbors’ third  
14 assignment of error challenges the city’s conclusion that EC 9.8320(3) is met  
15 on the eastern property boundary. Neighbors’ Petition for Review 25.  
16 According to Neighbors, the planning commission misconstrued EC 9.8320(3)  
17 in concluding that open space provides “adequate screening” of the PUD from  
18 the adjacent park, and should have required the PUD to be screened from the  
19 view of the park with landscape screening.

20           EC 9.8320(3) requires “adequate screening from surrounding  
21 properties.” EC 9.0500 defines the word “screening” as “[a] method of visually  
22 shielding or obscuring an area through the use of fencing, walls, berms, or

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<sup>9</sup> We do not understand Meadows to have “proposed noncompliance” under EC 9.8320(11)(k)(2009) with the screening requirements for the eastern property boundary, or the planning commission to have approved proposed noncompliance for that boundary under EC 9.8320(11)(k)(2009).

1 densely-planted vegetation.” Given that definition, we agree with Neighbors  
2 that the planning commission’s conclusion that open space along the eastern  
3 boundary provides “adequate screening from” the adjacent park fails to give  
4 meaning to the word “screening,” where it does not require the PUD to be  
5 visually shielded or obscured from the adjacent park through any of the means  
6 specified in the definition. The planning commission appears to have relied on  
7 its conclusion that the proposed PUD is “reasonably compatible and  
8 harmonious with” the adjacent park under EC 9.8320(13)(2009) to conclude  
9 that no screening of the proposed PUD from the park is required. However, as  
10 Neighbors point out, EC 9.8320(3) is concerned with screening the proposed  
11 PUD *from* adjacent lands; it is not concerned with the views the PUD will have  
12 *of* adjacent lands. While open space along the eastern boundary may be  
13 compatible and harmonious with the adjacent park, open space does not screen  
14 the PUD from view from the park. Accordingly, a portion of Neighbors’  
15 second and third assignments of error are sustained.

## 16 **2. Northern, Western, and Southern Boundaries**

17 In portions of their second and third assignments of error, Neighbors  
18 challenge the planning commission’s conclusion that the PUD will be  
19 adequately screened from the surrounding properties to the north, west, and  
20 south. The planning commission concluded that, with conditions of approval  
21 requiring (1) landscaping along the northern property line in accordance with  
22 Meadows’ landscaping plan and outside of required setbacks, (2) vegetation as  
23 proposed along the concrete wall on the western property line, and (3)  
24 landscaping that satisfies the city’s High Screen Landscaping Standard along  
25 the south property line, screening along the north, west and south property lines  
26 is adequate to satisfy EC 9.8320(3). Record 12-13. Neighbors do not

1 challenge these findings or conditions or otherwise explain why the planning  
2 commission erred in concluding that EC 9.8320(3) is met with respect to the  
3 northern, western, and southern boundaries. Accordingly, these portions of  
4 Neighbors’ second and third assignments of error are denied.

5 **3. Building Location and Bulk**

6 In a portion of their third assignment of error, Neighbors argue that the  
7 city failed to adopt findings that consider “building location \* \* \* and bulk” in  
8 determining whether the PUD is adequately screened from view from  
9 surrounding properties. Meadows responds by pointing to the city’s findings  
10 that address building location and bulk and conclude that the scale of the  
11 buildings is within the range of large and small single family homes, and the  
12 proposed height is less than the maximum allowed. Record 401. Absent any  
13 challenge to those findings or any attempt to explain how the proposed PUD  
14 does not satisfy EC 9.8320(3) with regard to building location and bulk,  
15 Neighbors’ arguments provide no basis for reversal or remand.

16 This portion of Neighbors’ third assignment of error is denied.

17 **C. Compatibility with Adjacent and Nearby Land Uses (EC**  
18 **9.8320(13))**

19 EC 9.8320(13)(2009) requires the city to find that “[t]he proposed  
20 development shall be reasonably compatible and harmonious with adjacent and  
21 nearby land uses.” In their third assignment of error, Neighbors argue that the  
22 city’s findings that the PUD is reasonably compatible and harmonious with  
23 adjacent and nearby land uses are inadequate and are not supported by  
24 substantial evidence in the record. Neighbors first challenge a finding in the  
25 hearings officer’s decision that observes that if the hearings officer determines  
26 that the proposed PUD complies with all of the provisions of EC 9.8320, then a

1 finding of incompatibility would be “logically and legally indefensible.”  
2 Record 400. However, Neighbors fails to quote the hearings officer’s finding  
3 regarding EC 9.8320(13)(2009) in its entirety. While the hearings officer  
4 concluded that findings of compliance with all of the applicable provisions of  
5 EC 9.8320 would support a finding that the proposed PUD is reasonably  
6 compatible and harmonious with adjacent and nearby land uses, he also  
7 adopted additional findings that conclude:

8 “The Hearings Official is also persuaded that the proposed co-  
9 house will be compatible and harmonious for the following  
10 reasons: 1) the development will be at the end of the street where  
11 comparatively fewer property owners along Oakleigh Lane will be  
12 affected visually, 2) the scale of the buildings, as the applicant  
13 points out, are within the range of typical single family homes.  
14 The applicant states that the common house is similar in size to a  
15 large home and the other buildings are similar to smaller single  
16 family homes, 3) the proposed density is less than the maximum  
17 and the proposed height is less than the maximum height allowed,  
18 and 4) the proposed use is residential (as opposed to some  
19 conditional use allowed in the zone). \* \* \*” Record 401.

20 As Meadows points out, Neighbors do not acknowledge or challenge these  
21 findings. Accordingly, Neighbors’ challenge to the city’s conclusion that the  
22 proposed PUD satisfies EC 9.8320(13)(2009) provides no basis for reversal or  
23 remand of the decision. *See Protect Grand Island Farms v. Yamhill County*, 66  
24 Or LUBA 291, 295-96 (2012) (to demonstrate that a local government adopted  
25 a decision that is not supported by adequate findings, a petitioner should  
26 address and as necessary assign error to all independent findings adopted in  
27 support of a decision that a particular criterion is or is not satisfied).

28 In his third assignment of error, Conte argues that the hearings officer  
29 improperly construed EC 9.8320(13)(2009) with regard to the compatibility of



1 traffic generated by the PUD and challenges the city’s findings regarding  
2 traffic impacts. The hearings officer found:

3 “As to arguments about traffic impacts, the Hearing Official  
4 adopts the findings for EC 9.8320(12) here by this reference.  
5 Evidence of a modest increase in total vehicle trips, where there is  
6 no evidence of associated traffic problems, is sufficient to  
7 demonstrate that the proposed PUD will be compatible with  
8 adjacent and nearby uses.” Record 401.

9 Conte argues that the city’s public works staff concluded that an increase in  
10 traffic would create unsafe conditions on Oakleigh Lane, and that the hearings  
11 officer’s findings fail to explain how unsafe traffic conditions are harmonious  
12 and compatible with the adjacent land uses. Conte also faults the hearings  
13 officer for relying on the findings regarding a different criterion, EC  
14 9.8320(12), because according to Conte, the two criteria require different  
15 analyses.

16 We understand the hearings officer to have concluded, based on the  
17 evidence in the record from Meadows, the city’s public works staff, and others,  
18 that the proposed PUD is reasonably compatible and harmonious with the  
19 adjacent and nearby land uses because the new traffic from the PUD will create  
20 only a modest increase in vehicle trips. Conte does not point to any evidence in  
21 the record that contradicts the hearings officer’s conclusion that only a modest  
22 increase in vehicle trips will result from the PUD. A reasonable person could  
23 find based on the evidence in the record that where only a modest increase in  
24 vehicle trips is created by a PUD, the PUD is compatible with adjacent and  
25 nearby land uses, particularly given the inherently subjective nature of the  
26 criterion. *Olson v. City of Springfield*, 56 Or LUBA 229, 237 (2008).  
27 Moreover, the hearings officer’s reliance on the same evidence that he relied on  
28 to find compliance with EC 9.8320(12) is not error, and is not particularly

1 unusual where the two criteria require evaluation of similar evidence. We  
2 cannot say that the hearings officer's findings are inadequate or represent an  
3 erroneous interpretation and application of EC 9.8320(13).

4 Finally, we also understand Neighbors to argue that the proposed PUD is  
5 not reasonably compatible and harmonious with the use of the adjacent  
6 property to the north, because the PUD could harm cedar trees located on that  
7 property. Neighbors' Petition for Review 27-28. We reject the argument for  
8 two reasons. First, it is insufficiently developed for review. *Deschutes*  
9 *Development v. Deschutes County*, 5 Or LUBA 218 (1982). Second, the  
10 argument fails to recognize or address a condition of approval imposed by the  
11 decision that requires Meadows to demonstrate that the cedar trees can survive  
12 the construction impacts and take any necessary protection measures to ensure  
13 their survival. Record 409.

14 This portion of Neighbors third assignment of error and Conte's third  
15 assignment of error is denied.

16 **D. Minimize Impacts to Significant Trees (EC 9.8320(4)(b))**

17 EC 9.8320(4)(b) requires the PUD to be "designed and sited to preserve  
18 significant trees to the greatest degree attainable or feasible \* \* \*." In a portion  
19 of their third assignment of error, Neighbors argue that the city erred in finding  
20 that the proposed PUD satisfies EC 9.8320(4)(b) because Meadows proposes to  
21 remove the four significant trees on the property. Neighbors' Petition for  
22 Review 26-27.

23 Meadows responds that Neighbors are precluded from raising the issue  
24 under *Miles* and ORS 197.825(2). Neighbors has not responded to Meadows'  
25 exhaustion waiver argument. We agree with Meadows that Neighbors'

1 challenge to the city’s conclusion that the PUD satisfies EC 9.8320(4)(b) is not  
2 preserved for our review.

3 This portion of Neighbors’ third assignment of error is denied.

4 **E. Parking Area and Garbage Screening Standards (EC**  
5 **9.6420/9.6205)**

6 In their third assignment of error, Neighbors also argues that the garages  
7 and parking areas “violate EC 9.6420 (parking area standards) by permitting  
8 gravel surfacing, and EC 9.6205 regarding requirements for high screens and  
9 full screen fencing adjacent to recycling and garbage areas.” Neighbors’  
10 Petition for Review 26. Meadows responds that neighbors are precluded under  
11 *Miles* and ORS 197.825(2) from raising those issues. Neighbors has not  
12 responded to Meadows’ exhaustion waiver argument. We agree with Meadows  
13 that the issues are not preserved for our review.

14 **F. Minimal Off-Site Impacts (EC 9.8320(12))**

15 EC 9.8320(12) requires the city to determine that the PUD “shall have  
16 minimal off-site impacts, including impacts such as traffic, noise, stormwater  
17 runoff and environmental quality.” The hearings officer concluded that traffic  
18 impacts off-site would be minimal. The hearings officer relied on his  
19 conclusions, based on peak vehicle trip estimates and traffic projections  
20 provided by Meadows, that (1) a traffic impact analysis (TIA) is not required  
21 under EC 9.6870 because the PUD will not generate additional traffic above  
22 the threshold required for a TIA, and (2) no level of service deficiencies would  
23 occur based on new trips added to the area. The hearings officer rejected  
24 opponents’ arguments that the projected doubling of average daily trips over  
25 current levels traffic impacts would have more than minimal impacts off-site.  
26 Record 397-99.

1           In Conte’s second assignment of error, we understand Conte to argue  
2 that the hearings officer’s interpretation of EC 9.8320(12) misconstrues the  
3 provision and equates a finding of compliance with EC 9.8320(5), discussed  
4 below, with a finding of compliance with EC 9.8320(12). We also understand  
5 Conte to challenge the hearings officer’s reliance on the same evidence that he  
6 relied on to conclude (1) that EC 9.8320(5) is met, (2) that a traffic impact  
7 analysis would not be required under EC 9.6870, and (2) that no level of  
8 service deficiencies would occur, and to challenge the hearings officer’s failure  
9 to rely on other evidence introduced by opponents in determining that the PUD  
10 will have minimal impacts on traffic off-site.

11           Meadows responds, and we agree, that a reasonable person could find,  
12 based on the evidence in the record, that the PUD will have minimal impact on  
13 traffic off-site, particularly given the inherently subjective nature of the  
14 criterion. Moreover, the hearings officer’s reliance on the same evidence that  
15 he relied on to find compliance with EC 9.8320(5) and that a TIA is not  
16 required is not error, and is not unusual where the two criteria require  
17 evaluation of similar evidence. We cannot say that the hearings officer’s  
18 findings are inadequate or represent an erroneous interpretation and application  
19 of EC 9.8320(12).

20           This portion of Conte’s second assignment of error is denied.

21           **G. Conclusion**

22           The portions of Neighbors’ second and third assignments of error that  
23 challenge the city’s finding that the eastern boundary of the PUD complies with  
24 EC 9.8320(3) because it provides adequate screening from the surrounding  
25 parkland to the east are sustained.

1 All other portions of Neighbors’ second and third assignments of error  
2 are denied.

3 Conte’s second and third assignments of error are denied.

4 **CONTE’S FIRST ASSIGNMENT OF ERROR/NEIGHBORS’ FOURTH**  
5 **ASSIGNMENT OF ERROR**

6 EC 9.8320(5) requires the city to find that “[t]he PUD provides safe and  
7 adequate transportation systems through compliance with the following:

8 “(a) EC 9.6800 through EC 9.6875 Standards for Streets, Alleys,  
9 and Other Public Ways (not subject to modifications set  
10 forth in subsection (11) below).

11 “(b) Pedestrian, bicycle and transit circulation, including related  
12 facilities, as needed among buildings and related uses on the  
13 development site, as well as to adjacent and nearby  
14 residential areas, transit stops, neighborhood activity  
15 centers, office parks, and industrial parks, provided the city  
16 makes findings to demonstrate consistency with  
17 constitutional requirements. ‘Nearby’ means uses within  
18 1/4 mile that can reasonably be expected to be used by  
19 pedestrians, and uses within 2 miles that can reasonably be  
20 expected to be used by bicyclists.

21 “(c) The provisions of the Traffic Impact Analysis Review of EC  
22 9.8650 through 9.8680 where applicable.”

23 As relevant here, EC 9.8320(6) requires the city to find that “[t]he PUD will  
24 not be a significant risk to public health and safety \* \* \* or an impediment to  
25 emergency response.” Conte’s first assignment of error and Neighbors’ fourth  
26 assignment of error challenge the city’s conclusion that the PUD meets EC  
27 9.8320(5) and (6).

28 **A. Motion to Strike**

29 The city moves to strike Exhibit A to Conte’s brief, arguing that Exhibit  
30 A is not included in the record. We agree that Exhibit A is not included in the

1 record. LUBA’s review is limited to the record filed by the local government.  
2 ORS 197.835(2). The city’s motion to strike Exhibit A is granted.

3 **B. EC 9.8320(5)(a) and (b)/EC 9.8320(6)**

4 **1. Oakleigh Lane from River Road to the Subject Property**

5 In a portion of his first assignment of error, we understand Conte to  
6 argue that the city improperly construed EC 9.8320(5)(a) in failing to require  
7 Meadows to demonstrate that the entirety of Oakleigh Lane, from its  
8 intersection with River Road to the subject property, “provides a safe and  
9 adequate transportation system” and meets all standards under EC 9.6800  
10 through 9.6875. Conte Petition for Review 10, 11, 13, 16-22, 29. First,  
11 according to Conte, EC 9.8320(5) requires the entirety of Oakleigh Lane to  
12 meet the standards in EC 9.8320(5)(a), (b) and (c) and requires Oakleigh  
13 Lane’s existing right of way to be widened and improved to 45 feet, consistent  
14 with EC 9.6870.<sup>10</sup>

15 The planning commission found that compliance with EC 9.8320(5) is  
16 demonstrated by compliance with subsections (a), (b), and (c), and that EC  
17 9.8320(5) does not contain an independent requirement to determine whether a

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<sup>10</sup> EC 9.6870 provides:

“Street Width. Unless an alternative width is approved through use of other procedures in this code, the right-of-way width and paving width of streets and alleys dedicated shall conform to those designated on the adopted Street Right-of-Way map. \* \* \*”

Oakleigh Lane is a low volume residential local street and the street right of way map designates the right of way width between 45-55 feet.

1 PUD provides a “safe and adequate transportation system” beyond determining  
2 compliance with (a), (b), and (c). The planning commission also rejected  
3 Conte’s interpretation of EC 9.8320(5)(a) as requiring the entirety of Oakleigh  
4 Lane to meet existing right-of-way standards and be improved to city  
5 standards:

6 “[N]either EC 9.8320(5)(a) nor EC 9.6800 through 9.6875 require  
7 that an existing street must meet certain standards in order to  
8 serve a proposed development. EC 9.6870 only provides the  
9 required paving widths for certain types of streets when and if  
10 those streets are fully improved to City standards.” Record 8.

11 Respondents respond that the planning commission’s interpretation of  
12 EC 9.8320(5) is correct, and that nothing in the EC requires the entirety of  
13 Oakleigh Lane to meet the standards in EC 9.8320(5) in order for the PUD to  
14 be approved. We agree with respondents. The plain language of EC 9.8320(5)  
15 requires the city to determine that “the PUD” meets the standards in (a). It does  
16 not require “all streets serving the PUD” to meet the standards if those streets  
17 are not located within the PUD. In addition, the EC 9.6870 requirements for  
18 right of way widths apply to “dedicated” streets. It does not require Meadows  
19 to dedicate right of way on land that it does not own or to improve land it does  
20 not own.

21 In another portion of his first assignment of error, we understand Conte  
22 to argue that the city improperly construed EC 9.8320(5)(b) in failing to require  
23 Meadows to demonstrate that the entirety of Oakleigh Lane provides safe and  
24 adequate “pedestrian, bicycle and transit circulation.” Conte Petition for  
25 Review 22. According to Conte, there is evidence in the record that without  
26 widening Oakleigh Lane, pedestrian and bicycle traffic will not be safe.  
27 Conte Petition for Review 24.

1           The language of EC 9.8320(5)(b) does refer to lands beyond the PUD  
2 boundaries, and requires safe and adequate pedestrian, bicycle and transit  
3 circulation both within the PUD and “as well as to adjacent and nearby  
4 residential areas, transit stops \* \* \* provided the city makes findings to  
5 demonstrate consistency with constitutional requirements. \* \* \*” Thus while  
6 the city is not limited in its consideration of whether the PUD satisfies EC  
7 9.8320(5)(b) to on-site pedestrian and bicycle circulation, it is limited in its  
8 ability to remedy any deficiencies in off-site circulation and connectivity by the  
9 portion of the provision that requires the city “to demonstrate consistency with  
10 constitutional requirements.”

11           However, Conte is simply mistaken when he argues that the city failed to  
12 consider off-site circulation and connectivity for pedestrians and bicycles along  
13 the entirety of Oakleigh Lane. The city did consider off-site circulation and  
14 connectivity and concluded that the PUD meets EC 9.8320(5)(b):

15           “With regard to bicycles and pedestrians traveling westward on  
16 Oakleigh Lane toward transit services on River Road, referral  
17 comments from Public Works staff state that, for unimproved local  
18 streets in the River Road area (i.e., streets that lack sidewalks and  
19 have not been striped to identify dedicated travel lanes), the  
20 expectation is that pedestrians and bicyclists will share the paved  
21 surface with vehicles. Additionally, there is a tendency on dead  
22 end streets such as Oakleigh Lane, for motorists to travel at  
23 slower, more cautious speeds, because of the perceived  
24 narrowness of the street.

25           “Public works staff confirm that, until such time that property  
26 owners elect to improve Oakleigh Lane to full city standards  
27 (including sidewalks), the existing paved surface of Oakleigh Lane  
28 will continue to adequately provide for vehicle and pedestrian  
29 traffic, as well as for emergency vehicles and delivery services,  
30 provided the paved surface is not blocked by parked vehicles. \* \*  
31 \*



1           “Public Works staff states that the existing paved surface provides  
2 safe passage for two-way vehicular traffic, bicycles, pedestrians  
3 and emergency vehicles. As such, Public Works staff indicates  
4 that there is nothing to suggest that the impacts of the proposed  
5 development will result in unsafe conditions in Oakleigh Lane.”  
6 Record 372.

7 The planning commission also found that Oakleigh Lane from River Road to  
8 the subject property is presently safe and will be safe if the PUD is approved.  
9 Record 9.

10           In a portion of his first assignment of error, we also understand Conte to  
11 argue that the planning commission’s conclusion that Oakleigh Lane is  
12 presently safe and will be safe after the PUD is built is not supported by  
13 substantial evidence in the record. ORS 197.835(9)(a)(C). The hearings  
14 officer and planning commission relied on the evidence in the record, including  
15 evidence from Meadows and from the city’s public works staff, that Oakleigh  
16 Lane will provide safe and adequate transportation with the additional vehicle  
17 trips generated by the PUD. Record 9, 372, 1255-76. The planning  
18 commission understood the public works staff comments regarding the need for  
19 a 45-foot right of way for Oakleigh Lane to be limited to the portion of  
20 Oakleigh Lane within the proposed PUD and to address constitutional  
21 requirements for exacting a portion of Meadows’ property for widening of  
22 Oakleigh Lane on the subject property, and found that the comments do not  
23 provide evidence that Oakleigh Lane in its entirety is unsafe. Record 9-10, 15.

24           Conte reads the evidence supplied by the city’s public works staff  
25 differently than the planning commission did. Conte argues that the city’s  
26 public works staff took the position that the entirety of Oakleigh Lane must  
27 have a 45-foot wide right of way in order to be safe. Conte Petition for Review

1 29, 37-39. Respondents respond that the public works comments that Conte  
2 relies on in support of his argument do not say what he argues they say.<sup>11</sup>

3 We have reviewed the public works staff comments on the proposed  
4 PUD at Record 1255-76 and 1268-69 and we think the planning commission  
5 and respondents' description and understanding of the comments and the  
6 evidence provided in them regarding whether the PUD satisfies the applicable  
7 criteria is the accurate one. It is also evidence that a reasonable person would  
8 rely on in reaching a decision. *City of Portland v. Bureau of Labor and*  
9 *Industries*, 298 Or 104, 119, 690 P2d 475 (1984).

10 We also understand Conte to argue that the city improperly construed EC  
11 9.8320(6) because it failed to consider whether the "configuration of Oakleigh  
12 Lane" will be "a significant risk to public health and safety or \* \* \* be an  
13 impediment to emergency response." Conte Petition for Review 34. Meadows  
14 responds that Conte's argument misconstrues the plain language of EC  
15 9.8320(6) and impermissibly adds language to it. Meadows points out that EC  
16 9.8320(6) requires the city to determine whether "the PUD" is an impediment  
17 to emergency response, not whether "the configuration of Oakleigh Lane" or  
18 all off-site streets would be an impediment. Meadows also points to the city's  
19 findings that the PUD will not be a "significant risk to public \* \* \* safety \* \* \*  
20 or an impediment to emergency response" based on the future possible  
21 hammerhead turnaround and the condition of approval requiring a temporary

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<sup>11</sup> Conte concedes "[a]lthough the [public works staff] findings do not state explicitly that Oakleigh Lane would be unsafe after the PUD is developed unless all or most of Oakleigh Lane is also widened from the development site to River Road, such a statement is unnecessary for Conte's argument since no other reasonable conclusion can be drawn from the [public works staff] findings. \* \* \*" Conte Petition for Review 39.

1 emergency access easement on the temporary emergency turnaround on the  
2 property until the permanent hammerhead is developed. Record 375-76.

3 We agree with Meadows that the city properly understood the inquiry  
4 under EC 9.8320(6) to be limited to a determination of whether the PUD is an  
5 impediment to emergency response, and there is no basis in the express  
6 language of the provision to support Conte’s argument that the city was  
7 required to consider whether “the configuration of Oakleigh Lane” off-site will  
8 be an impediment. We also agree with Meadows that the city’s findings are  
9 adequate to explain why the city concluded that “the PUD is not a significant  
10 risk to public health and safety \* \* \* or an impediment to emergency response”  
11 based on the portion of Oakleigh Lane that is located on the subject property.

## 12 **2. Oakleigh Lane on the Subject Property**

### 13 **a. Right of Way Dedication**

14 The existing right of way of Oakleigh Lane is located entirely on the  
15 adjacent parcel to the north of the subject property, and is 20 feet. Conte  
16 argues that the city misconstrued EC 9.8320(5)(a) and EC 9.6870 by only  
17 requiring a dedication of 22.5 feet of the portion of Oakleigh Lane located on  
18 the subject property, because Oakleigh Lane’s right of way, considering the 20  
19 foot right of way on the property to the north and the 22.5 feet on the subject  
20 property, will be only 42.5 feet, and not 45 feet and thus will not meet the  
21 minimum right of way for a low volume residential street under EC 9.6870.  
22 Conte Petition for Review 15-16. Respondents respond that constitutional  
23 limitations placed on the city by the Fifth Amendment to the U.S. Constitution  
24 allow the city to require dedication at most one-half of Oakleigh Lane. We  
25 agree with respondents that Conte has not demonstrated that EC 9.6870 or any

1 other authority allows the city to require Meadows to dedicate more than one-  
2 half of Oakleigh Lane.

3 **b. Future Street Improvements**

4 Conte argues that the city misconstrued EC 9.8320(11)(b) and  
5 9.6505(3)(b) in failing to require the portion of Oakleigh Lane located on the  
6 subject property to be improved (paved with curbs, gutters and sidewalks  
7 installed) to the paving width standards in EC 9.6870 upon construction of the  
8 PUD, and instead requiring Meadows to sign an irrevocable petition for public  
9 improvements and assessment for the improvements if and when the city  
10 initiates a local improvement process.<sup>12</sup> Conte Petition for Review 35-37.

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<sup>12</sup> EC 9.6505 provides in relevant part:

“Improvements - Specifications. All public improvements shall be designed and constructed in accordance with adopted plans and policies, the procedures specified in Chapter 7 of this code, and standards and specifications adopted pursuant to Chapter 7 of this code. Additionally, all developments shall make and be served by the following infrastructure improvements:

“(3) Streets and Alleys.

“\* \* \* \* \*

“(b) The developer shall pave streets and alleys adjacent to the development site to the width specified in EC 9.6870 Street Width, unless such streets and alleys are already paved to that width, provided the City makes findings to demonstrate consistency with constitutional requirements. All paving shall provide for drainage of all such streets and alleys, and construct curbs and gutters, sidewalks, street trees and street lights adjacent to the development site according to the Design Standards and Guidelines for

1 Respondents respond that EC 9.8360(5)(b), which applies to final PUD  
2 approval, expressly allows deferral of public improvements beyond final PUD  
3 approval where an irrevocable petition has been signed by the property owner  
4 and accepted by the city, and the city imposed a condition of approval requiring  
5 exactly that.<sup>13</sup> We agree with respondents that the city did not misconstrue EC  
6 9.6505 in failing to require Oakleigh Lane to be improved before the PUD is  
7 developed.

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Eugene Streets, Sidewalks, Bikeways and  
Accessways and standards and specifications adopted  
pursuant to Chapter 7 of this code and other adopted  
plans and policies.” (Underlining in original).

<sup>13</sup> EC 9.8360(5)(b) provides:

“Planned Unit Development, Final Plan Application  
Requirements. In addition to the provisions in EC 9.7010  
Application Filing, the following specific requirements apply to  
PUD final plan applications:

“ \* \* \* \* \*

“(5) Public improvements as required by this land use code or as  
a condition of tentative plan approval have been completed,  
or:

“(a) A performance bond or suitable substitute as agreed  
upon by the city has been filed with the city finance  
officer in an amount sufficient to assure the  
completion of all required public improvements; or

“(b) A petition for public improvements and for the  
assessment of the real property for the improvements  
has been signed by the property owner seeking the  
subdivision, and the petition has been accepted by the  
city engineer.”

1                                   **c. Cul de Sac Standards**

2           EC 9.6820(3) prohibits a cul de sac more than 400 feet long. An  
3 exception to the 400-foot maximum length is available where “buildings or  
4 other existing development on the subject property or adjacent lands, including  
5 subdivided but vacant lots or parcels, physically preclude connection now or in  
6 the future, considering the potential for redevelopment.” EC 9.6820(5)(b). We  
7 understand Conte to argue that there is not substantial evidence in the record to  
8 support an exception to the cul de sac length standards when it fails to require  
9 the possible future hammerhead turnaround to be built when the PUD develops.  
10 According to Conte, Oakleigh Lane was not entitled to an exception, and in any  
11 event, the cul de sac bulb should be constructed when the PUD is constructed.  
12 Conte Petition for Review 18, 36-37.

13           Meadows responds that the city properly determined that an exception to  
14 the cul de sac length was justified because the evidence in the record  
15 demonstrates that future connecting streets are precluded due to existing  
16 development to the north and south, between Hilliard Lane to the north and  
17 McClure Lane to the south. We agree with Meadows that the exception was  
18 justified. For the reasons explained above, we also agree with Meadows that  
19 the city did not err in allowing future street improvements to be secured by an  
20 irrevocable petition for improvements signed by Meadows.

21                                   **d. Constitutionality of the Future Hammerhead**  
22                                   **Turnaround**

23           EC 9.8320(5)(a) requires compliance with EC 9.6815(2)(d), which  
24 requires secondary access for fire and emergency vehicles “consistent with EC  
25 9.6870.” However, EC 9.6815(2)(g)(1) allows an exception to the secondary

1 access standard if the applicant provides a street connection study that  
2 demonstrates

3       “a. [t]hat the proposed street system meets the intent of street  
4       connectivity provisions of this land use code as expressed in  
5       EC 9.6815(1) \* \* \* and

6       “b. How undeveloped or partially developed properties within a  
7       quarter mile can be adequately served by alternative street  
8       layouts.”

9 Meadows provided a street connection study that demonstrated how  
10 undeveloped properties on the east end of Oakleigh Lane, to the north, can be  
11 adequately served without a secondary access for fire and emergency vehicles,  
12 by constructing a hammerhead turnround at the east end of Oakleigh Lane that  
13 could provide access to the property to the north. The city concluded that the  
14 possibility of a hammerhead turnaround would satisfy the intent of EC  
15 9.6815(1) and demonstrated how the properties to the north could be  
16 adequately served, and granted the exception.

17       In their fourth assignment of error, Neighbors assert that the street  
18 connection study that shows a portion of the possible hammerhead turnaround  
19 on the property to the north is inconsistent with the city’s condition requiring a  
20 dedication of only 13 feet of right of way, and not 20 feet, in the area of the  
21 possible hammerhead turnaround, because the street connection study assumed  
22 a total 40-foot right of way. We understand Neighbors’ argument to take the  
23 position that the street connection study does not provide substantial evidence  
24 that an exception to the street connectivity standards is justified. ORS  
25 197.835(9)(a)(C). Neighbors also argue that the street connection study that  
26 reflects a portion of the possible hammerhead turnaround on the property to the

1 north is a taking of the property to the north without just compensation as  
2 required by the Fifth Amendment to the U.S. Constitution.

3 Respondents respond, and we agree, that the street connection study is  
4 substantial evidence in support of the city’s decision to grant an exception to  
5 the street connectivity standard at EC 9.6815(2)(d), and a reasonable person  
6 would rely on it to grant the exception. Respondents also respond, and we  
7 agree, that the street connection study’s depiction of the property to the north in  
8 the possible future hammerhead turnaround is not a taking of the property to  
9 the north and does not require the property to the north to dedicate any land.

10 **C. EC 9.8320(5)(c) (TIA Requirements)**

11 EC 9.8320(5)(c) requires the city to determine that “the PUD provides  
12 safe and adequate transportation systems through compliance with \* \* \* [t]he  
13 provisions of the Traffic Impact Analysis Review of EC 9.8650 through 9.8680  
14 where applicable and 9.8650 through 9.8680.” EC 9.8670 specifies the  
15 circumstances when a TIA is required, which include, as relevant here:

16 “Applicability. Traffic Impact Analysis Review is required when  
17 one of the conditions in subsections (1) – (4) of this section exist \*  
18 \* \*

19 “\* \* \* \* \*

20 “(2) The increased traffic resulting from the development will  
21 contribute to traffic problems in the area based on current  
22 accident rates, traffic volumes or speeds that warrant action  
23 under the city’s traffic calming program, and identified  
24 locations where pedestrian and/or bicyclist safety is a  
25 concern by the city that is documented. \* \* \*”

26 The hearings officer concluded that the increased traffic generated by the PUD  
27 will not contribute to traffic problems in the area, considering the factors set  
28 out in EC 9.8670(2). Record 374-75. The hearings officer relied on the



1 evidence in the record that demonstrated that the increase in peak vehicle trips  
2 is less than 100 trips, the evidence in the record demonstrating no current  
3 traffic problems, evidenced by accident rates, traffic volumes, or speeds, the  
4 lack of documented concern by the city regarding pedestrian or bicyclist safety,  
5 and the fact that that the level of service for roads and intersections in the  
6 immediate vicinity is adequate. The hearings officer additionally rejected  
7 opponents' arguments that traffic problems will result from the PUD:

8 "Although the Hearings Official understands the neighbors'  
9 concerns about increased numbers of vehicles using Oakleigh  
10 Lane, the strong assertion that an increase in ADT will result in  
11 traffic accidents or actual danger to pedestrians and bicyclists is  
12 not supported by evidence in the record. Assertion[s] [are] not  
13 evidence, and neither is an explanation of inductive reasoning.  
14 Therefore, the Hearings Official cannot substitute the neighbors'  
15 very strongly held opinions that more cars will necessarily  
16 decrease traffic safety for actual evidence. Anecdotal instances of  
17 unsafe traffic conditions are also not enough to trigger a TIA.

18 " \* \* \* \* \*

19 "The Hearings Official has not been directed to evidence in the  
20 record that shows accident rates for Oakleigh Lane or at the  
21 intersection with River Road are a problem. Nor have other  
22 documented 'problems' with traffic volumes or speed been  
23 submitted by any party. Contrary to Mr. Conte's assertion, Staff's  
24 position that there are no traffic safety concerns associated with  
25 the proposal or Oakleigh Lane is some evidence that a TIA under  
26 EC 9.8670(2) is not necessary. Public works did a lengthy and  
27 thorough analysis of traffic conditions that is largely repeated in  
28 the staff report. Neither Mr. Conte nor any other party submitted  
29 evidence to the contrary, and that is what is required in order for  
30 Staff or the Hearings Official to determine that EC 9.8670(2)  
31 might be implicated by this application. \* \* \*" Record 374-75.

32 In a portion of the first assignment of error, we understand Conte to  
33 argue that the city's conclusion that a TIA is not required under EC 9.8760(2)

1 is not supported by substantial evidence in the record. Conte Petition for  
2 Review 30-32. According to Conte, the city’s public works staff’s analysis  
3 provides substantial evidence of “a documented concern” about pedestrian and  
4 bicycle safety. However, similar to our conclusion above, we agree with  
5 respondents that the public works staff’s comments simply do not say what  
6 Conte argues they say.<sup>14</sup> The city’s conclusion that a TIA is not required  
7 under EC 9.8760(2) is supported by substantial evidence in the record. ORS  
8 197.835(9)(a)(C).

9 Conte’s first assignment of error is denied. Neighbors’ fourth  
10 assignment of error is denied.

11 The city’s decision is remanded.

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<sup>14</sup> The city’s public works staff’s comments provide, in relevant part:

“The development and existing street system do not warrant review under [EC 9.8320(5)(c)], pursuant to the applicability criteria at EC 9.8670. The applicant notes that the development will generate roughly 15 pm peak hour trips, which is well below the 100 trip threshold of these standards. Further, staff has no concerns related to traffic safety issues or poor service levels which result from this development. \* \* \*” Record 1265.